

SEPTEMBER 12, 2016

New York Implements Regulation Strongly Favoring Payment of Wages by Check and Discouraging Payment by Direct Deposit and Debit Card

BY ELI Z. FREEDBERG

On September 7, 2016, the New York State Department of Labor (“NYDOL”) adopted a final regulation setting the conditions by which employers in New York State can pay wages by direct deposit or by debit card. This regulation is effective March 7, 2017, and adopts most of the provisions that the NYDOL initially proposed on June 5, 2016. The regulation magnifies the scope of New York Labor Law section 192, which prohibits employers from directly depositing the net wages or salary of most employees in a bank or other financial institution without first obtaining the employee’s prior written consent.

In particular, the final regulation clarifies how an employee can provide “consent” to accept wage payments by direct deposit or debit card, adds entirely new requirements mandating that employers provide notice to employees identifying other available methods of paying wages, prohibits employers from taking adverse employment actions against employees who refuse to accept wage payments by direct deposit or debit cards, and implements numerous conditions that effectively limit an employer’s ability to pay employees’ wages by debit card.

Covered Employees

The regulation applies to all employees who work in New York State except for any person employed in a bona fide executive, administrative, or professional capacity whose earnings exceed \$900 per week. The regulation also does not apply to employees who work on a farm that is not connected with a factory.

Employers Must Provide Written Notice to All Employees Who Receive Wages by Direct Deposit or Debit Card

All employers that remit their employees' wages by direct deposit or by debit card are now required to provide a highly specific notice form to those employees. The notice must:

- Describe, in "plain language", all of the employee's options for receiving wages (i.e., by check, direct deposit, and/or debit card);
- Expressly provide that the employer cannot compel the employee to accept wages by direct deposit or debit card;
- Expressly inform the employee that she may not be charged any fees for services that are necessary for the employee to access the wages in full; and
- Provide a list of locations (that must be in "reasonable proximity" to the workplace or residence of the employee)¹ where the employee can access and withdraw the wages at no charge, if the employer is offering the employee the option to access wages by debit card.

Employees Must Provide Written Consent to Accept Wages by Direct Deposit or by Debit Card

The regulation requires an employer to obtain an employee's written consent prior to issuing wages by direct deposit or debit card. The regulation further provides that an employee's consent may be withdrawn at any time. If an employee does withdraw his consent, then the employer has a maximum of two weeks to stop payment by direct deposit or debit card and to provide wages to that employee by check.

In addition, the regulation provides that consent cannot be provided if an employer intimidates, coerces or threatens to take adverse employment action (such as suspension, termination, loss of shifts, etc.) to any employee who refuses to accept wages by direct deposit or debit card. Similarly, an employer cannot make acceptance of wages by direct deposit or debit card a condition of hire or of continued employment.

Recordkeeping Requirements

This notice and consent form must be presented to employees in English **and** in the employee's primary language (provided the NYDOL had issued a sample notice and consent form in that language). The NYDOL has represented that it will prepare sample notices in Spanish, Chinese, Haitian Creole, Korean, Polish, Russian, French, Arabic, Bengali, Tagalog, and Urdu.

The notices and consents may also be presented to the employee electronically, provided that the employee can view and print the notice and consent forms while the employee is at work and without cost. Moreover, the notice and consent forms must inform the employee of her right to access and print the notice form. The NYDOL has also mandated that employers keep copies of the notice and consent form for six years following the last payment of wages by direct deposit or debit card.

Requirements for Paying Wages by Direct Deposit

In order to pay employees by direct deposit, an employer must:

- Provide notice to the employee in the manner discussed above;
- Obtain written consent from the employee in manner discussed above;

¹ The regulation does not define the term "reasonable proximity."

- Maintain a copy of the written consent for the duration of the employee's employment and for a period of six years following the cessation of the employment relationship;
- Provide a copy of the written consent to the employee in the manner discussed above; and
- Deposit the pay to the financial institution selected by the employee.

New Direct Deposit Authorizations Not Required, But New Notices Are

In the draft regulations published in June of 2016, the NYDOL proposed a rule that would have invalidated all direct deposit authorizations that were signed by employees covered under this rule prior to the effective date of the new regulation. Fortunately, the NYDOL removed this provision from the final rule. However, the NYDOL has stated that direct deposit authorizations executed before the effective date of the rule will remain valid only if the employees who executed those authorizations also receive notices that comply with the new regulation. This would include providing notice in foreign languages to employees who have previously authorized direct deposits.

Requirements for Paying Wages by Debit Card

In order to pay employees by debit card, an employer must:

- Provide notice to the employee in the manner discussed above;
- Obtain written consent from the employee in the manner discussed above;
- Wait seven business days, even if the employer receives consent from the employee to issue wage payments by debit card, before allowing the consent to take effect;
- Provide access to an automated teller machine that is located within a reasonable travel distance from the worksite or the employee's home and allows employees to make withdrawals at no cost;
- Provide at least one method to withdraw up to the total amount of wages for each pay period, or the balance remaining on the payroll debit card, without the employee incurring a fee;
- Ensure that the funds on the debit card never expire;²
- Maintain a copy of the written consent for the duration of the employee's employment and for a period of six years following the cessation of the employment relationship; and
- Provide a copy of the written consent to the employee in the manner discussed above.

The regulation also prohibits employers from passing along to employees, directly or indirectly, application, initiation, loading, or participation fees; a fee for point of sale transactions; an overdraft, shortage or low balance status fee; a fee for account inactivity; a maintenance fee; any charges for using telephonic or online customer service; charges for accessing balance or other account information through any means; fees for providing the employee with statements, transaction histories, or the card issuer's policies; charges for ordering replacement cards; fees for closing the account; costs associated with requests to issue payment of the balance on the debit card by check; declined transaction fees; or any other fee not explicitly identified by type and dollar amount in the contract between the employer and issuer or in the terms and conditions of the payroll debit card provided to the employee.

An employer also cannot use a payroll debit card to issue a loan or advance on wages and also is prohibited from receiving any kickback or financial remuneration from the debit card issuer, card sponsor, or third party for delivering wages by payroll debit card.

² The card may be suspended for inactivity if the card issuer provides reasonable notice of the suspension and agrees to refund the remaining balance on the card within seven days of the suspension.

Where an employee is covered by a valid collective bargaining agreement that expressly provides the method or methods by which wages may be paid to employees, an employer must also have the approval of the union before paying by payroll card.

Finally, if there is any change or modification in the terms and conditions of the use of the payroll debit card, including any changes in the itemized list of fees, the employer is obligated to provide a notice of the change at least 30 days before any change takes effect. This notice must be written in plain language, in the employee's primary language or in a language the employee understands, and in at least 12-point font. If the issuer charges the employee any new or increased fee within 30 days of the date the employer has provided the employee with written notice of the change, the employer must reimburse the employee for the amount of that fee.

Recommendations

New York employers should consider taking the following steps:

- Review current pay practices to determine whether employees are paid with direct deposit and/or debit cards.
- Make a list of all current pay alternatives to be identified in the new notice forms.
- Prepare a notice form that includes all of the disclosures mandated by the regulation in English. If the employer has employees whose primary language is Spanish, Chinese, Haitian Creole, Korean, Polish, Russian, French, Arabic, Bengali, Tagalog, or Urdu, it can check whether the NYDOL has released notice and consent templates in those languages to determine whether the notice and consent forms must be translated.³
- If no new consent is obtained, or if consent is withdrawn, suspend payment by direct deposit or paycards and cut paper checks.
- If payment by debit cards is desired, identify whether a no-fee ATM is available or practicable to install at the worksite.
- If payment by debit cards is desired, ensure that there are no transaction costs associated with the withdrawal of funds, and the terms and conditions governing the use of the card comply with the regulation, especially with respect to the requirement that fees and charges not be passed on the employee.
- Review and renegotiate existing debit card provider contracts as necessary.

³ If you have employees whose primary language is Spanish, Chinese, Haitian Creole, Korean, Polish, Russian, French, Arabic, Bengali, Tagalog, or Urdu, check to see whether the NYDOL has issued sample Wage Theft Prevention Act notices in these languages, because you may be required to issue those forms as well.