

Court Sides With New York Department of Labor on Paycard Regulations

On January 9, a *New York* appellate court sided with the New York Department of Labor (DOL) on the agency's burdensome payroll card regulations [*Reardon v. Global Cash Card, Inc.*, No. 526973 (N.Y. App. Div. 3d, 1-9-20)]. The regulations (12 NYCRR §192) are in effect, though the state may not have been enforcing them during the litigation. It is uncertain whether the case will be appealed to the state Court of Appeals (the highest court in New York).

APA was not involved in the litigation. However, APA's Government Relations Task Force [Payroll Cards Subcommittee](#) engaged with the DOL during the rulemaking process by submitting comments and raising concerns regarding the rules, notice, and consent forms.

What the paycard regulations require

Written notice and consent. Employers paying employees by paycard or direct deposit are required to provide employees with a written notice that identifies the following:

- (1) A plain language description of all of the employees' options for receiving wages;
- (2) A statement that the employer may not require the employee to accept wages by paycard or by direct deposit;
- (3) 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
- (4) If offering employees the option of paycards, a list of locations where employees can access and withdraw wages at no charge within reasonable proximity to their place of residence or place of work.

Employers are also required to obtain consent from an employee in writing and must ensure that:

- (1) The employee's informed consent is obtained without intimidation, coercion, or fear of adverse action by the employer for refusal to accept payment by direct deposit or paycard; and
- (2) The employer does not make payment of wages by direct deposit or paycard a condition of hire or continued employment.

Electronic notice and consent. Written notice and written consent may be provided and obtained electronically, so long as an employee is given the ability to view and print both items at work, without cost to the employee, and the employee is notified of his or her right to print the items. Notice and consent templates are available on the [DOL website](#). They are the original documents that were open for comment in early 2017 and have not been updated.

Seven-day waiting period. When paying wages by paycard, the employer must provide the required notice and receive consent at least seven business days prior to

paying wages by paycard (the employee's consent does not take effect during the seven business days).

Also, an employer is not permitted to pay wages by paycard unless there is local access (near the employee's home or work) to one or more ATMs that offer withdrawals at no cost to the employee and at least one method to withdraw up to the total amount of wages for each pay period or balance remaining on the paycard without the employee incurring a fee.

Prohibited fees. Note that an employer cannot charge (directly or indirectly) an employee a fee for any of the following services:

- (1) Application, initiation, loading, participation, or other action necessary to receive wages or hold a paycard
- (2) Point-of-sale transactions
- (3) Overdraft, shortage, or low-balance status
- (4) Account inactivity
- (5) Maintenance
- (6) Telephone or online customer service
- (7) Accessing balance or other information online, by phone, or at any ATM
- (8) Providing the employee with written statements, transaction histories, or the card issuer's policies
- (9) Replacing the paycard at reasonable intervals
- (10) Closing an account or issuing payment of the remaining balance by check or other means
- (11) Declined transactions at ATMs that do not provide free balance inquiries

Paycards cannot be linked to any form of credit, and the funds on the paycard must never expire. The paycard account may be closed for inactivity, provided that the issuer gives reasonable notice to the employee and the remaining funds are refunded to the employee within seven days.

Change in terms and conditions. At least 30 days before any change in terms and conditions of the paycard take effect, an employer must provide written notice in plain language, in the employee's primary language (or a language the employee understands) in at least 12-point font, of any change, including a change to the itemized list of fees. The employee must be reimbursed for any new or increased fee charged before the end of the 30-day period.

Direct deposit and recordkeeping. Employers must maintain a copy of an employee's consent to receive his or her wages via direct deposit for the length of employment and for six years following the last payment of wages via direct deposit. A copy of the consent must also be provided to the employee.

Court ruling upholds regulations

Following the DOL issuing final paycard regulations in September 2016, Global Cash Card, Inc. (now ADP, LLC) filed a petition with the state's Industrial Board of Appeals (IBA) claiming that the regulations were "invalid and unreasonable." The IBA

agreed, finding that the DOL had exceeded its authority in issuing the regulations. The regulations were initially put on hold (they were originally set to take effect on March 7, 2017). On appeal by the DOL, the trial court overturned the IBA decision and found that the DOL did not exceed its authority. The paycard provider then appealed. Neither side asked for the regulations to remain on hold pending the outcome of the court case, so the regulations took effect at some point during the litigation and are in effect now.

Here, the issue for the court remained whether the DOL exceeded its rulemaking authority. The court considered several factors and determined that the DOL was within its authority to issue rules regulating the payment of wages. The court did not determine the reasonableness of the regulations.