

Litigation

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New York AG Takes a Swipe at Payroll Cards

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Employers and employees are increasingly turning to payroll cards, rather than paper paychecks, to pay and receive their payrolls. However, a class action was filed recently in Pennsylvania challenging certain practices and it has been reported that New York's attorney general has initiated an inquiry about payroll card programs used to pay New York employees.

Paying wages and other monies to employees using payroll cards is an increasingly attractive option for many employers and employees. Payroll cards can provide increased convenience to employees, who can enjoy the added advantage of a fast, convenient way to access their wages without the cost of using a check casher, the added security of having a personal identification number ("PIN") protected card and, for those who do not have a debit or credit card, the convenience of being able to purchase items over the phone or online. For some employers, the use of payroll cards can ease administrative burdens related to payment via checks. In 2012, according to the Aite Group, LLC, \$34 billion was loaded onto 4.6 million active payroll cards — these numbers are expected to reach \$68.9 billion and 10.8 million cards by 2017. However, some payroll card programs have come under review in New York and subject to a lawsuit in Pennsylvania.

Payroll Cards Are Not a New Concept

Payroll cards have been in existence since the mid-1990s. The convenience, speed and ease of receipt of funds, security features of the cards, and potential decrease of administrative burden have facilitated their growth in popularity. Employees can avoid the fees that can be associated with cashing paper checks while employers can distribute payroll quickly and easily.

Employee Initiates Class Action in Pennsylvania Challenging Required Use of Payroll Card

On June 13, 2013, Natalie Gunshannon, a former McDonald's franchise employee, filed a putative class action against the franchise and its owners in Pennsylvania state court for allegedly violating Pennsylvania's Wage Payment and Collection Act by "refusing to pay Plaintiff and the Class wage compensation as provided by law." The complaint in *Gunshannon v. Albert/Carol Mueller T-A McDonalds* alleges that the franchise's hourly employees were paid wages through a payroll card "without the option of being paid in cash or by bank check," and that they were "charged fees in order to access their wages" and

had no “ability to avoid paying fees and costs when accessing earned wages.” The complaint seeks reimbursement of the fees, as well as general and special damages.

The Pennsylvania Attorney General’s Office has indicated payment of payroll via a payroll card is permissible. An October 1, 2009 letter issued by the Commonwealth of Pennsylvania states, in part, that “Under Pennsylvania law, payment by direct deposit and debit card is permissible. However, an employee must agree to one of these forms of payment. It appears that an employee may not be compelled to accept payment through direct deposit or a debit card.”

The New York Times reported on Monday, July 1, 2013 that the franchise owners have indicated they are changing their policy to offer paper paychecks and direct deposit. The lawsuit, however, remains pending.

On the Heels of *Gunshannon* Class Action, New York Attorney General Initiates Payroll Card Inquiry

On July 2, 2013 several publications reported that the New York attorney general had commenced an inquiry into the use of payroll cards to pay New York employees. The publications reported that a letter had been sent to twenty employers, national retailers and restaurant chains, including McDonald’s. One or more publications provided a link to a letter purportedly from Terri Gerstein, Labor Bureau Chief, State of New York Office of the Attorney General, to Walmart Stores, Inc. The letter requested documents and information regarding Walmart’s payroll card practices, including fee schedule information and information related to consent to the use of payroll cards. The letter advised that, to comply with New York law, “employees must give advance written consent to be paid by payroll cards, and this agreement to receive wages by payroll card must not be a condition of their employment.” It also advised that “[e]mployees must have a method to obtain all of their wages in a timely manner, without incurring fees,” and “we are concerned about excessive or insufficiently disclosed fees which may unduly reduce employees’ take home pay.” The letter cites to N.Y. Labor Law §§ 191, 192, 193, and 195(3).

The N.Y. Department of Labor has issued various opinion letters that confirm the permissibility of the payment of wages through debit cards, including letters dated October 29, 2009, January 15, 2010, and October 6, 2010. As indicated in these opinion letters, the payment of wages via debit cards is governed by N.Y. Labor Law §§ 191, 192, and 193.

Additionally, legislation has been proposed in New York, in N.Y. Assembly Bill 6419 and Senate Bill 4392, to regulate employers’ use of payroll cards to deliver wages or other compensation to their employees. According to the bills, employers will be required to provide the option of receiving wages or other compensation by electronic fund transfer, in accordance with N.Y. Labor Law § 191-c. Wages credited to a payroll card account must be FDIC-insured (or insured by another entity) on a pass-through basis to the employee. The bills also provide that the provisions of the Labor Law relating to payroll card accounts are not to be construed to preempt or override the terms of any collective bargaining agreement with respect to methods of an employer’s payment of wages, salary, or other compensation due to employees.

State Laws on Payroll Card Programs

Many states have specific requirements related to payroll cards. Some require free withdrawals under certain circumstances, and specific disclosures. Additionally, a number of states have pending legislation related to payroll cards. It is likely the popularity of payroll cards, as well as the requirements imposed on employers related to such payroll card programs, will continue to increase.

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