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Labor and Employment Alert: New York Update: Payroll Debit Card Rules Have Been Revoked, But New Pay Transparency Rules Are Adopted

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Payroll Debit Cards

New York currently has no laws or regulations specifically addressing the use of payroll debit cards. In an opinion letter, the New York Department of Labor (NYDOL) has said that payroll debit cards are permitted if their use is voluntary. In September 2016, the NYDOL published a rule setting forth additional requirements for the use of direct deposit consent forms and for payment by payroll debit card. The rule was to become effective on March 7, 2017.

The rule would have imposed new requirements for employers who pay their employees using payroll debit cards. First, the written notice and consent would need to be signed by the employee and provided to the employer at least seven days before the employer issues the first payment. An employer would not be permitted to use payroll debit cards for wage payments, unless the employee had access to at least one ATM that offers withdrawals without any fees, and the employee had at least one means of withdrawing the total amount of wages for each pay period or the entire remaining balance without incurring a fee. Additionally, the rule would have imposed restrictions on fees and terms of use associated with those debit cards. For example, the rule would have required employers to provide access to one or more ATMs that offer withdrawals at no cost to the employee. In addition to these requirements relating to payroll debit card, the rule would have specified what must be included within a consent form authorizing direct deposits.

But in February 2017, the New York State Industrial Board of Appeal invalidated and revoked this rule. The board determined that the NYDOL had exceeded its authority in adopting the rule because it imposed prohibitions and restrictions that were outside the Labor Code. Instead, the board found that the rules “go beyond regulation of the employment relationship and into the area of banking law, which is outside respondent's competence and expertise in the regulation of employment and occupational safety and health.”

The NYDOL has not yet indicated whether it will appeal the board's decision to the trial court or whether it will issue revised rules that are narrower in scope in order to comply with the decision. For example, it is likely that a rule focusing on the type of consent form to ensure the employee's voluntary and informed assent to using direct deposit or a payroll debit card would be within the NYDOL's authority. For now, employers are not required to comply with these rules. Contact your Vorys lawyer if you have question about the invalidated rules or using alternative forms of paying your employees under New York law.

Employee pay discussions

Under New York Labor Law §194(4), an employer may not prohibit employees from inquiring about, discussing, or disclosing his or her wages or those of another employee. But an employer may limit an employee who has access to wage information of other employees as part of that employee's essential job function.

The law allows an employer to establish a written policy that provides reasonable workplace and workday limitations on the time, place, and manner for discussions or disclosures related to wages. Limitations may include prohibiting an employee from discussing or disclosing the wages of another employee without that employee's prior permission. Under the law, an employee's failure to adhere to those reasonable limitations is an affirmative defense to any claims made against an employer based on these provisions, if the adverse action was for failure to adhere to those limitations and not for mere inquiry, discussion, or disclosure of wages in accordance with the employer's reasonable limitations.

In February 2017, the NYDOL adopted rules to provide further guidance on employees' discussion of wages in the workplace. The new rules explain that an employer may provide copies of its written policy as to the time, place, and manner restrictions it is imposing either electronically, through publicly available posting, or by paper copy. An employer may not avail itself of the affirmative defense described above unless the employer can demonstrate that the written policy was provided to the relevant employees. The employer must maintain copies of its written policies during the period of the applicability and for six years.

The limitations must be justified without reference to the content of the regulated speech, narrowly tailored to serve a significant interest, and leave open ample alternative channels for the communication of information. According to the NYDOL's [fact sheet](#), "[s]uch restrictions may not specifically reference the inquiry, discussion, and disclosure of wages." An employer may not impose restrictions on employees in such a way that unreasonably or effectively precludes or prevents inquiry, discussion, or disclosure of wages at the worksite and/or during work hours. So while an employer could state that employees may only engage in communications that are directly related to their job duties during designated work periods, the restriction cannot completely remove their ability to discuss their wages.

Contact your Vorys lawyer if you have questions about adopt limitations on discussions of pay in your workplace.