



June 2016

Follow @Paul_Hastings



The New York State Department of Labor Issues Revised Proposed Rulemaking that Will Greatly Impact Employers Who Offer Direct Deposit and Payroll Debit Cards

By [Cathy Beyda](#) & [Emily Pidot](#)

On June 15, 2016, the New York State Department of Labor (“NYSDOL”) published a revised proposed rule governing permissible methods of wage payment to employees¹ in New York State. This is the second revision made by the NYSDOL to its original proposed rule, which was published on May 27, 2015. Like the prior iterations, the June 15 proposed rule imposes significant new burdens on employers who offer electronic payment methods, including payroll debit cards and direct deposit, as outlined below.

A Word about Payroll Debit Cards

A payroll debit card (also referred to as a “payroll card” or “pay card”) is a prepaid debit card distributed to employees through their employer as a means of receiving wages. Each pay day, the employee’s net wages are electronically deposited into the employee’s payroll card account at a financial institution. The employee can then use the card to access his or her wages in cash or to make purchases and pay bills. Many employers have elected to complement their direct deposit programs with payroll debit cards in order to bring the benefits of electronic wage payment to employees who do not have bank accounts or have limited access to traditional financial services. These benefits include reliable and timely delivery of wages, as well as increased security and convenience for both employers and their employees.

The proposed rule is in response to concerns expressed by consumer advocates and others that some employees are being forced to receive their wages on payroll debit cards and that fees can reduce the take home pay of low wage earners. Others disagree and say the proposed rule goes too far.

Proposed Notice and Consent Requirements for Electronic Payment Methods

Section 192 of the New York Labor Law prohibits employers from paying wages using direct deposit without the employee’s advance written consent. The NYSDOL has interpreted this requirement in the context of traditional direct deposit and payroll debit card accounts through administrative guidelines and counsel opinion letters posted on its website.² The proposed rule adds a number of new requirements regarding notice and consent:



A. *New Pre-Consent Notice Requirements*

Consent to direct deposit or a payroll debit card must be obtained after the employee receives written notice, in English and in the employee's primary language,³ of the following information:

- A description of all of the employee's wage payment options;
- A statement that the employer may not require the employee to accept direct deposit or payment using a payroll debit card;
- A statement that the 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 payroll cards, a list of locations where employees can access and withdraw their wages without charge within reasonable proximity to their workplace or place of residence. The NYSDOL has indicated that this requirement may be satisfied by providing employees with access to an online or telephone system that allows them to identify such locations.

The proposed rule emphasizes that consent must be obtained without intimidation, coercion or fear of adverse action, and cannot be made a condition of hire or employment. Moreover, employees must be able to withdraw their consent at any time.

The notice and consent requirements may be satisfied electronically so long as employees are provided with the ability to view and print the notice and consent without cost while at work. The employer must notify employees of their right to print the materials.

Finally, the proposed rule would require employers to maintain an employee's consent form for the duration of the employment relationship and for six years following the last payment of wages by direct deposit. Although this requirement is set forth in the section applicable to direct deposit only, it is likely to apply to consent to payroll debit cards as well.

B. *Seven-Day Cooling Off Period: Payroll Debit Cards*

The proposed rule requires a two-step enrollment process for payroll debit cards whereby an employer must first make the required disclosures and obtain an employee's consent, and then wait seven business days before taking any action to pay the employee using a payroll debit card. This requirement would not apply to direct deposit.

C. *Invalidation of Existing Employee Consents*

In the Assessment of Public Comments, the NYSDOL declared that an employee's consent to direct deposit or payment using a payroll debit card that was obtained prior to the effective date of the final rule will only be valid if it complies with the notice and consent requirements of the final rule.

Many of the proposed notice and consent requirements are unprecedented in New York or any other state. As such, unless the NYSDOL changes its position prior to issuing a final rule, it is likely that employers will need to obtain new consents from most non-exempt employees who currently receive their wages electronically. The NYSDOL has stated that it will give employers six months to obtain new consents and come into compliance once the final rule is published.



Additional Proposed Requirements for Payroll Debit Cards

The revised proposed rule includes cash access requirements that far exceed those required in other states. Specifically, employers who offer payroll debit cards would be required to use a program that provides access to at least one ATM within a reasonable travel distance to the employee's work location or home that offers unlimited free withdrawals to the employee and at least one means of withdrawing up to the full account balance each pay period without a fee. The proposed rule also prohibits employers or their agents from charging most fees that could be incurred using a payroll debit card.

In addition, the proposed rule would require employers to provide employees with 30 days' advance notice of any changes to the terms and conditions of the payroll card account. Federal law currently requires financial institutions that issue payroll debit cards to provide 21 days' advance notice of changes to payroll card accounts and only if the changes are considered adverse.

Next Steps

Employers should review their existing direct deposit and payroll debit card consent forms to determine whether they may need to obtain new consents from their employees should the proposed rule become final in the coming weeks. In addition, employers who offer payroll debit cards should consult their providers in preparation for the final rule.

Employers impacted by the proposed rulemaking may consider aligning with chambers of commerce, organizational associations, trade groups, or payroll service companies to submit comments, criticism, or concerns during the public comment period, which will end on July 15, 2016.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

New York

Marc Bernstein
1.212.318.6907
marcbernstein@paulhastings.com

Kenneth W. Gage
1.212.318.6046
kennethgage@paulhastings.com

Patrick W. Shea
1.212.318.6405
patrickshea@paulhastings.com

Stephen P. Sonnenberg
1.212.318.6414
stephensonnenberg@paulhastings.com

Emily R. Pidot
1.212.318.6279
emilypidot@paulhastings.com

Palo Alto

Cathy S. Beyda
1.650.320.1824
cathybeyda@paulhastings.com

San Francisco

Zach P. Hutton
1.415.856.7036
zachhutton@paulhastings.com

M. Kirby C. Wilcox
1.415.856.7002
kirbywilcox@paulhastings.com

¹ The proposed rule does not apply to any person employed in a bona fide executive, administrative, or professional capacity whose earnings are in excess of \$900 a week, or to employees working on a farm not connected with a factory.

² New York State Department of Labor, Guidelines: Direct Deposit of Wages in a Bank or Financial Institution (March 2016); New York State Department of Labor, Counsel Opinion Letter (October 29, 2009).

³ The NYSDOL plans to publish on its website templates translated into a variety of languages.

Paul Hastings LLP

Stay Current is published solely for the interests of friends and clients of Paul Hastings LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2016 Paul Hastings LLP. .