AMERICAN PAYROLL ASSOCIATION

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Regulation of Payroll Card Accounts: A Guide for Policymakers (With Model Payroll Card Legislation)

I. Introduction[1]

Payroll cards are now a popular and mainstream method of wage payment. In 2017, 21.8% of American Payroll Association (APA) members offered payroll cards to their employees.[2]

The APA has monitored developments in the use and regulation of payroll cards for over a decade. In 2004, APA's Government Relations Task Force formed a payroll card subcommittee in response to increased interest in this payment method. Since that time, the APA has offered education to its members regarding payroll card compliance, helped develop payroll card best practices, and provided information on its public website about the benefits of electronic payments, compliance with legal requirements, and how to select a payroll card provider. In addition, the APA has supported sensible legislative and regulatory initiatives that protect the rights of workers to receive their full wages while ensuring that employers are able to offer this beneficial payment method to their employees.

This Guide provides policymakers with a comprehensive source of information concerning payroll cards. It addresses the following topics:

- What are payroll cards?
- The benefits of payroll cards for both employees and employers
- Common misconceptions about payroll cards
- Recognition of payroll cards as a permissible method of wage payment
- Federal and state law regulation of payroll cards (including the APA's position on common payroll card provisions)

At the end of this Guide we have attached the APA's model payroll card legislation. We encourage state policymakers to consider this language, which takes into consideration the interests of both employers and their employees, and has as its goal ensuring that payroll cards remain a beneficial and viable wage payment option.

We hope you find the Guide helpful. Please feel free to contact Bill Dunn, Director of Government Relations, American Payroll Association (202-232-6889) with any comments or questions that you may have about this Guide or payroll cards generally.

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[1] This paper is provided for information purposes only and is not intended to constitute legal advice.
[2] American Payroll Association, 2017 Survey of Salaries and the Payroll Profession.

II. What Are Payroll Cards?

Payroll cards are reloadable prepaid cards that are linked to an account at a national or regional bank or credit union, and are distributed to employees through their employers for the primary purpose of receiving wages and other compensation.[3] Today, the vast majority of payroll cards are branded meaning that they bear the logo of a major payment brand such as Visa® or Mastercard®. These cards may be used anywhere that the payment brand is accepted.

On payday, the employer electronically deposits an employee's full net wages into the employee's payroll card account. Most payroll card accounts are structured as pooled or omnibus accounts with individual subaccounts owned by each employee. Upon deposit into the account, ownership of the funds transfers to the employee, similar to deposits into an employee's bank account. The employee can then use the payroll card to access his or her wages in cash without cost. Alternatively, the employee may choose to store some or all of his or her wages in the payroll card account for safekeeping and use the card to make purchases and/or pay bills in person, online, or over the telephone.

Payroll cards differ from other reloadable prepaid cards, known as general purpose reloadable (GPR) cards, in that they are acquired through the employment channel for the primary purpose of receiving wages. GPR cards are normally obtained directly by consumers at retail locations, banks or online and can be used for a variety of purposes. Although GPR cards function much like payroll cards and can be used by employees to sign up for direct deposit, the acquisition of a payroll card through the employment channel triggers unique federal and state law regulations.

III. Why Employers Offer Payroll Cards (i.e., the Benefits of Payroll Cards)

A. As a Benefit to Their Employees

Payroll cards offer a variety of benefits to employees. They are particularly beneficial for employees who do not have bank accounts and those with limited access to traditional financial services. According to a 2015 study by the Federal Deposit Insurance Corporation (FDIC), 7.0% of U.S. households are unbanked and another 19.9% are underbanked, meaning that they have a bank account but still rely on alternative financial services such as check cashing services.[4] These workers often spend hundreds of dollars a year to cash their paychecks and incur additional costs purchasing money orders to pay their bills.[5] Once the

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[3] Federal and state law definitions of payroll cards vary and these variations can have a significant impact. The APA recommends that states adopt the Regulation E definition of "payroll card account" or a slight variation of it. As an example, see the Model Payroll Card Language attached to this Guide.

[4] FDIC, 2015 National Survey of Unbanked and Underbanked Households (October 20, 2016).

[5] A 2012 study by the Massachusetts Division of Banks concluded that an unbanked employee in Massachusetts earning $30,000 a year who is paid with a paper check spends approximately $650 annually in check cashing fees and fees to purchase money orders to pay their bills. Massachusetts Division of Banks, 2012 Report on Check Cashers and Basic Banking Fees. Other sources suggest that employees who rely on check cashing services may spend closer to $1,000 each year on fees. *See*, Sloane and P. Hewitt, Payroll Cards: 100% Electronic Payments 80% of the Time, Crossing the Market Finish Line (Mercator Advisory Group January 2009).

check is cashed, the employee is left holding his net wages in cash which may be lost or stolen.

According to Linda Sherry, Director of National Priorities for Consumer Action, "Payroll cards offer the opportunity for workers who would otherwise receive a paper paycheck to avoid potential check cashing fees, money orders and the risk of losing cash."[6] If a branded payroll card is lost or stolen, the payment brand's zero liability policy and Regulation E's liability limitations protect the employee from losses arising from fraudulent use. The Center for Financial Services Innovation (CFSI) has stated that: "payroll cards can serve as an important tool for building long-term financial health," particularly for employees working in low-paying or hourly jobs.[7]

Payroll cards also are convenient. Employee-cardholders have full access to their funds at over 90,000 bank branches nationwide and may use their branded payroll cards anywhere that the payment brand (Visa or Mastercard) is accepted.

For these and other reasons, employees want the option of receiving wages to a prepaid account, such as a payroll card account. A recent study by the Pew Foundation found that 43% of unbanked consumers who purchase GPR cards have their wages loaded to the card account using direct deposit, and 31% of consumers with bank accounts who purchase GPR cards add wages to their prepaid account.[8] While this arrangement can be beneficial to employees, the APA firmly believes that employers should have the option of offering payroll cards through the employment channel as doing so provides employees with additional protections.

B. Reliable Wage Payment

Payroll cards allow employers to deliver, and employees to receive, wages on payday. This is especially important when employees are away from the workplace for such reasons as illness, travel or simply because the employee is not scheduled to work on payday. Payroll cards have proven to be a particularly valuable solution during periods of severe weather and national disasters when mail delivery can be impeded. In fact, many employers report that they first decided to offer payroll cards after severe weather conditions and national disasters delayed the delivery of wages at a time when employees needed access to their funds the most. Many of these employers also reported that payroll cards proved to be an important vehicle for delivering disaster relief to employees.

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[6] Consumer Action and NBPCA Partner to Offer Payroll Card Best Practices for Employers and Employees (Press Release, February 20, 2014).

[7] Thea Garon & Beth Brockland, Center for Financial Services Innovation, The Compass Guide to Payroll Cards (2015).

[8] The PEW Charitable Trusts, *Banking on Prepaid* (June 2015).

C. Streamlined Payroll Processing

Payroll cards allow employers to streamline their payroll practices by reducing their reliance on paper paychecks and related processes, and by transferring escheatment responsibility to the card issuer.

D. Cost-Savings for Employers and Their Employees

Employers who offer payroll cards often enjoy significant cost savings as they no longer have to process, print, or mail paychecks, or to reissue checks that have been lost or stolen. NACHA estimates that employers can save between $2.87 and $3.15 per payment using electronic methods instead of paper paychecks.[9] A 2005 study by the Comptroller of the Currency found that it costs between $8 and $10 to replace a lost or stolen paycheck.[10] More than a decade later, our members report that it often costs them over $20 to replace a single lost or stolen check taking into account the cost of stopping payment on the original check and hiring an overnight carrier service to deliver a replacement check to the employee. Like employers, employees often enjoy cost savings as well particularly if they previously had to pay to cash their checks and to purchase money orders to pay their bills.

IV. Common Misconceptions Regarding Payroll Cards

A. Payroll Cards Are Unregulated

A common misconception about payroll cards is that the payment method is unregulated and, therefore, that additional regulation is necessary. As discussed below, payroll cards are subject to Regulation E and other federal banking laws. In addition, payroll cards are subject to the federal and state wage and hour laws.

B. Wages Are Deposited Into an Account Owned by the Employer

Another common misconception is that the employee's wages are deposited into an account that is owned and/or controlled by the employer. This is not the case. The financial institution that issues the payroll card establishes a separate electronic subaccount for each employee. Once wages are deposited into the account, the employer loses access to the funds and has no ability to view transactions conducted by the cardholder.

C. Employees Must Incur Fees to Access Their Wages

Probably the most common misconception about payroll cards is that employees must incur fees to access their wages from a payroll card account. This simply is not the case. Studies have shown that employees can, and many do, use payroll cards without ever incurring fees.[11] In fact, the wage and hour laws in most states require that employees be provided a

[9] The Electronic Payments Association (NACHA), *Fast Facts About Direct Deposit*.
[10] Office of the Comptroller of the Currency, Community Development Insights, *Payroll Cards: An Innovative Product for Reaching the Unbanked and Underbanked* (June 2005).
[11] See, e.g., S. Wilshusen, R. Hunt, J. van Opstal, & R. Scheider, Fed. Reserve Bank of Philadelphia, *Consumer's Use of Prepaid Cards: A Transaction-Based Analysis* (August 2012).

means of withdrawing their full net wages each pay period without cost. Visa and Mastercard both require that employee-cardholders be provided the ability to withdraw their full wages each pay period without cost. In addition, most payroll card programs offer employees several ways to access cash wages. These typically include bank teller withdrawals, ATM withdrawals, cash back at the point of sale, and self-issued convenience checks.

Nevertheless, a few reports have asserted that payroll cards carry hidden fees that reduce the take home pay of low income workers. These reports make far reaching conclusions that are not supported by the data. As an example, a report released by the New York State Attorney General's Office in 2014 titled *Pinched by Plastic* concludes that "many employers used programs that charged workers significant fees" and those fees "add up quickly." The limited data provided in the report demonstrates that the opposite is true, however. Outside the context of overdraft protection, which most payroll cards do not offer, the report cites few pieces of data on fees incurred by cardholders. First, the report states that in some programs, employees incurred an average of $15 in fees over a one year period. Second, in an attempt to show that employees incur high fees, the report states that one vendor received almost $70,000 in cardholder fees from one employer's workers over the one year period. This figure covers approximately 5,000 employees, meaning that employees incurred on average $14-$15 in fees over the one year period.

Despite its claims, *Pinched by Plastic* acknowledged that "payroll cards can be a less costly wage payment option for employees" when compared to alternatives such as check cashing services.[12] Indeed, one of the primary benefits of payroll cards is that they provide employees without bank accounts with a convenient means of accessing their full wages without cost. However, just like employees who decide to use a check-cashing service, or employees with direct deposit who decide to access wages from an out-of-network ATM, employees with payroll cards may incur fees if they fail to take advantage of the many methods of cash access that are offered free of charge. These fees should never come as a surprise to employees given the disclosure requirements of federal Regulation E and similar state wage and hour laws. The report itself acknowledged that 20-25% of employees from one group of employers did not incur a single fee during the one-year period survey indicating that employees can and do take advantage of the fee-free methods of obtaining access.

D. Employers Profit at the Expense of Their Employees

Consumer groups often suggest that payroll cards allow employers to transfer the cost of payroll onto their employees. While it is true that employers save the cost of processing, printing, and delivering paper paychecks, these costs are reduced or eliminated. They are not passed on to employees. As discussed above, if used properly, both employees and employers should enjoy cost savings when wages are paid using payroll cards.

[12] New York State Attorney General, *Pinched by Plastic: The Impact of Payroll Cards on Low Wage Earners* (June 2014).

E. Employees Are Not Given a Choice

As discussed below, federal banking law requires that employees be provided at least one other payment option in addition to payroll cards. The wage payment statutes in most states regulate the specific payment methods that employers must offer.

F. Payroll Cards Are Only for Unbanked Workers

Finally, payroll cards are often promoted as a solution for workers without bank accounts who cannot participate in traditional direct deposit. While this is definitely the case, in practice, both banked and unbanked employees have embraced payroll cards. In fact, many employers who have implemented payroll card programs report that their biggest surprise was the number of banked employees who signed up for the card. A recent study by the Mercator Advisory Group revealed that nearly half (46%) of employees with payroll cards also have a bank account.[13] Other studies have found that many millennials are turning to payroll cards and other prepaid cards, often citing the positive role that prepaid cards play in financial management.[14]

Banked employees who elect to receive a payroll card often participate in split pay, meaning that they have a portion of their wages deposited into their traditional bank account and the remainder loaded onto a payroll card. As an example, an employee may decide to have his or her monthly spending money loaded onto a payroll card and the remainder of his or her wages deposited into a savings account. Split deposits serve as an important budgeting tool and promote savings. For this reason, split deposits are strongly encouraged by such organizations as the Consumer Federation of America and NACHA.[15]

V. Recognition of Payroll Cards as a Permissible Method of Wage Payment

Payroll cards are now widely recognized to be a lawful method of wage payment. As of December 1, 2017, the wage and hour statutes and/or regulations in 28 states expressly authorize the use of payroll cards.[16] In most of the remaining states, the wage and hour regulators have adopted enforcement positions recognizing payroll cards to be a permissible method of wage payment, usually as a form of direct deposit. Depending on the state, these enforcement positions have been communicated through published guidance documents, opinion letters, or informal responses to e-mail inquiries. A few states, such as Alabama,

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[13] Ben Jackson, Mercator Advisory Group, *Payroll Cards in the United States: A Balancing Act for Providers* (March 2016).

[14] Global Cash Card and The Center for Generational Kinetics, *A New Look At Employees and Pay in America* (February 2016); Susan Herbst-Murphy & Greg Weed, Fed. Reserve Bank of Philadelphia, *Millennials with Money: A New Look at Who Uses GPR Prepaid Cards* (September 2014).

[15] NACHA Celebrates America Saves Week (2016), https://www.nacha.org/news/nacha-celebrates-america-saves-week-feb-22-27-and-encourages-saving-through-direct-deposit-ach.

[16] Twenty-eight states have updated their wage payment statutes or regulations to expressly address payroll cards. These states are Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma (attorney general opinion), Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, and West Virginia. In addition, the Massachusetts statutes address payroll cards in the context of staffing agencies and worksite employers.

Louisiana, and Mississippi, do not regulate methods of wage payment at all. The APA is not aware of any state that prohibits the use of payroll cards or takes the position that payroll cards are not a lawful method of wage payment.

VI. Regulation of Payroll Cards

Payroll cards generally are subject to two separate regulatory schemes. First, the banking laws regulate the relationship between financial institutions and their customers. In the payroll card context, the banking laws ensure, among other things, that employee-cardholders have access to information about their accounts, are protected in the event of unauthorized use or bank insolvency, and enjoy confidentiality of their personal financial information. To date, most regulation of payroll cards by the banking laws has taken place on the federal level.

Second, the federal and state wage and hour laws regulate the employment relationship and ensure, among other things, that employees are paid their full wages in a timely manner. Issues governing permissible methods of wage payment generally are addressed on a state level.

Despite these separate regulatory schemes, a few states have attempted to regulate financial institutions that issue payroll cards through their wage and hour laws, or to hold employers responsible for banking law compliance. The APA strongly opposes this practice as holding employers liable for banking procedures beyond their control will deter employers from offering this beneficial payment method to the detriment of their employees.

A. Federal Regulation of Payroll Cards

1. Fair Labor Standards Act

Federal wage and hour law generally does not regulate permissible methods of wage payment. The Fair Labor Standards Act (FLSA) focuses primarily on the payment of minimum wage and overtime compensation, recordkeeping, and child labor standards.[17] Fees incurred to access wages from a payroll card account could violate the FLSA, however, if they deny employees the ability to receive minimum wage and overtime compensation.

2. The Electronic Fund Transfer Act and Regulation E

Unlike the federal wage and hour law, federal banking law expressly regulates payroll card accounts and imposes certain requirements on both the financial institution that holds the account and employers who offer the cards. These provisions are found primarily in the Electronic Fund Transfer Act (EFTA) and its implementing regulation, Regulation E.[18]

The EFTA and Regulation E establish the rights, financial liabilities, and obligations of consumers and other participants in electronic fund transfer (EFT) activities. Payroll cards

[17] 29 U.S.C. § 201 *et seq.*
[18] 15 U.S.C. § 1693 *et seq;* 12 C.F.R. Part 1005.

have been covered by Regulation E since 2007. In October 2016, the Consumer Financial Protection Bureau (CFPB) issued a final rule (Prepaid Rule) increasing the consumer protections on covered accounts, including payroll card accounts, and extending the provisions of Regulation E to a broad range of prepaid products.[19] Most provisions of the Prepaid Rule go into effect on April 1, 2019.

Importantly, Regulation E's compulsory use provision prohibits financial institutions and "other persons" from requiring an employee to receive EFTs of wages to an account at a particular financial institution.[20] The CFPB interprets this provision as prohibiting employers from requiring that their employees receive their wages to a payroll card account.[21] The CFPB has made clear, however, that the compulsory use provision does not prohibit an employer from offering its employees a choice between a payroll card and another method of wage payment. In a 2013 bulletin, the CFPB emphasized that "[p]ermissible alternative wage payment method(s) are governed by state law".[22] Thus, while Regulation E would allow employers to offer employees the choice for direct deposit to an account of the employee's choosing or a payroll card, state law determines whether a paper paycheck option must also be offered.

Regulation E also includes a variety of disclosure requirements. For example, Regulation E requires financial institutions to disclose to consumers all of the terms, conditions, and fees associated with a covered account.[23] Effective April 1, 2019, financial institutions will be required to provide consumers with additional information before they acquire a prepaid account, including a payroll card account.[24] The new pre-acquisition disclosures include: (1) A short form disclosure setting forth certain key fees and other information regarding the prepaid card account;[25] and (2) A long form disclosure setting forth information about all fees that may be imposed in connection with the prepaid card account and certain other key information (e.g., FDIC insurance, the financial institution's contact information, and how to submit complaints to the CFPB).[26] In addition, outside, but in close proximity to the short form, the financial institution must disclose its name, the name of the card program, and any fees for purchasing and/or activating the card account (note, payroll card programs do not charge fees for obtaining the card or activating the account).[27] For payroll cards, the short form disclosure must also notify employees that they do not have to accept the payroll card account.[28] The short form may, but is not required to, contain a statement regarding state-required information or other fee discounts or waivers.[29] In addition, the financial

[19] Currently, only payroll card accounts and certain prepaid accounts that receive government benefits are covered by Regulation E.
[20] 12 C.F.R. § 1005.10(e)(2).
[21] CFPB Bulletin No. 2013-10 (September 12, 2013).
[22] *Id*.
[23] 12 C.F.R. § 1005.7(b).
[24] 12 C.F.R. § 1005.18(b)(1)(i) (effective April 1, 2019). In the payroll card context, a consumer acquires an account when he or she chooses to be paid via a payroll card account.
[25] 12 C.F.R. § 1005.18(b)(2) (effective April 1, 2019).
[26] 12 C.F.R. § 1005.18(b)(4) (effective April 1, 2019).
[27] 12 C.F.R. § 1005.18(b)(5) (effective April 1, 2019).
[28] 12 C.F.R. § 1005.18(b)(2)(xiv)(A) (effective April 1, 2019).
[29] 12 C.F.R. § 1005.18(b)(2)(xiv)(B) (effective April 1, 2019).

institution must provide 21 days' advance notice of certain changes in the terms and conditions of the account.[30] Finally, the card itself must include the name of the financial institution as well as a website and phone number that the consumer may use to contact the financial institution regarding the account.[31]

In addition to the compulsory use provision and the above disclosure requirements, Regulation E requires card issuers to provide employees with periodic activity statements or an alternative to periodic statements. Effective April 1, 2019, if the alternative is used, the issuer must do all of the following: (1) make balance information available to employees through a readily available telephone line; (2) make an electronic history available showing the employee's account transactions for a period of at least 12 months; and (3) provide promptly upon an employee's request a written history of the employee's account transactions covering a period of at least 24 months prior to the request.[32] Finally, Regulation E also limits cardholder liability when a lost or stolen card is used fraudulently and requires financial institutions to make dispute resolution procedures available to cardholders.[33]

The CFPB's Prepaid Rule also revises another federal Rule, Regulation Z, to significantly limit the ability of financial institutions to offer overdraft and credit features on prepaid card accounts.[34] Most payroll card programs do not offer these features.

3. FDIC Insurance

The funds in a payroll card account are eligible for FDIC insurance if the account is held at an insured bank. The FDIC has confirmed that where a separate account has been opened in the name of a particular employee-cardholder, it will recognize the employee to be the owner of the account.[35] This issue is important because, in the event of a bank failure, the FDIC must be able to identify the owner of the deposit in order to ascertain the beneficiary of the insurance payout.

Most payroll card accounts are pooled accounts with separate subaccounts for each employee. When this is the case, the FDIC will apply its pass-through insurance rules to identify the owner of the deposit.[36] Under these rules, an individual cardholder will be recognized as the owner of the deposit if three conditions are satisfied. First, the account records of the depository institution must disclose the existence of the agency or custodial relationship. Second, the records of the insured depository institution, custodian or other party must disclose the identities of the cardholders who actually own the deposits and the amount owned by each cardholder. Finally, the funds in the account must actually be owned

[30] 12 C.F.R. §§ 1005.8(a), 1005.18(f)(2).
[31] 12 C.F.R. § 1005.18(f)(3).
[32] 12 C.F.R. § 1005.18(c) (effective April 1, 2019). Until April 1, 2019, electronic and written transaction histories must cover a period of at least 60 days prior to the request.
[33] 12 C.F.R. §§ 1005.6, 1005.11.
[34] 12 C.F.R. Part 1026.
[35] FDIC General Counsel Opinion No. 8, 73 Fed. Reg. 67155 (Nov. 13, 2008).
[36] *Id*.

by the individual cardholders under an agreement among the parties or pursuant to applicable law.

4. Other Federal Banking Law Provisions

A number of other federal banking laws apply to or impact the use of payroll card accounts. For example, the Gramm-Leach-Bliley Act and Regulation P address the use of nonpublic personal information by financial institutions.[37] In addition, the Bank Secrecy Act regulations require financial institutions, including those that issue payroll cards, to establish procedures for verifying the identity of their customers.[38]

B. State Law Regulation of Payroll Cards

The states vary significantly in how they treat payroll cards and in the conditions they impose when payroll cards are offered. Most states treat payroll cards as a form of direct deposit, although a few states treat payroll cards to be the functional equivalent of a paycheck. Some states consider payroll cards to be both. The following is a summary of the most common requirements imposed on payroll cards by the state wage and hour laws, as well as the APA's position on these provisions.

1. Employee Choice and Consent

Employees must be given some choice as to how they receive their wages. As mentioned above, the federal EFTA and Regulation E prohibit employers from requiring that employees receive wages using a payroll card. Employees who are offered a payroll card must also be given at least one other payment option. Permissible alternative wage payment methods are governed by state law and typically include cash, check, and/or direct deposit.

About half of the states appear to allow employers to offer their employees the choice between direct deposit and a payroll card without also offering a paper paycheck option. In the remaining states, a paper paycheck option is required and often must be the default method of payment. Some states require employers to offer both direct deposit and a paper paycheck to employees who are offered payroll cards.

The APA supports legislative initiatives that allow, but do not require, employers to compensate their employees using electronic wage payment methods only. Certainly, states that currently allow employers to require direct deposit should allow employers to give their employees the choice between direct deposit to an account of their choosing and direct deposit to a payroll card account. These provisions should make clear what will happen when an employee fails to make an election. Specifically, employers should be able to credit wages to a payroll card account when the employee has been offered the choice between traditional direct deposit and a payroll card and the employee fails to provide the information necessary for direct deposit (e.g., the routing and account number).

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[37] 15 U.S.C. § 6801 *et. seq.;* 12 C.F.R. Part 1016.
[38] 31 C.F.R. § 1020.220.

Finally, the CFPB has stated that direct deposit to a GPR card is an important wage payment option of which employees should be advised.[39] Accordingly, the APA recommends that the state wage payment statutes make clear that "direct deposit" also includes the deposit of wages to a GPR card account obtained by the employee directly from the card issuer, program administrator or other third party. See our Model Payroll Card Legislation, attached as Appendix A to this Guide, for sample language.

2. Full and Free Access to Wages

Both federal and state wage and hour law require that employees be paid their wages on the established payday. Thus, if an employee elects to receive a payroll card, his or her full net wages must be deposited into the payroll card account on or before pay day and must be available to the employee for use or withdrawal on that day.

The full and free access to wages requirement is interpreted in most states to mean that employees must be able to make at least one withdrawal of up to their full net wages from the payroll card account each pay period without fees. In other words, employees must be able to "cash out" their net wages like they would a paper paycheck on or after payday. Some states vary from this general rule, however. For example, a few states require that the free withdrawal each pay period provide access to the full account balance and not just the employee's net pay for the pay period.[40]

The APA supports legislation that treats payroll cards like other methods of wage payment and requires that employees be able to access their full wages at least once each pay period without cost.

3. Disclosure Requirements

In addition to the disclosures required under the federal banking laws, the state wage and hour laws often require employers to provide their employees with information about their payroll card program. Some states require employers to notify employees about all of their wage payment options and to explain to employees how they can access their wages, check their account balances, or receive transaction histories without cost. Educating employees on how to use their payroll card to their best advantage is important to a successful payroll card program. We support legislative and regulatory initiatives that include these provisions, and allow employers to make the disclosures electronically and in the language that the employer normally uses to communicate employment-related policies to their employees.

4. Fee Prohibitions

Fees that deny employees the opportunity to access their full net wages each pay period generally are viewed as violating the full and free access to wages requirement. For this reason, many states prohibit fees for the initial payroll card, one replacement card a year

[39] Prepaid Accounts under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 81 Fed. Reg. 84060-84061 (November 22, 2016).
[40] In addition, three states require that employees be provided with more than one free withdrawal each pay period.

upon request, participation in the program, loading wages into the card account, and monthly maintenance of an active account. The APA supports these fee prohibitions. Some states prohibit additional fees even though the fees are easy to avoid and are not associated with services that are necessary to access full wages. While we encourage employers to negotiate the best possible terms and conditions for their employees, the APA does not believe that employers should be statutorily required to provide one group of employees with discretionary banking services without cost (and be subject to liability for failing to do so) simply because these employees have chosen to receive their wages via a payroll card. By way of example, we oppose legislative proposals that prohibit fees for declined transactions and account inactivity. These services are costly to provide and beyond the control of the issuer and program manager, while fees for these services are easy for the cardholder to avoid.

5. Access to Account Information

Many states require that employees be provided access to their account balance online and/or over the telephone without cost. The APA supports these provisions as the ability to access balance information allows employees to use payroll cards to their best advantage and promotes healthy financial decision making. We caution against requiring that every method of accessing balance information be provided without cost as doing so may be cost prohibitive.[41]

A few states have attempted to regulate the provision of transaction histories to payroll card holders. The obligation to provide account transaction histories necessarily falls with the financial institution or program administrator, not the employer, and seems inappropriate in wage payment statutes governing employer conduct. Indeed, access to transaction histories is already required under federal banking law. State-specific variations would be extremely burdensome and are unnecessary given that the CFPB recently studied the issue and amended Regulation E to require increased access to transaction information on prepaid accounts.[42]

6. Deposit Insurance

Some states require that payroll cards be attached to an FDIC insured account or that they be issued by a federally insured financial institution. A couple of states require that pooled payroll card accounts be insured on a pass-through basis to the employee.[43] To satisfy this requirement, pooled accounts must be structured in a particular way and certain records

[41] Most programs provide employees with the ability to check their account balance without cost over the telephone (using an interactive voice response system), on the cardholder website, through email alerts and/or using their mobile devices (e.g., mobile apps and text alerts). Providing free balance inquiries at ATMs is cost prohibitive, however. This is because most payroll card providers do not own a network of ATMs. Instead, they must contract with third-party networks, like Allpoint and MoneyPass, to provide in-network ATM access and must pay the third-party network a fee for each transaction (often more than $1.50 a transaction).

[42] 12 C.F.R. § 1005.18(b) (effective April 1, 2019).

[43] Haw. Rev. Stat. § 388-5.7; Mich. Comp. Laws § 408.476.

must be maintained. The APA supports provisions requiring that payroll card accounts be eligible for FDIC or NCUA insurance on a pass-through basis to the employee.

VI. Conclusion

Payroll cards offer a host of benefits to employers and their employees. The APA supports legislative and regulatory initiatives that recognize the use of this beneficial payment method and protect the rights of workers to receive their full wages without cost. These initiatives must be reasonable, however, and should not create unduly burdensome requirements that make it difficult for employers to offer payroll cards. In this regard, we have attached as Appendix A Model Payroll Card Legislation that incorporates the principles addressed in this Guide. We hope that you find it helpful.

Appendix A

Model Payroll Card Legislation

(1) Definitions.

(a) "Payroll card" means a card or other device used by an employee to access wages from a payroll card account;

(b) "Payroll card account" means a prepaid account that is directly or indirectly established through an employer and to which transfers of the employee's wages, salary or other compensation are made; and

(c) "Direct deposit" means the credit of wages to an account in a bank, credit union or other financial institution. For purposes of this section, "direct deposit" includes the credit of wages to a general purpose reloadable prepaid card account obtained directly by the employee from a merchant, financial institution or other third party and not from the employee's current employer.

(2) Methods of Wage Payment. Wages shall be paid using one or more of the following methods:

(a) In lawful money of the United States;

(b) By check payable at full face value upon demand in lawful money of the United States;

(c) By direct deposit to an account designated by the employee [*optional*: provided the employee voluntarily authorizes the payment method];

and

(d) By credit to a payroll card account in accordance with paragraph (3) below.

[*Note:* The optional statement in Paragraph (2)(c) can be included in states that permit electronic pay on a voluntary basis only].

(3) Payment of wages to a payroll card account.

(a) Employee Consent. An employer may initiate payment of wages to an employee by credit to a payroll card account provided:

(i) The employee has authorized the payment method in writing or electronically, or

(ii) The employer has offered the employee direct deposit to an account designated by the employee or payment via a payroll card account, and the employee has not both consented to direct deposit and provided the employer with the information necessary to make the deposit.

[*Note:* Paragraph (3)(a)(ii) can be removed if a state requires a paper paycheck option].

(b) Notice of terms and conditions. When offering an employee the option of receiving wages by credit to a payroll card account, an employer shall provide the employee with notice of the following items in written or electronic form. The notice must be provided in the language(s) the employer normally uses to communicate employment-related policies to its employees:

(i) All of the employee's wage payment options,

(ii) The terms and conditions relating to the use of the payroll card, including a list of fees that may be assessed by the payroll card issuer,

(iii) The methods available to employees for accessing wages from the payroll card account without cost,

(iv) The methods available to employees for checking the balance in the payroll card account without cost, and

(v) A statement that third parties may assess fees in addition to the fees assessed by the card issuer.

(c) Access to wages and account balance. Employees who receive wages by credit to a payroll card account must:

(i) Except as provided in this subparagraph, be able to make at least one withdrawal from the payroll card account each pay period without cost for any amount up to and including the full amount of the employee's net wages for that period. If wages are paid more frequently than weekly, employees must be able to make at least one withdrawal each week without charge for any amount up to and including the full amount of the employee's net wages for that week.

(ii) Be provided with a means of checking their payroll card account balances through an automated telephone system and one additional electronic means, without cost irrespective of the number of inquiries made.

(d) Prohibited Fees. In addition to the fees prohibited under paragraph (c), an employer may not offer a payroll card account that charges fees to the employee for any of the following:

(i) The application, initiation, or privilege of participating in the payroll card program,

(ii) The issuance of the initial payroll card,

(iii) The issuance of one replacement card per calendar year upon request of the employee,

(iv) The transfer of wages, salary or other compensation from the employer to the payroll card account, and

(v) Purchase transactions at the point of sale.

(e) Deposit Insurance. Wages credited to a payroll card account must be insured by the Federal Deposit Insurance Corporation, National Credit Union Administration, or another entity on a pass-through basis to the employee.

(f) Collective bargaining agreements. Nothing in this section shall be construed to preempt or override the terms of any collective bargaining agreement that addresses the methods an employer may use to pay wages, salary or other compensation due to employees.

(4) Change in wage payment methods. The employer shall honor an employee's written or electronic request to change the employee's method of receiving wages to another method of payment offered by the employer in accordance with this Section. The change shall take effect as soon as practicable, but no later than the first payday after 14 days from the receipt by the employer of the employee's request and any information necessary to implement the change.