

New York State Industrial Board of Appeals Revokes Regulations on Methods of Wage Payments Set to Take Effect on March 7

Article By:

Stephanie L. Aranyos

Evan B. Citron

On February 16, 2017, the New York State Industrial Board of Appeals (IBA) issued a Resolution of Decision invalidating and revoking the regulations regarding methods of payment of wages. The IBA decided that the regulations exceeded the Commissioner of Labor's rulemaking authority by seeking to regulate and place restrictions on financial institutions and banking services. A copy of the decision can be found on the IBA's Board Decisions page.

Background

Final regulations amending the methods of payment of wages regulations were set to go into effect on March 7, 2017. The new regulations imposed various requirements on employers paying employees via direct deposit or payroll debit card by specifically requiring employers to provide employees with a written notice that includes: (1) a "plain language" description of all options for receiving wages; (2) a statement that the employer may not require the employee to accept wages by payroll debit card or by direct deposit; (3) a statement that the employee may not be charged any fees for services necessary to access wages in full; and (4) if offering employees the option of receiving payment via payroll debit card, a list of locations where employees can access and withdraw wages at no charge to the employees within reasonable proximity to their place of residence or place of work.

In addition to the notice requirement, the new regulations required that employers receive written consent before paying wages via direct deposit or payroll debit card and that such consent for payroll debit cards have a seven day waiting period before taking effect.

The regulations also reached beyond the employment relationship to regulate fees imposed by payroll debit card providers. The regulations specifically prohibited the following fees: (1) those necessary to receive wages or to hold the payroll debit card; (2) point-of-sale (POS) transactions; (3) overdraft, shortage, or low balance status; (4) account inactivity; (5) maintenance; (6) telephone or online customer service; (7) accessing balance or other account information online, by Interactive

Voice Response through any other automated system offered in conjunction with the payroll debit card, or at any automated teller machine (ATM) in network made available to the employee; (8) providing the employee with written statements, transaction histories or the issuer's policies; (9) replacing the payroll debit card; (10) closing an account or issuing payment of the remaining balance by check or other means; (11) declined transactions at an ATM that does not provide free balance inquiries; or (12) any fee not explicitly identified by type and by dollar amount in the contract between the employer and the issuer or in the terms and conditions of the payroll debit card provided to the employee.

IBA Decision

On or about October 21, 2016, Global Cash Card (GCC), a national payroll debit card provider, filed a petition with the IBA, alleging that the Commission of Labor exceeded her authority by issuing regulations that attempt to regulate a financial product.

The IBA agreed, finding that the regulations “exceed [the DOL’s] rulemaking authority and encroach upon the jurisdiction of banking and financial services regulators.” *Global Cash Card, Inc. v. Commissioner of Labor* (Docket No. PR 16-120). In so finding, the IBA focused on two specific aspects of the regulations: (1) the requirement that employers provide access to one or more ATMs that offer withdrawals at no cost to the employee; and (2) the prohibition on charging an employee certain fees related to the use of a payroll debit card. In explaining the reasoning underpinning its decision, the IBA cited the language of Article 6 of the Labor Law, prior New York State Department of Labor (NYSDOL) opinion letters, the purview of the New York Department of Financial Services (DFS), and recent legislative efforts concerning payroll debit cards.

First, the IBA found that the regulations “depart significantly from the plain language of [Article 6],” specifically Section 192 of the Labor Law. Section 192, the IBA noted, “provides the manner in which an employer may pay wages to an employee,” and “does not prohibit payment of wages by payroll debit card with an employee’s consent.” While Section 199 permits the Labor Commissioner to “issue such rules and regulations as [she] determines necessary for the purposes of carrying out the provisions of [Article 6],” the regulations, the IBA reasoned, went well beyond that necessary to carry out Section 192, and any other relevant provisions.

The IBA also cited a DOL opinion letter (No. RO-09-0158) in noting that the DOL had previously recognized that Article 6 permitted payment by payroll debit cards, provided that certain conditions had been met. That letter, and others, held that payment of wages by debit cards was permitted under Section 191 “so long as employees have an effective means by which to make an unlimited number of withdrawals on the card without incurring fees by bank teller or automatic teller machine.” The letter specifically recognized that an employer was “not required to ensure any free ATM transactions. However...the location at which free withdrawals may be made must be located within a reasonable distance of the employee’s worksite.”

The IBA referenced the DFS’s purview in concluding that the regulations’ prohibitions on fees charged by debit payroll card vendors exceeded the scope of the NYSDOL’s authority. The DFS, the IBA noted, “regulates banks and financial institutions and the fees they may charge for banking services . . . , including fees related to checking accounts to which employers may legally direct deposit wages . . . and licensed check cashers where employees may choose to cash their paychecks.” The IBA analogized fees associated with the use of payroll debit cards with those other fees, and concluded that they were similarly outside the scope of the NYSDOL’s purview.

Recent legislative efforts regarding payroll debit cards and legislators' public comments on the regulations further reinforced the IBA's decision to revoke the regulations. From 2011 to 2015, the legislature proposed eight bills addressing payment of wages by payroll debit cards—each of which failed to be enacted into law, according to the decision. That degree of legislative activity regarding the issue, the IBA reasoned, demonstrated that it was a matter of public concern which garnered significant attention from lawmakers. Public comments submitted by legislators for and against the regulations further evidenced the ongoing debate among lawmakers concerning the issue. These developments, the IBA noted, demonstrated that the issue was properly addressed, if at all, by legislators, not the NYSDOL.

Although the IBA acknowledged the policy concerns underpinning the regulations—including the concern “that low-wage workers without access to traditional bank accounts will be coerced by their employers to receive their wages by payroll debit card”—it noted that the Labor Law already prohibits employers from requiring employees to receive wages by payroll debit card and from charging employees any direct or indirect fees to receive their wages.

Practical Impact: What Should Employers Do Now?

For the many employers that have been struggling to meet the March 7 effective date, the IBA's decision offers some welcome relief. It does not, however, provide any certainty for the future, and many employers are wondering what they should do. Some employers have already prepared to comply with the new regulations and are ready to roll out new payroll practices next month. Do they hold off or press forward?

While the regulations are revoked, employers are not required to comply with the new regulations. But, the IBA's decision is subject to judicial review. Presently, we do not know whether the Commissioner of Labor will appeal from the IBA decision. Even then, we do not know when a judge would render a final decision in the proceeding, which could be many months from now.

So, where does that leave employers today? Employers must weigh various business and legal risks in deciding whether to comply with the now-revoked regulations.

Employers can choose not to make changes and delay indefinitely to see how events play out. This approach is not without some risk, as it is yet to be seen whether an appeal will be taken from the IBA's decision. Thus, employers that have not yet made changes may feel that it is safer to continue their planning processes so they can be in compliance with the revised regulations if and when all or part of them become effective.

Employers that already have made changes will need to decide whether it makes business sense to suspend, alter, or reverse those changes pending any subsequent legal developments. Employers that reverse changes should understand the risks of doing so and keep records. Employers may also want to communicate with employees about the revocation and the potential for further future changes.

All employers should ensure that employees whom they pay via direct deposit and payroll debit card have voluntarily agreed to these payment methods and that they have obtained advance consent from these employees. Although the IBA revoked the regulations in their entirety, the IBA clearly stated that employers are permitted to pay employees wages via direct deposit and payroll debit card with an employee's advance consent and that such consent must be voluntary. In addition to these safeguards, employers paying wages via payroll debit card will want to, at a minimum, ensure that

fees are reasonable and consistent with the NYSDOL's previous guidance.

© 2025, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., All Rights Reserved.

National Law Review, Volume VII, Number 51

Source URL: <https://natlawreview.com/article/new-york-state-industrial-board-appeals-revokes-regulations-methods-wage-payments>