

## New York Department of Labor Issues Final Regulations for Direct Deposit and Payroll Debit Cards

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On September 7, 2016, the New York State Department of Labor (“NYSDOL”) adopted [final regulations](#) (“Final Regulations”) limiting the methods by which New York employers may pay their employees and defining mandatory procedures for the use of direct deposit and payroll debit card payments. The Final Regulations, which closely track [earlier proposed regulations](#), will become effective on March 7, 2017.

The Final Regulations apply to payment methods for all employees who work in New York State *except* persons employed in a bona fide executive, administrative, or professional capacity whose earnings exceed \$900 per week. Additionally, employees who work on a farm that is not connected with a factory are not covered by the Final Regulations.

The Final Regulations permit employers to pay employees in one of four methods: cash, check, direct deposit, or payroll debit cards. Written notice, consent, and recordkeeping requirements for employers that offer employees the ability to be paid via direct deposit or payroll debit cards are also addressed in the Final Regulations and discussed below.

Employers should also note that, in the case of employees represented by a union, an employer may be obligated to bargain with the employees’ bargaining representative before changing the manner in which employees are paid.

### Written Notice

Employers that offer employees the ability to be paid via direct deposit or payroll debit cards must provide employees with a written notice prior to the employee’s consent to be paid in one of these two methods. The notice must include all of the following:

- a “plain language” description of the employees’ options for receiving wages;
- a statement that the employer may not require an employee to accept wages by direct deposit or payroll debit card;

- a statement that an employee may not be charged any fees for services that are necessary for the employee to access his or her wages in full; and
- for employees receiving payroll debit cards, a list of locations<sup>1</sup> where employees can access and withdraw wages for free within a reasonable proximity to their home or work.

The written notice must be provided in English and in the primary language of the employee when a template notice in such language is available from the NYSDOL. With respect to both providing notice and obtaining consent to be paid via one of these methods, employers are free to use their own templates, so long as such templates comply with the NYSDOL's requirements. The NYSDOL has yet to publish its templates, although we anticipate that they will be published in advance of the March 2017 implementation date.

Employers may provide notice electronically as long as employees (i) can view and print the notice at work without incurring any costs and (ii) are made aware of their right to print the materials.

## **Consent**

Employers must obtain an employee's express written consent *before* issuing wages by direct deposit or payroll debit card. Granting such consent cannot be a condition of hire or continued employment. Further the written consent must be an "informed consent,"<sup>2</sup> meaning it was made "without intimidation, coercion, or fear of adverse action by the employer."

Like the required notice, the consent form must be presented to employees in English and in the primary language of the employee, when a template consent in that language is available from the NYSDOL. The consent form also may be presented to employees electronically.

Employees must be entitled to withdraw their consent at any time, but employers will have a reasonable amount of time, which may not be longer than two pay periods, to implement any changes in the method of wage payment. Furthermore, the Final Regulations prohibit discrimination against employees for refusing to consent to receiving wages through direct deposit or payroll debit card.

Significantly, the Final Regulations will invalidate all existing direct deposit and payroll debit card consent or authorization forms that were executed *before* the effective date of

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<sup>1</sup> The requirement to provide a list of locations may be satisfied by providing a link to a website that supplies a list or mechanism by which an employee can access a list of automated teller machine ("ATM") locations that provide local access.

<sup>2</sup> "Consent" is defined as "an express, advance, written authorization given voluntarily by the employee and only given following receipt by the employee of written notice of all terms and conditions of the method of payment."

the Final Regulations. As a result, an employee's current direct deposit and payroll debit card consent or authorization forms will remain valid *only if*, by March 7, 2017, employers provide employees who are currently paid via direct deposit or payroll debit card with (i) updated notices that comply with the Final Regulations and (ii) written notification of an employee's right to withdraw consent to the current direct deposit or payroll debit card consent or authorization.

## **Recordkeeping**

If paying wages by direct deposit or payroll debit cards, an employer must maintain a copy of its employees' written consent for the duration of each consenting employee's employment plus six years after termination of employment. Also, the employer must give a copy of the written consent to the consenting employee.

## **Additional Requirements for Payroll Debit Cards**

The Final Regulations establish several additional requirements for employers that use payroll debit cards.

### *Use of a Payroll Debit Card*

When paying wages by payroll debit cards, employers must wait seven business days after receiving consent and prior to taking any action to issue wages through a payroll debit card. Further, employers may not use a payroll debit card to remit wages to an employee where the payment is linked to any form of credit; for example, an employer may not pay wages via a payroll debit card when the employer provides the employee a loan or cash advance against future pay.

Employees receiving wages through payroll debit cards must be able to easily access the money on the card. Thus, the Final Regulations require employers to provide employees with access to an automated teller machine ("ATM") that is located within a reasonable travel distance from the worksite or from each employee's home and allows employees to make withdrawals at no cost. Additionally, the payroll debit card must provide at least one method for withdrawing all of the wages for each pay period or the balance remaining on the payroll debit card without an employee incurring any fees.

Further, the funds on the payroll debit card may never expire. The Final Regulations do permit accounts to be closed due to inactivity, provided that reasonable notice is given to the employee and any funds remaining on the card are refunded to the employee within seven days.

### *Terms and Conditions of the Payroll Debit Card*

If there are any changes in the terms and conditions of the payroll debit card, employers must provide written notice to employees in "plain language," in an employee's primary language (or a language that the employee understands), at least 30 days *before* any such changes take effect. In case such notice is required, it must be provided in at least 12-point font. Further, if the issuer of the card charges any new or increased fees to the

employee prior to the end of this 30-day window, the employer must reimburse the employee for such fees.

Employers are prohibited from charging (directly or indirectly) employees certain fees for using payroll debit cards, including fees related to:

- application, initiation, loading, or participation in the payroll debit card program;
- account inactivity;
- account maintenance;
- overdraft, shortage, or low balance status;
- balance inquiries;
- telephone or online customer service;
- providing the employees with written statements, transaction histories, or the issuer's policies;
- closing an account or issuing payment of the remaining balance by check or other means;
- declined transactions at an ATM that doesn't provide free balance inquiries; and
- replacing the payroll debit card at reasonable intervals.

If an employer incurs any costs associated with payroll debit card accounts, it may not pass any of those costs on to employees. Employers also may not receive kickbacks or any financial remuneration from the issuer, card sponsor, or any third party for delivery wages by payroll debit card.

For employees covered by a valid collective bargaining agreement ("CBA") that expressly provides the method(s) by which wages may be paid to employees, an employer must also obtain the approval of the union before paying by payroll debit card.

### **Potential Liability for Employers**

The Final Regulations do not specify penalties for violations of the regulations.

### **What Employers Should Do Now**

Employers in New York State using direct deposit or payroll debit cards to compensate employees should do the following prior to March 7, 2017:

- Prepare notice and consent forms (using either templates from the NYSDOL or creating a form with all required information) for use going forward.
- Issue the notice and consent forms to all new employees (except those who are employed in a bona fide executive, administrative, or professional capacity whose earnings exceed \$900 per week, and applicable farm workers, as noted above (collectively, “Exempt Employees”)) as part of the onboarding process.
- Prepare and provide to current employees (other than Exempt Employees) who are paid by direct deposit or payroll debit cards an updated notice that includes the right to withdraw consent.
- Give employees a copy of their consent for direct deposit and/or payroll debit cards.
- Prepare and utilize acknowledgment forms on which current employees can confirm receipt of notices of their rights under the Final Regulations.
- Carefully review agreements with the payroll debit card issuers, or any other company associated with the issuance or processing of payroll debit cards, to ensure compliance with the Final Regulations.
- Review any applicable CBAs to determine:
  - whether they provide you with the right to unilaterally change the manner in which employees covered by the CBAs are paid, or
  - whether you must give notice to any employee representatives and/or obtain the unions’ agreement before changing how those employees are paid.

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