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The New York State Industrial Appeals Board Invalidates Controversial Regulations Governing Methods of Wage Payment

By Cathy Beyda, Gerry Sachs, Emily Pidot, Sara Weed & Kelsey Sullivan

Controversial regulations governing methods of wage payment in New York were ruled invalid by the State of New York Industrial Appeals Board (the "Board") on February 16, 2017,[1] just 19 days before the regulations were scheduled to take effect. The decision was issued in response to a petition filed by Global Cash Card ("GCC"), a leading payroll card provider, claiming that the Commissioner of Labor (the "Commissioner") exceeded her authority in promulgating the regulations and that the regulations were unreasonable. The Board agreed. The Commissioner has 60 days from the issuance of the decision to file an appeal in court.

The Regulations

The regulations were the result of a year-and-a-half long rulemaking process that started with the publishing of an initial proposed rule on May 27, 2015, followed by the issuance of two revised proposals, and culminating in the adoption of final regulations on September 7, 2017 (the "Regulations"). Set to be codified at 12 NYCRR Part 192, the Regulations identified permissible methods of paying employees who work in the State of New York and established standards that must be met with respect to each payment method.

Among other things, the Regulations included new notice and consent requirements for both traditional direct deposit and payroll debit cards. The notice requirements included informing employees of all of their wage payment options, and specifically advising them that direct deposit and payroll cards are voluntary and may not involve fees for services necessary to access wages in full. In addition, the Regulations required that these and other notices be provided, and consent obtained, in both English and the employee's primary language, if a notice and consent template in that language was available from the Commissioner.

With respect to payroll debit cards, employers would have been required to wait at least seven business days before acting on an employee's consent to the payment method. The Commissioner advised that new authorizations would not be required from employees who currently receive their wages by direct deposit or via a payroll debit card so long as these employees were provided the newly required notices prior to the Regulation's March 7, 2017 effective date.

Many provisions of the Regulations would have applied only to payroll debit cards. These include a requirement that employee-cardholders be provided access to an ATM that offers unlimited withdrawals without cost within a reasonable travel distance from the employee's home or work, and a method of withdrawing their full wages or the balance in the card account without incurring a fee. In addition, the Regulations imposed broad fee prohibitions on payroll debit card accounts and required employers to provide 30-days advance written notice of any changes to the terms and conditions of the account.

The Regulations were controversial from the outset. Employers and employer groups submitted comments arguing that the Regulations, as proposed and later adopted, imposed a number of unduly burdensome and costly requirements on payroll debit cards that are not required with respect to any other wage payment method. They also argued that many provisions of the Regulations were vague and, therefore, provided little guidance as to what was needed to comply. Financial institutions, payroll card companies, and payment networks reiterated these concerns and also argued that onerous fee provisions and unique requirements for cardholders in New York would make it difficult, if not impossible, to offer payroll debit cards in the State. In contrast, Governor Cuomo, consumer groups, and labor unions supported the rule claiming that new standards were necessary to protect employees from "predatory practices that seek to deny them a fair day's pay for a fair day's work."[2]

Global Cash Card's Challenge to the Rule and the Commissioner's Response

On October 21, 2016, GCC filed a Petition challenging the Regulations on the ground that they constitute an invalid usurpation of legislative authority, are preempted in part by federal banking law, and are unreasonable. In a brief supporting its Petition, GCC argued that several provisions of the Regulations constitute complex policymaking, a task reserved to the legislature. In support of this contention, GCC noted that bills addressing payroll debit cards were pending before and during the rulemaking process, and that to date the Legislature has been unable to resolve the issue. GCC further maintained that financial accounts, including payroll debit cards, are complex, federally-regulated instruments outside the Commissioner's area of expertise. Finally, GCC identified several provisions of the Regulations as being unreasonable, noting that the Board has broad power to review the reasonableness of any regulation promulgated by the Commissioner.

The Commissioner filed an Answer to GCC's Petition on December 14, 2016. A brief supporting the Answer asserted that, in promulgating Part 192, the Commissioner drew upon the authority delegated by the Legislature to issue such rules and regulations as she deems necessary to carry out the provisions of Article 6 of the Labor Law. Article 6 sets forth standards to ensure the full, prompt, and unrestricted payment of wages. In addition, the Legislature authorizes the Commissioner to issue regulations governing any provision of the Labor Law as she finds necessary and proper. The Commissioner contended that this authority does not disappear during periods of public debate about protecting the right of employees to their wages, nor is this authority rendered invalid as unconstitutional or improper when the Legislature is considering legislation governing methods of wage payment. The Commissioner asserted that in the context of the Regulations, she has special expertise concerning the payment of wages by employers under circumstances that ensure consent and reasonable access to full wages. Finally, the Commissioner maintained that Part 192 regulates employers, not banks or financial institutions, and therefore is not preempted by federal banking law.

The Decision

The Board ruled that the Regulations were invalid because they exceeded the jurisdiction delegated to the Commissioner (i.e., regulation of the employment relationship), went beyond the scope of the enabling statutes, and encroached upon the jurisdiction of banking and financial services regulators. The Board likened the fees associated with the use of payroll debit cards to fees for other banking services that are regulated by the Department of Financial Services. These include fees that banks and financial institutions may charge on checking accounts that lawfully receive direct deposits of wages from employers and fees that licensed check cashers may charge when cashing employee paychecks. The Board concluded that "[b]ecause the statute already allows employers to pay wages by payroll debit card with an employee's consent, the regulations are invalid to the extent they prohibit otherwise lawful conduct by financial institutions for providing banking services."

The Board found support for its position from the fact that the Legislature has considered at least eight bills relating to payroll debit cards over a short period of time that overlapped with the rulemaking process, demonstrating that the issue of payment by payroll debit card is a matter of public concern being debated within the Legislature. The Board also noted that public comments were submitted by members of the Legislature during the rulemaking process both in support of and opposed to the Regulations.

The Board concluded by acknowledging that the Commissioner has a well-founded concern that low wage earners should not be coerced into receiving wages to a payroll debit card account and that employees paid by payroll debit card should not be subject to excessive fees. The Board pointed out, however, that it already is illegal for an employer to require the payment of wages to a payroll debit card or to make any direct or indirect charge to an employee in order to receive wages. It observed that these same employees already face the possibility of paying fees to licensed cash checkers if they chose to use their services to cash their paychecks.

Impact of the Ruling

At this point, there is no indication as to whether the Commissioner will appeal the Board's decision. Future regulation of payroll debit cards in the State of New York may come from the Department of Financial Services, a more streamlined rulemaking from the Labor Commissioner, or through legislation. While we await future action in this regard, employers, issuers, program managers, and others who offer payroll debit cards should continue to look to the New York Labor Law ("Labor Law"), and opinion letters interpreting its provisions, for guidance on what is required to be compliant in New York.

Although the Labor Law does not expressly address payroll debit cards, the Board confirmed in its recent decision that section 192 of the Labor Law is broad enough to encompass the use of payroll debit cards. Section 192 requires an employee's advance written consent before an employer may deposit an employee's wages or salary in a bank or other financial institution.

In letters dated October 29, 2009 and January 15, 2010, Counsel for the Commissioner ("Counsel") opined that the use of payroll debit cards directly implicates sections 191, 192, and 193 of the Labor Law. While section 192 requires employee consent, section 191 requires the full and timely payment of wages and section 193 limits the circumstances under which an employer may make deductions from an employee's wages. At that time, Counsel interpreted these provisions as imposing the following conditions on the use of payroll debit cards in the state of New York. The New York courts often give deference to the Counsel's opinion letters.[3]

- *Employee Consent*. Counsel opined that for consent to be valid under section 192, it may not be made a condition of employment, it must be obtained after the inception of the employment relationship, and employees must be provided full notice of the terms and conditions of the payroll card option including full disclosure of fees associated with the use of the card.

- *Full and Free Access to Wages*. In its letters, Counsel interpreted section 191 broadly to mean that employees who are paid via a payroll debit card must be provided an effective means of making an unlimited number of withdrawals using the card either at a bank teller or using ATMs. Counsel further opined that employees must be able to withdraw their full wages to the penny and that the location of free withdrawals must be within a reasonable distance of the employee's worksite.

- *Other Fees*. Counsel opined that section 191 prohibits fees for services that are essential for an employee to access his or her wage in full but does not prohibit financial institutions from imposing fees for banking services incidentally provided to employees. By way of example, Counsel declared that fees for an initial card, replacement cards at reasonable intervals, and account maintenance would violate the Labor Law. In contrast, fees for electronic fund transfers, money orders, or electronic bill pay are examples of fees that would not violate the Labor Law. Counsel stated that when permitted fees are charged, no part of the fee may be remitted or otherwise directed to the employer or its subsidiary as to do as to do so would violate section 193.

- *Timely Payment of Wages without Encumbrance*. Counsel cautioned that any delay associated with an employee's ability to obtain wages in full and in the time frames required by the Labor Law would violate section 191. Counsel pointed to holds placed on the clearance of funds, minimum balance requirements, and a scarcity of bank branches as examples of encumbrances that may limit or delay access to wages.

In many instances, Counsel's opinion letters go beyond the letter of the Labor Law and touch upon issues addressed by the Board in its recent decision. Moreover, it is unclear how the Board's decision will impact the Commissioner's enforcement stance. Nevertheless adherence to the guidelines set forth in the Counsel opinion letters should help to reduce any risk in this area.

Employers, financial institutions, program managers and other interested parties should consult qualified legal counsel for help navigating the complex rules and regulations governing the use of payroll debit cards in New York and across the country.

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

New York

Emily R. Pidot
1.212.318.6279
emilypidot@paulhastings.com

Palo Alto

Cathy S. Beyda
1.650.320.1824
cathybeyda@paulhastings.com

Washington, D.C.

Gerald S. Sachs
1.202.551.1975
geraldsachs@paulhastings.com

[1] *In re: Global Cash Card, Inc.*, No. PR 16-120 (N.Y. Indus. Bd. of App. Feb. 16, 2017).

[2] State of New York, *Governor Cuomo Enacts Country's Most Comprehensive Worker Protections Against Hidden Payroll Card Fees* (Press Release Sept. 8, 2016).

[3] *See Barenboim v. Starbucks Corp.*, 995 N.E.2d 153, 158 (N.Y. 2013); *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 (N.Y. 2008).

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