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INCORPORATED

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:

MFY Legal Services, Inc. appreciates the opportunity to comment on the referenced proposed rules, which would create strong worker protections and rein in abusive practices that are rampant in the payroll card industry. As growing numbers of employers seek to steer workers to payroll cards, it is vital that New York State ensure that workers have fair and unobstructed access to their wages. We strongly support the proposed rules, which would prohibit employers in New York State from forcing workers to accept their wages on payroll cards; ban big banks and other payroll card issuers from charging workers high and hidden fees simply to access their own wages; and protect working New Yorkers from other payroll card abuses.

The payroll card industry has successfully marketed payroll card programs to employers with the promise of greatly reduced payroll costs. However, far too many payroll card programs simply shift those costs from large employers to their low-wage workers. In turn, banks and other large players in the payroll card industry, such as Visa and MasterCard, profit at the expense of workers' – and their families' – financial security. By preserving workers' choice in how they are paid, and by prohibiting most payroll card fees, the proposed rules will ensure that working New Yorkers, especially low-wage workers, are not unfairly deprived of any part of their hard-earned wages.

MFY envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, for 50 years MFY has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. We serve more than 10,000 New Yorkers each year. MFY's Consumer Rights Project and Workplace Justice Project participate in a working group of community, consumer, and labor organizations to address the impact of payroll cards on low-wage workers in New York City and State. Collectively, our organizations work with thousands of low-wage New Yorkers in retail, restaurant and other industries, many of whom are already being paid through payroll cards. Our comments are based on worker testimonials, extensive review of payroll card agreements and fee schedules, and our recent surveys of low-wage workers paid by payroll cards.

Our working group has surveyed lower wage workers in the retail, restaurant and other industries about their experiences with payroll cards. The main problems that surveyed workers have reported include 1) employers' failure to obtain workers' consent before paying wages by payroll card; 2) excessive and hidden fees that workers are forced to pay each month, simply to access their wages or obtain balance information; and 3) employers' failure to inform workers about the terms and conditions of their payroll card accounts, or even how to access their wages at no cost.

Industry claims that payroll cards provide savings to workers are belied by our survey results, which show that workers who receive payroll cards often pay high fees simply to access their wages. Workers reported paying fees of up to \$3.75 to withdraw wages from an ATM; up to \$3 for point-of-sale transactions; and up to \$10 to obtain a paper statement.

The proposed DOL rules address the most pressing problems that workers face with respect to payroll cards. We strongly support the provisions of the proposed rules that would:

- **Ensure that workers paid by payroll card are able to access their wages in full, for free, and that workers can make unlimited free withdrawals at in-network ATMs.** Under the rules, workers paid by payroll card would be able to access the *full* amount of their wages each pay period, without paying a fee. Workers would also receive, from their employers, a written list of locations "within reasonable proximity" to their home or workplace where they could access and withdraw their wages for free. Workers would also have access to at least one network of ATMs that offers unlimited free withdrawals. This provision is key to ensuring that workers enjoy the full benefit of their pay without being gouged by exorbitant transaction fees.

- **Guarantee workers a choice in how they receive their wages, and require employers to obtain workers’ informed consent before paying workers on payroll cards.** The rules would ensure that workers receive, in writing, the terms and conditions of the payroll card account before choosing whether to receive their wages by payroll card.
- **Prohibit other unfair and excessive fees.** The rules would prohibit fees charged to workers simply to access wages or to use and maintain a payroll card account, such as application, initiation, maintenance, point of sale, overdraft, declined transaction, inactivity, and customer service fees. The rules would also prohibit any fees not explicitly identified in the written terms and conditions provided to workers.
- **Ensure that workers have convenient, free access to account balance information.** The rules would allow workers to check their balance and other account information for free by phone, online, or at an in-network ATM. Free ATM access to this information is especially critical: it is precisely when workers (or anyone with an ATM card, for that matter) are standing at an ATM, ready to withdraw money, that they most need to know what their current balance is. Free ATM access is also essential for low-wage workers who may not have convenient access to the internet¹ or who may have limited English proficiency.²
- **Prohibit any form of credit on payroll cards; ban kickbacks to employers from payroll card issuers; and protect workers from other payroll card abuses.** The rules would prohibit overdraft fees and bar employers from using payroll cards that were linked to any form of credit, including a loan or cash advance against future pay. Under the rules, employers could not shift any payroll costs onto workers or receive any kickbacks from payroll card issuers for enrolling workers in payroll card programs. Employers also could not punish or fire any worker for refusing to accept wages by payroll card, and both employers and payroll card issuers could not engage in unfair, deceptive, or abusive practices in relation to the payment of wages by payroll card.

To strengthen the rules even further, we recommend making the following minor changes to the proposed rules so that they:

¹ The OAG report cites to research suggesting that “37% of adults making under \$30,000 per year do not have access to the internet at home, and 24% of these adults do not have internet access at all.” *Id.* at 13. According to the United States Census Bureau, as of 2013, only forty-seven percent of households with income below \$25,000 had broadband internet service. *See* Computer and Internet Use in the United States: 2013 (American Community Survey Reports, Nov. 2014), Table 1, available at <http://www.census.gov/history/pdf/2013computeruse.pdf>.

² The OAG also found that “[p]ayroll card vendors do typically offer an automated phone line for checking balance information, but this may not always be accessible to workers with limited English proficiency.” OAG report at 13.

1. **Make clear that the network of ATMs offering unlimited free withdrawals must be a local network.** We recommend clarifying the language in section 192-2.3(b)(1) of the proposed rules accordingly.³ The ability to make free withdrawals at a local network of ATMs is especially important for workers whose work schedules make it difficult or impossible to go to a bank teller during regular business hours, or who cannot afford to travel far distances every time they need to access their wages.⁴
2. **Specify that once a worker withdraws consent to receive wages by payroll card, the employer must finalize that change within two pay periods.** The rules as drafted would permit the employer a “reasonable period of time” to finalize such a change. We are concerned that some employers may take advantage of this lack of specificity to delay restoring workers to a different method of payment.
3. **Provide workers a choice as to the form in which they receive periodic statements.** The rules as drafted would allow payroll card issuers, not workers, to choose what form the periodic account statements would take. Since the proposed rules would also ban fees for written statements, it is likely that most, if not all, payroll card issuers would choose to offer periodic statements only in electronic form. This would be unfair to and inconvenient for low-wage workers who do not have ready access to the internet.⁵
4. **Require that employers or payroll card issuers mail a written annual notice of the right to obtain a transaction history, annual statement, or periodic statement on request.** The rules as drafted would allow payroll card issuers to choose whether to provide this annual notice in electronic or paper form. Again, this would be unfair to and inconvenient for those low-wage workers who do not have ready access to the internet.⁶

³ We applaud Governor Cuomo for emphasizing the importance of this provision when he announced the DOL’s rules, by stating that “[e]mployers would...be required to provide unlimited free ATM withdrawals within a local network...” Press Release, Office of the Governor of New York State, Governor Cuomo Announces New Proposed Rules Concerning Businesses that Pay Workers with Debit Cards (May 27, 2015), available at <https://www.governor.ny.gov/news/governor-cuomo-announces-new-proposed-rules-concerning-businesses-pay-workers-debit-cards>.

⁴ In a study of the use of payroll cards by national and regional employers, the Office of the New York State Attorney General (OAG) also found that “[w]orkers reported difficulties accessing wages via OTC [over-the-counter] withdrawal through a bank teller because banks and/or tellers appeared to be unfamiliar with these procedures and may have been hesitant to provide funds to individuals who were not bank members.” Office of the New York State Attorney General, *Pinched by Plastic: The Impact of Payroll Cards on Low-Wage Workers* (June 2014) (“OAG report”), available at <http://www.ag.ny.gov/pdfs/Pinched%20by%20Plastic.pdf>.

⁵ *Supra* n. 3.

⁶ *Id.*

5. **Ensure that notice of all terms and conditions of the cardholder agreement are given in the language in which the employee and employer communicate.** The rules as written do not address language access issues. To ensure that every employee's consent is truly voluntary and informed, it is important that the terms and conditions of the cardholder agreement are given in the language in which the employee and employer use to communicate.

We commend the DOL for proposing strong rules to protect working New Yorkers from coercion, fee-gouging, and other payroll card abuses, and we look forward to the implementation and enforcement of strong final rules.

Thank you for the opportunity to comment.

Sincerely,

_____/s/
Evan Denerstein
Staff Attorney