

June 24, 2015



Julie T. Bittner,
Esq.

Questions
on this topic?
[CLICK HERE](#)

Rules, Regulations, and Litigation are Shaping the Payroll Landscape

By Julie T. Bittner

Employers are constantly trying to find more efficient and inexpensive ways to run their business. In the last ten years or so, payroll cards, also known as "paycards" or "payroll debit cards," have become a more common form of wage payment. In lieu of a paper check, an employer transfers an employee's wage payment into a payroll card account maintained by the employer's bank or a bank selected by the employer's payroll card vendor. The bank issues payroll cards to the employees and processes all card transactions. With each payroll period, the accounts are reloaded with the employees' wages.

Employers tout the benefits of using a payroll card system. Payroll card systems typically reduce the employer's overall payroll cost. The distribution of payroll funds is simplified, and it is environmentally friendly because of the reduction in use of paper. Employers also can use the payroll card program to immediately pay out terminated employees and to easily issue other out-of-cycle payments to their employees as needed.

For the employee, there are also benefits to participating in a payroll card system. Unlike direct deposit, employees do not need a bank account to participate in the program, and they can participate regardless of their creditworthiness. Employees also do not have to disclose their personal bank account information to their employer

simply to get paid, and they do not need to spend time and money at check-cashing outlets to access their payroll funds -- they are automatically on the card ready for use. Payroll cards are often branded by Visa or MasterCard and can be used where debit and credit card transactions are accepted. Employees can make cash back transactions and withdraw cash -- all without a credit card. Finally, employees also have access to an FDIC-insured account that both provides them with more security than simply carrying cash and gives them liability protection for fraudulent charges.

The Fair Labor Standards Act ("FLSA") is the primary federal law regulating wage payment; however, the FLSA does not specifically address the payroll card payment method. It generally requires employers to pay nonexempt employees at least the applicable minimum wage and overtime compensation and exempt employees a minimum weekly salary. FLSA regulations also provide that wages are not considered paid unless they are received by the employee "free and clear." This requirement is not satisfied if the employee must "kick back" a portion of his or her wages to the employer, either directly or indirectly. This "kick back" provision could create problems for employers if the payroll card vendor offers a commission or other payment to the employer as an incentive to enroll employees.

The Electronic Fund Transaction Act ("EFTA") generally governs the electronic transfer of funds to and from consumer accounts. It is the only federal regulatory act that specifically deals with payroll cards. (See 15 U.S.C. §§1693 to 1693r) Regulation E is the EFTA's implementing regulation, and it [explicitly provides](#) that no employer can require employees to receive direct deposit into an account at a particular financial institution. Therefore, employers cannot require employees to participate in a payroll card program unless the employees can choose the bank and have the option of receiving wages by another method, such as cash or check.

Some states have explicitly codified the use of payroll card programs as long as the payroll card is not the exclusive option for obtaining wages. A mainstay in this legislation is that the employee has access to the full amount of his or her wages on regular paydays, at no cost. These laws also typically include a provision that the payroll card agreement outline the terms and conditions of the program at the outset of its use.

Prepaid cards have been a staple in federal, state, and local governments. To date, prepaid cards have been used to disburse social security benefits, unemployment insurance benefits, workers' compensation benefits, tax refunds, and employee wages. However, in the private sector, the use of payroll cards has come under fire.

Litigation has ensued alleging that wage payment by payroll

cards violates state and federal law because nearly all payroll card programs charge fees for various card-related activities such as account opening/closing, monthly account maintenance, account balance inquiries, ATM withdrawals, and overdrafts. If those fees impact the take home pay of low-wage workers, there is a potential violation of wage and hour laws if sub-minimum wages are the result of these fees. Further, some of the fee disclosures issued to the employees have been scrutinized because employees with limited English proficiency or limited access to the internet can be at a disadvantage if the only free access to the account is available online.

Employers are responsible for making sure that the wage payment method they choose complies with federal and state law. If employers choose to implement a payroll card program, they should align themselves with a vendor that is experienced with the wage payment laws of every jurisdiction where the employer employs workers. They should also find a vendor that offers "fee free" services that are essential to an employee's access to their wages in full. These include free account opening/closing activities, free monthly account maintenance, free access to balance inquiries, and free access to the full amount of their wages each pay period.

Employers need to carefully consider all of the potential risks associated with implementing a payroll card program. Violations of state and federal laws can lead the employer into a potential class or collective action lawsuit where employers may face huge damage awards if a violation is found.

The 60-Second Memo® is a publication of Gonzalez Saggio & Harlan LLP and is intended to provide general information regarding legal issues and developments to our clients and other friends. It should not be construed as legal advice or a legal opinion on any specific facts or situations. For further information on your own situation, we encourage you to contact the author of the article or any other member of the firm.



[Forward this issue](#)

Copyright 2015 Gonzalez Saggio & Harlan LLP. All rights reserved.

Arizona | California | Florida | Georgia | Illinois | Indiana | Iowa | Massachusetts
New Jersey | New York | Ohio | Tennessee | Washington, D.C. | Wisconsin

www.gshllp.com