

July 31, 2015

By email to regulations@labor.ny.gov
Michael Paglialonga
NYS Department of Labor
Building 12
State Office Campus, Room 509
Albany, NY 12240
Re: Methods of Payment of Wages
Proposed Rule Making 5/27/15 N.Y. St. Reg. LAB-21-15-00009-P

Dear Mr. Paglialonga:

The **National Consumer Law Center (on behalf of its low-income clients)** appreciates the opportunity to comment on the proposed rulemaking. We have also signed on to joint comments, which we join in full, submitted with other consumer advocacy organizations. With these additional comments, we provide more specific information regarding some of the problems facing payroll card users with the aim of aiding the Department in refining its regulations.

Requiring Employers to Provide Employees with a Real Up-Front Choice

We support the rules designed to ensure that employers do not require employees to receive wages via a payroll card. While choice of payment method is federal law, New York's proposed rules can provide more clarity to ensure that employee choice is real.¹

First, we support the rule that employees ***cannot be automatically enrolled in a payroll card and expected to disenroll*** in order to exercise their choice. Some employers² and government agencies³ default consumers into cards without giving employees an up-front choice. That practice violates the EFTA ban on requiring a consumer to have an account at a particular institution as a condition of receipt of wages or government benefits. It discourages employee choice and likely results in the employee being forced to use the card at least for the initial payments until direct deposit or payment by check can be arranged.

Default options matter and can prevent employees from exercising their choice. In NCLC's survey of direct deposit rates for unemployment compensation prepaid cards, the median direct deposit rate was 57% with a high of 82%.⁴ The state with the lowest direct deposit rate, Arizona at 16%, did not give

¹ See Proposed Rule § 192-2.3.

² Sandra Pedicini, "More companies opt to give workers payroll debit cards," Orlando Sentinel (Oct. 6, 2013) ("Orlando Sentinel, Companies Opt Payroll Cards") ("At Darden, which owns chains including Olive Garden and Red Lobster, new employees automatically are set up to receive debit cards, but they can make a phone call or go online to opt out."), <http://www.orlandosentinel.com/business/os-cfb-cover-payroll-cards-20131006,0,1927050.story>. An official with Pacific Sunwear also boasted about default enrollment at an industry conference.

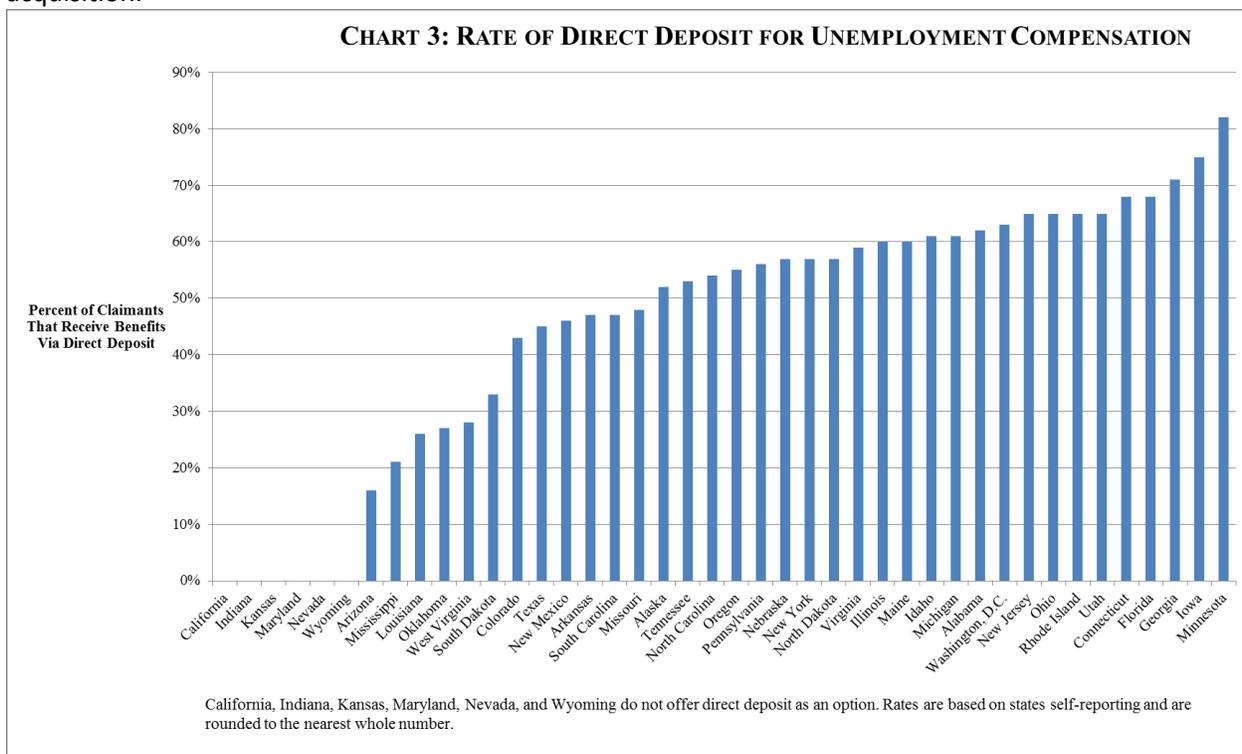
³ California, Indiana, Kansas, Maryland and Nevada require consumers to receive unemployment benefits on the state's prepaid card. See Lauren Saunders & Jillian McLaughlin, NCLC, "2013 Survey of Unemployment Compensation Prepaid Cards" at 10 (Jan. 2013) ("NCLC Unemployment Prepaid Card Report"), <http://www.nclc.org/images/pdf/pr-reports/report-prepaid-card-2013.pdf>.

⁴ NCLC Unemployment Prepaid Card Report, *supra*, at 7.

workers the initial choice of direct deposit.⁵ Workers were automatically enrolled in the prepaid card and had to disenroll to choose direct deposit. Other states with low direct deposit rates also did not offer the initial choice of direct deposit for all unemployment applicants and required extra steps for the worker to choose that option.⁶ For workers that have bank accounts, direct deposit is the most convenient and affordable payment mechanism.

Second, we support the rule that an employer must give employees **“all of the employee’s options for receiving wages.”**⁷ An investigation by the New York Attorney General found that many employers obscure or discourage choices that employees have under New York and federal law.⁸

The onus should not be on the employee to ask about other ways to access her wages. Employees should be told. Choice is meaningless without clear information to exercise it. In NCLC’s survey of direct deposit rates for unemployment compensation (illustrated in the below chart excerpted from our report on the issue), the state that came out on top, Minnesota, makes it easy for recipients to sign up for direct deposit. When workers apply, they are given the clear, up-front choice of direct deposit. Workers can also change their payment method at any time by logging into their account online or by phone. States at the bottom (with low direct deposit rates) forced recipients to figure out how to sign up for direct deposit.⁹ Employers should be required to present clear options to the consumer before card acquisition.



⁵ *Id.* at 9.

⁶ *Id.* at 9.

⁷ Proposed Rule § 192-2.3(2)(i).

⁸ New York State Attorney General, *Pinched by Plastic: The Impact of Payroll Cards on Low-Wage Workers*, at 16-18, available at <http://www.ag.ny.gov/pdfs/Pinched%20by%20Plastic.pdf> (“NY AG Payroll Card Report”).

⁹ NCLC Unemployment Prepaid Card Report at 9.

Third, the rules should specify that the consumer must have **sufficient time to review the payroll card disclosures and to exercise her choice** of pay method before being given a card. The Consumer Financial Protection Bureau highlighted this issue in discussing the importance of receiving disclosures before an account is acquired:

Further, the Bureau believes that some employees acquiring payroll card accounts may receive information about the accounts in a manner that makes it difficult for an employee to comprehend the accounts' key fees. For example, employees might receive terms and condition documents regarding payroll card accounts at the same time they receive other benefits-related paperwork, making the fees difficult for employees to comprehend while sorting through other important and time-sensitive paperwork.¹⁰

Instead, employees should receive complete information about their pay options and have **30 days to choose** how to receive their pay before they can be sent a payroll card.¹¹ Consumers no longer routinely carry around checks that list their routing and account numbers for direct deposit. They should have a reasonable amount of time to provide that information—or even to open a new account—in order to enable them to receive their funds in the account of their choosing.

Requiring Employers to Provide Direct Deposit as an Alternative

When providing an employee with the option of how to receive her pay, the rules should require that employers that provide payroll cards also provide direct deposit as an alternative option. While the vast majority of employers that use payroll cards offer the choice of direct deposit, a few do not. According to one article:

Applebee's spokesman Dan Smith said the franchisee who owns Central Florida restaurants does not allow direct deposit.

"The default option is the payroll card, but if they'd rather have the check mailed to them, that option is available to them," Smith said.¹²

An employee should not have to wait for her paycheck to arrive in the mail if she does not want the company payroll card. Workers who receive payroll cards often work at restaurants and other retail locations where they receive minimum wage or low hourly wages. They need their pay as soon as possible. The same is true of individuals who receive government benefits. A coerced choice is no choice at all.

Employers are not required to pay electronically. But if they choose to do so, they must allow the employee to choose where to receive the direct deposit. Otherwise, notwithstanding federal law, the employee is effectively required to establish an account with a particular institution in order to receive electronic fund transfers and have immediate access to her wages.

¹⁰ 79 Fed. Reg. at 77151. The Bureau also points out the importance of comparison shopping, even for student or payroll card accounts. 79 Fed. Reg. at 77152. For example, an employee might choose to open a bank account or a different prepaid card account in order to receive direct deposit. But an employee can only comparison shop if given some time.

¹¹ Of course, in some states, the consumers' affirmative consent is needed. But in others, employers are allowed to enroll the employee in a payroll card without affirmative consent.

¹² Orlando Sentinel, Companies Opt Payroll Cards, *supra*.

Requiring Employers to Provide Information about How to Disenroll

Information about up-front choices is important. But sometimes that information will be obscured by other important matters, or the consumer may not have a deposit account at that point. Or, the employee may find that the payroll card is inconvenient. The rules should be amended to require that the card issuer or employer provide the employee with information on how to disenroll and receive funds another way if circumstances change.

A separate sheet of paper should call attention to the options available to the employee and how to exercise them. For example, the cover letter that comes along with a payroll card could say:

Welcome to your Employer X Payroll Card. Your wages will be deposited to this card each pay period. **If you prefer to receive your wages by direct deposit to another account or by check (if available from your employer), please contact your employer at (800) 111-2222 or go to www.employerX.com/payroll.**

Providing specific information about how to contact the employer is important. Payroll cards are often used at fast food and other retail establishments, and the manager in the store is unlikely to be the one who manages payroll. The employee should not have to hunt for that information.

Free Network ATM Withdrawals Help Consumers & Minimize Costs to Industry

We strongly support the proposal to eliminate fees for in-network ATMs.¹³ Full access to every penny of wages must be a reality, not just words on a page. Yet the Attorney General's survey found that only "25%-30% of workers successfully utilized their payroll cards without any fees."¹⁴

To truly have full and free access to wages, workers need *both* a method to withdraw their wages to the penny *and* convenient access to cash when they need it. This can only happen through free and convenient access to ATMs.

Convenience checks and teller withdrawals, the two methods frequently used for complete cash withdrawals of payroll cards, are inconvenient. At the four companies that provided complete information to the Attorney General, only 4% to 9% of the workers used teller withdrawals and less than 1% used convenience checks.¹⁵ Convenience checks are "cumbersome," "complex" to use, and "inconvenient."¹⁶ Moreover, an unbanked worker who uses a convenience check still has to pay to get it cashed.

Further, while payroll cards can theoretically be used to access cash at a bank teller window, tellers are unfamiliar with the cash withdrawal rules. Despite rules governing every bank that accepts Visa or MasterCard, we have heard complaints about consumers who have had difficulty making withdrawals from prepaid or payroll cards at the teller window. Using a bank teller also requires visiting a bank during business hours and often waiting in line. Low-wage workers may not have banks conveniently

¹³ Proposed Rules § 192-2.3(a)(3)

¹⁴ NY AG Payroll Card Report, *supra*, at 3 n.3.

¹⁵ NY AG Payroll Card Report, *supra*, at 8.

¹⁶ NY AG Payroll Card Report, *supra*, at 16, 17, 19.

located in their neighborhood, lack cars, and may not have the free time to visit during teller hours. ATMs, by contrast, are available at many other locations and are often accessible 24 hours a day.

The reality is that ATMs are the primary way in which workers will access cash from their payroll cards. Payroll cards must be designed to reflect that reality and enable free access to cash by providing ample free ATM withdrawals.

The payroll card industry argues that providing free network ATM withdrawals will make the cards economically unfeasible and put them out of business. But the facts show otherwise.

The most expensive employees for a payroll card company are not the ones making multiple ATM withdrawals but rather employees who feel compelled to use their one free withdrawal to empty the card after each paycheck. Many workers do so. Those cards cost the payroll card company to manage and yet generate zero revenue because they generate neither withdrawal fees nor interchange fees.

If workers can get free cash whenever they need it, they will take out only the amount of cash that they need. Leaving money on the card enables the worker to use the card to make purchases, generating interchange fees for the card provider. Interchange fees, not consumer fees, are the largest source of revenue for prepaid cards.

Two surveys by the National Consumer Law Center provide evidence that a rule requiring unlimited free network ATM withdrawals will not doom payroll cards. Many state governments use payroll cards for their own workers, and 13 of the 19 state payroll cards do not charge for network ATM withdrawals.¹⁷ The other six all offer at least one free withdrawal per deposit or per week. Free cash at network ATMs is available not only in large states but also on the payroll cards used in small states including New Hampshire, South Dakota and West Virginia, even though only a tiny fraction of their government workers are paid on a payroll card.

Completely free network ATM withdrawals are also common on prepaid cards used by states to distribute unemployment compensation, cards that are very similar to payroll cards. According to a 2013 report by NCLC, 24 of the 42 unemployment compensation prepaid cards offer unlimited free in-network ATM withdrawals.¹⁸

The payroll card industry fears government regulation of the industry's freedom to charge fees. But eliminating ATM fees is the single most important reform to help workers access their wages, while helping to ensure the proliferation and profitability of payroll cards. Free ATM withdrawals can be a win-win for workers and card providers.

¹⁷ The fee schedules for state government payroll cards are collected in NCLC's Comments to the Consumer Financial Protection Bureau, March 23, 2015, at Exhibits 18-36, *available at* http://www.nclc.org/images/pdf/banking_and_payment_systems/nclc_prepaid_card_npr_comments-032315.pdf ("NCLC CFPB Prepaid Card Comments"). At least as of the date those comments were submitted in March 2015, unlimited free network ATM withdrawals were available on the state government payroll cards used by Arizona, Kentucky, Missouri, Nebraska, New Jersey, New Hampshire, Ohio, Oklahoma, Oregon, South Dakota, Texas, West Virginia and Wisconsin.

¹⁸ Lauren Saunders, NCLC, 2013 Survey of Unemployment Prepaid Cards at 15 (2013), *available at* <https://www.nclc.org/issues/unemployment-compensation-prepaid-cards.html> ("NCLC 2013 UC Prepaid Card Survey").

Requiring CONVENIENT network ATMs

Even cards that provide free in-network ATM withdrawals may impose substantial out-of-network withdrawal charges. In the New York survey, workers withdrew cash at out-of-network ATMs far more than they did at network ATMs.¹⁹ We support the proposed rule to require that employers provide payroll card users with a “list of locations where employees can access and withdraw wages at no charge to the employees within reasonable proximity to their place of residence and place of work.”²⁰

Thank you for this opportunity to comment.

Respectfully,

The National Consumer Law Center (on behalf of its low-income clients)

¹⁹ Out-of-network ATM withdrawals amounted to 46% to 67% of cash withdrawals at the four large retailers who supplied information, compared to 25% to 49% for network ATM withdrawals. NY AG Payroll Card Report, *supra*, at 8.

²⁰ Proposed Rules § 192-2.3(2)(iv).