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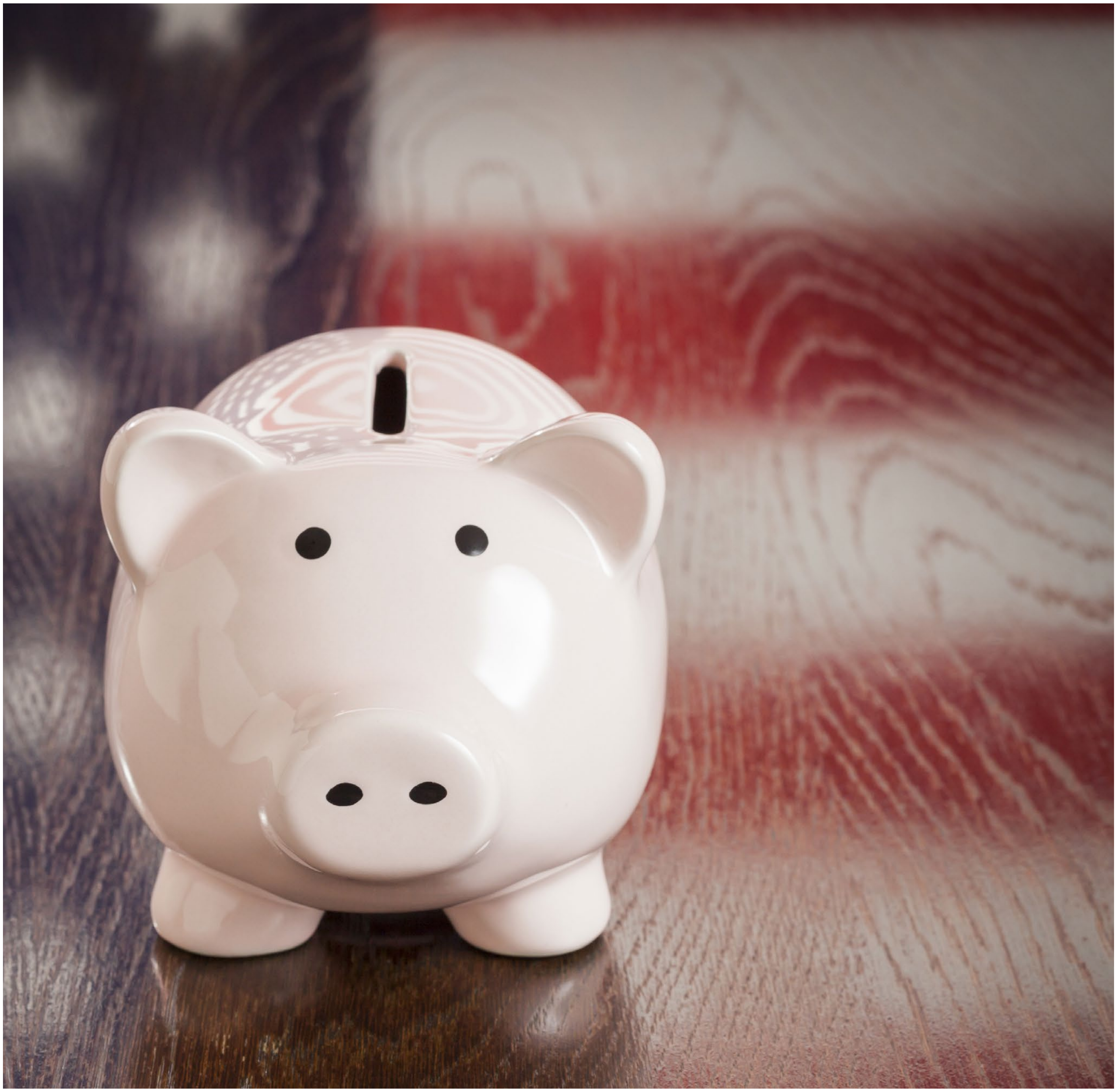

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Pay Me How? What You Should Know About Payroll Cards

BY SUZANNE MARTINDALE AND CHRISTINA TETREAULT

As businesses and government agencies seek to go paperless, millions of workers are now receiving their wages electronically. For full-time workers with bank accounts, direct deposit is a popular choice. However, for part-time or seasonal workers, or those without bank accounts, the default option is more and more likely to be a "payroll card."

Payroll cards are debit cards that can be used much like a debit card linked to a personal bank account. They have network logos (e.g., VISA or MasterCard) and can be used to make purchases or get cash at an automatic teller machine (ATM). The main difference is that the money linked to the card does not sit in an individual bank account in the employee's name. Instead the employer arranges a program with a third-party vendor to provide payroll card services, and that vendor sets up a pooled account with a bank to hold the funds and issue payroll cards to employees.

Some workers may find payroll cards a convenient noncash option for receiving wages. However, payroll cards can come with usage fees that eat into the funds—possibly in violation of relevant labor laws. Some employees may be given payroll cards as the default option for receiving wages instead of being presented with different choices for how to be paid. These restrictions on employee choice could run afoul of consumer protection laws.

Here we cover trends in the payroll-card market, benefits and risks of using the cards, applicable state and federal laws, and tips for advocates assisting workers on payroll cards.

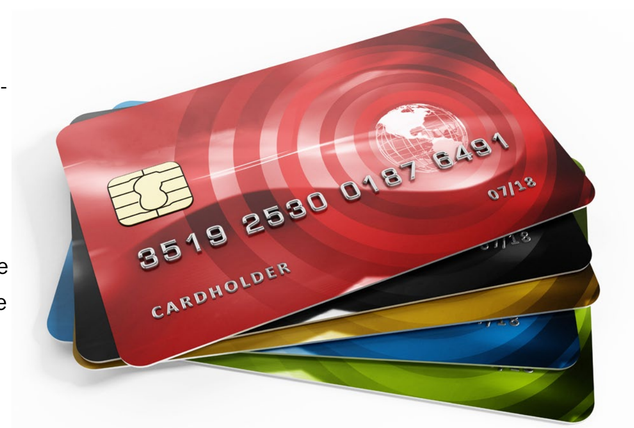
Payroll-Card Market

Payroll cards continue to rise in popularity. According to the market research firm Aite Group, the total dollar volume loaded onto payroll cards will reach over $51 million in 2014—and rise by 19.9 percent each year into 2016.[1] These increases are not surprising since many large employers have adopted payroll cards as a method of disbursing funds.[2]

Increased use of payroll cards has paralleled the decline of other traditional financial products such as checking accounts.

Increased use of payroll cards has paralleled the decline of other traditional financial products such as checking accounts.[3] About one-in-twelve U.S. households are "unbanked," meaning that no one in the household has a bank account, and about one-in-five are "underbanked," meaning that they have a bank account but also use alternative financial services such as check cashers.[4]

There are many reasons why some consumers may not have bank accounts. Some younger Americans are eschewing banks because they find alternative financial services more convenient.[5] For low- to moderate-income consumers, there may be barriers to opening an account. Checking accounts may require a minimum deposit that is hard to meet.[6] Others may find it onerous to wait for check deposits to clear before being able



1 Madeline K. Aufseeser, Aite Group, The Contenders: Prepaid Debit and Payroll Cards Reach Ubiquity (Nov. 14, 2012).

2 See, e.g., Walmart, Money Network, A Better Payday for You (2014); Citi, What Do You Get with Your Payroll Card? (2012); Costco, Employee Website: Pay Card (2014).

3 Press Release, Javelin Strategy and Research, Prepaid Cards Lure Underbanked and Gen Y Consumers (April 11, 2012) (key findings of report, Prepaid Cards and Products in 2012).

4 Federal Deposit Insurance Corporation, 2011 FDIC National Survey of Unbanked and Underbanked Households 10 (Sept. 2012).

5 See, e.g., Luke Landes, Young Americans Likely to Be Unbanked Regardless of Income Level, Consumerism Commentary (May 17, 2012).

6 Federal Deposit Insurance Corporation, *supra* note 4, at 26 ("Do not have enough money" was most common reason cited for not having bank account).

Employees may be charged fees that undercut their wages; or they may be forced or steered into using the cards, limiting their choice in how to be paid.

to access funds.[7] Some may lack the necessary identification for opening an account.[8] Others may have "bounced out" of the banking system due to repeated overdrafts, which can lead to involuntary account closures and negative entries in Chexsystems, a consumer reporting agency with a database many banks consult to avoid offering accounts to "risky" consumers.[9] These factors—along with the recent financial crisis—may partly explain why the number of unbanked and underbanked households in the United States rose from 30.8 million in 2009 to 34.1 million in 2011.[10]

Unbanked and underbanked households in particular are increasingly using payroll cards. In 2011 about 3 percent of all U.S. households received wages on a payroll card, similar to the number of households that used payroll cards in 2009.[11] However, among unbanked and underbanked households, payroll cards are used by 5.5 percent and 5.3 percent of households, respectively, up from 3.2 percent and 4.2 percent in 2009.[12]

Benefits and Risks of Using Payroll Cards

For some workers, a payroll card may offer benefits over other options. If a worker cannot qualify for a bank account, or simply does not want one, a payroll card can provide quick and convenient access to wages without needing to open up a bank account or pay fees to cash a check. A payroll card can be used to make purchases, get cash, and conduct transactions online. Furthermore, payroll cards have federal protections that limit the cardholder's liability for fraud, theft, and errors, as discussed in the next section.

Note that, for workers in some low-income and immigrant communities, cash is still common, and criminals may target them under the assumption that they are more likely to carry cash.[13] Getting wages via a payroll card can reduce the risk of losing funds to theft or violent crime.[14]

However, using payroll cards can come with serious downsides. Employees may be charged fees that undercut their wages; or they may be forced or steered into using the cards, limiting their choice in how to be paid. Using payroll cards also may inhibit access to pay stub information.

FEES

Some cards can come with usage fees that eat into a worker's wages, such as ATM or swipe fees. For example, the Wells Fargo payroll card charges $1.50 for each cash withdrawal after the first free withdrawal per pay cycle, and charges $1.00 for a PIN (personal identification number) transaction at the point of sale.[15] ATM fees can add up for workers, especially if they use the card primarily to access cash.[16] Almost one-in-five payroll cards are used like a check-cashing substitute, with 80 percent or more of the value taken off the card via cash withdrawal.[17]

If workers cannot withdraw their pay in full without fees, they are essentially getting discounted wages. Some workers pay such high payroll-card fees that they end up receiving less than minimum wage.[18] This may violate state wage and hour laws, as plaintiffs argued in a class action lawsuit filed in June 2013 against a McDonald's franchisee in Pennsylvania.[19] In the complaint, employee Natalie Gunshannon alleges that the Chase Payroll card she and other employees were given required them to incur fees to access wages and resulted in their receiving below minimum wage.[20]

7 Christopher Berry, To Bank or Not to Bank? A Survey of Low-Income Households 7 (Joint Center for Housing Studies, Harvard University, Working Paper No. BABC 04-3, Feb. 2004). Existing federal law requires the first $200 of a check deposit to be made available on the first business day after the deposit was made; additional funds may take longer (see 12 U.S.C. § 4002(a)(2)(D) (2012 & Supp. I) (next-day availability of first $200); *id.* § 4002(b) (most other funds available on second business day after deposit); *id.* § 4003 (exceptions allowing for further delays in certain circumstances).

8 See Federal Deposit Insurance Corporation, *supra* note 4, at 26.

9 Dennis Campbell et al., Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures 1–2 (Harvard Business School, Working Paper, June 6, 2008).

10 Federal Deposit Insurance Corporation, *supra* note 4, at 10.

11 *Id.* at 35.

12 *Id.* at 36.

13 E.g., in a 2010 survey of migrant workers living in Memphis, Tennessee, more than half of undocumented male migrant workers living in the United States for less than five years reported being victims of theft (Jacob Bucher et al., Undocumented Victims: An Examination of Crimes Against Undocumented Male Migrant Workers, 7 Southwest Journal of Criminal Justice 159, 168 (2010)).

14 There is some evidence that in neighborhoods where there is less cash, there is less crime. A recent study found that the introduction of electronic benefits transfer led to a drop in predatory street crime (see Richard Wright et al., Less Cash, Less Crime: Evidence from the Electronic Benefit Transfer Program 1 (National Bureau of Economic Research, Working Paper No. w19996, March 2014).

15 See Wells Fargo PayCard (2014) (click link to "Terms & Conditions," then scroll down to "Fees and Charges for Use of the Wells Fargo PayCard"). Some employers who use the Wells Fargo PayCard may choose to pay these fees on behalf of employees (*id.*).

16 Stephanie M. Wilshusen et al., Federal Reserve Bank of Philadelphia, Consumers' Use of Prepaid Cards: A Transaction-Based Analysis 22 (Aug. 2012) (according to Federal Reserve, automatic teller machine (ATM) withdrawals account for 85 percent of cash withdrawals using debit/ATM cards). Meanwhile, most fee revenues (54 percent) for payroll-card issuers come from ATM fees (*id.* at 32).

17 *Id.* at 22.

18 See Jessica Silver-Greenberg & Stephanie Clifford, *Paid via Card, Workers Feel Sting of Fees*, New York Times, June 30, 2013.

19 Complaint at 4, *Gunshannon v. Albert/Carol Mueller T-A McDonalds*, No. 7010-2013 (Pa. Ct. Com. Pl. Luzerne Cnty. filed June 13, 2013).

20 *Id.* at 2.

Shortly after the lawsuit was filed, Senate Democrats sent a letter to the Consumer Financial Protection Bureau (CFPB) and Department of Labor, urging them to investigate payroll-card fees for possible violations of consumer protection and labor laws.[21]

If workers cannot withdraw their pay in full without fees, they are essentially getting discounted wages. Some workers pay such high payroll-card fees that they end up receiving less than minimum wage.

CHOICE

Employers may also require or effectively steer employees into using payroll cards. Plaintiff's suit in *Gunshannon v. Albert/ Carol Mueller T-A McDonalds* also alleges that plaintiff was forced to use a payroll card: her requests to be paid via direct deposit or paper check were denied, and she was told that if she wanted to get paid, she had to use the card.[22] Some employers may not explicitly require their employees to accept payroll cards but nonetheless steer employees onto payroll cards instead of presenting all available options. This can leave workers feeling pressured to use the card in order to avoid delays in getting paid. According to Deyanira Del Rio of the New Economy Project, "We hear virtually every week from employees who never knew there were other options, and employers certainly don't disabuse workers of that idea." [23]

Steering employees onto payroll cards has also gotten regulators' attention. In September 2013 the Consumer Financial Protection Bureau issued a bulletin stating that employees cannot be compelled to use payroll cards under federal law.[24]

Once an employee is using the payroll card, choosing a different payment method for future wage payments can be hard because payroll cards, like other banking services, can be "sticky." If an employee wants to move direct deposits to a different account, getting the transfer completed can take several weeks, and this could cause delays in pay and other disruptions.[25]

ACCESS TO WAGE INFORMATION

Some employers may not provide employees using payroll cards with ready access to pay stubs showing hours worked, expense reimbursement details, or information about tax withholdings. A recent lawsuit against a Jimmy John's franchisee alleges that employees paid via payroll card were not given access to the details of their pay; instead they had to ask a manager for a printout.[26] The complaint alleges that this kept employees from understanding how pay and reimbursement were calculated and that employees may not have realized they were being paid less than minimum wage in violation of both federal and Kansas law.[27] As of this writing, the presiding judge has not ruled on defendant's motion to dismiss.[28]

Legal Framework for Payroll Cards

Under federal law, payroll cards receive consumer protections. Unlike some other prepaid debit cards, payroll cards are explicitly covered by federal laws that provide a right to disclosures, limited liability for unauthorized transactions or errors, and protection against unwanted overdraft fees. Yet consumers can easily confuse payroll cards with general-purpose reloadable (GPR) prepaid cards that have no federal protections.

Unlike payroll cards, GPR prepaid cards fall through the definitional cracks of Regulation E because funds sitting in pooled accounts and managed by third

21 Letter from Richard Blumenthal, U.S. Senator, et al. to Richard Cordray, Director, Consumer Financial Protection Bureau, and Seth Harris, Acting Secretary, U.S. Department of Labor (July 11, 2013).

22 Complaint at 8, *Gunshannon*, No. 7010-2013.

23 Silver-Greenberg & Clifford, *supra* note 18 (quoting Deyanira Del Rio as associate director of Neighborhood Economic Development Advocacy Project; organization recently changed its name to New Economy Project).

24 Consumer Financial Protection Bureau, CFPB Bulletin 2013-10, Payroll Card Accounts (Regulation E) (Sept. 12, 2013).

25 For more information on the obstacles to switching between different account providers, see Suzanne Martindale et al., Consumers Union, Trapped at the Bank: Removing Obstacles to Consumer Choice in Banking 5–7 (May 30, 2012) (delays in rerouting automated transactions such as direct deposit and bill payments).

26 Complaint at 5, *Lewis v. Bushwood Investments Limited Liability Company*, No. 13-cv-2610-JAR/JPO (D. Kan. filed Nov. 27, 2013).

27 *Id.* at 2, 5.

28 Defendant's Motion to Dismiss, *Lewis v. Bushwood Investments Limited Liability Company*, No. 13-cv-2610-JAR/JPO (D. Kan. filed Feb. 13, 2014).

parties are generally considered examples of "trust agreements" exempt from the definition of a "consumer asset account."[29] As a result, GPR prepaid cards linked to funds sitting in pooled accounts are technically exempt from the regulation.

This gap is worrying because many GPR prepaid card companies encourage consumers to have their wages direct-deposited onto their cards. However, that does not make them "payroll cards" for the purpose of Regulation E, and as a result they do not currently receive the same protections.

The Electronic Fund Transfer Act and Regulation E prohibit employers and financial institutions from requiring employees to establish an account at a particular institution as a condition of employment.

FEDERAL LAW

The Electronic Fund Transfer Act is the applicable federal law.[30] The Act regulates electronic fund transfers in and out of checking, savings, or "other asset accounts" used for personal, household, or family purposes.[31] The term "account" is further defined by regulation.[32] The Act's implementing Regulation E refines which types of accounts are granted protections.[33] The regulation was amended in 2006 to add employer-arranged payroll-card accounts to the definition of an "account" subject to the regulation.[34]

Consumers who use payroll cards receive several legal protections. First, financial institutions must, at account opening, disclose fees and other key terms and conditions.[35] Payroll-card users must also be notified of any fee increases at least 21 days before they take effect.[36]

Second, payroll-card accounts are protected from unauthorized transactions or errors. If there is fraud on the account due to a lost or stolen debit card, the consumer has limited liability so long as the incident is promptly reported.[37] If an error shows up in the account's transaction history, the consumer has 120 days from the date of the transaction to dispute it.[38] Once a consumer disputes the transaction, the financial institution must resolve the issue or provisionally credit any missing funds back to the account within 10 business days.[39]

Furthermore, consumers may not be assessed overdraft fees for point-of-sale or ATM debit transactions unless consumers affirmatively opt into an overdraft service offered by their financial institution.[40]

Payroll-card accounts receive almost all of the same protections that apply to individual bank accounts. However, there are two differences. First, unlike consumers with bank accounts, financial institutions are not required to send monthly statements to payroll-card account holders. Instead consumers can be given access to balance information by telephone, Web-based electronic transaction history of the past 60 days, and a written transaction history upon request.[41] Second, a consumer using a payroll card has 120 days to dispute a transaction from the date of the transaction itself, regardless of when (or whether) the consumer discovers it. By contrast, a consumer with a bank account has up to 60 days after *discovering* the transaction to make a dispute.[42]

Federal law also states that employees cannot be forced to use payroll cards. The Electronic Fund Transfer Act and Regulation E prohibit employers and financial institutions from requiring employees to establish an account at a particular institution as a condition of employment.[43]

The Electronic Fund Transfer Act and Regulation E are largely silent on fees. The law requires disclosures at account opening and prior to a fee increase and limits overdraft fees as discussed above.[44] However, the Act and Regulation E do not otherwise restrict usage fees such as maintenance, ATM, or swipe fees.

29 See Federal Reserve Board, Official Staff Interpretation of 12 C.F.R. § 205 (Dec. 30, 2005) (Electronic Fund Transfer Act, Regulation E, was codified at 12 C.F.R. § 205 prior to passage of Dodd-Frank, which transferred Regulation E authority to Consumer Financial Protection Bureau; Regulation E has since been recodified at 12 C.F.R. § 1005).

30 Electronic Fund Transfer Act, 15 U.S.C. §§ 1693–1693r.

31 *Id.* § 1693a(2). A "financial institution" is broadly defined to include banks, credit unions, savings associations, or "any other persons" directly or indirectly holding the account (*id.* § 1693a(9)).

32 Account "means a demand deposit, savings deposit, or other asset account (other than an occasional or incidental credit balance in an open end credit plan as defined in section 1602(i) of this title), as described in regulations of the Bureau, established primarily for personal, family, or household purposes..." (*id.* § 1693a(2)).

33 12 C.F.R. § 1005 (2013).

34 Electronic Fund Transfers, 71 Fed. Reg. 51439 (Aug. 30, 2006) (codified at 12 C.F.R. pt. 205).

35 15 U.S.C. § 1693c(a); 12 C.F.R. § 1005.7.

36 15 U.S.C. § 1693c(b); 12 C.F.R. § 1005.8.

37 15 U.S.C. § 1693g(a); 12 C.F.R. § 1005.6(b)(2). Liability is limited to no more than $50 if the consumer reports the lost or stolen card within two business days, and no more than $500 if within 60 days (12 C.F.R. § 1005.6(b)(2)). However, in practice, card issuers typically waive all liability. In any case, delays in reporting the problem can be forgiven due to extenuating circumstances (12 C.F.R. § 1005.6(b)(4)).

38 12 C.F.R. § 1005.18(c) (2013).

39 15 U.S.C. § 1693f(c); 12 C.F.R. §§ 1005.11(c)(1)–(2).

40 12 C.F.R. § 1005.17(b)

41 *Id.* § 1005.18(c).

42 *Id.* § 1005.6(b)(3). Delays in reporting the problem can be forgiven due to extenuating circumstances (*id.* § 1005.6(b)(4)).

43 15 U.S.C. § 1693k(2) (2012 & Supp. I); 12 C.F.R. § 1005.10(e)(2).

44 The "opt-in" rule for overdraft fees does not apply, however, to preauthorized transactions (e.g., scheduled bill payments) or bounced checks that overdraw the account (see 12 C.F.R. § 1005.17(b)).

STATE LAWS

At present, 22 states explicitly regulate payroll cards by law.[45] Eight other states have issued guidance to clarify permissible uses of payroll cards under their laws.[46] These laws and guidance policies have varying consumer protections. Some have choice-of-payment requirements. Some limit or prohibit fees.[47] Furthermore, some states require oral or written consent from employees before they can be issued payroll cards.[48]

Payroll-card laws are pending in a number of states. For example, Wisconsin's Senate Bill 415 would allow payroll cards with the employee's written consent.[49] Meanwhile, New Hampshire's House Bill 1404 would require that employees first be offered direct deposit or a check before they could be enrolled in a payroll-card program; the bill also would limit fees, increase the fee-free withdrawals per pay period to three, provide a paper statement option, and prohibit linking a payroll card to any form of credit, including overdraft.[50]

More changes may be coming from within the industry as well. In December 2013 MasterCard issued payroll-card standards for its issuing banks.[51] While the standards reiterate legally required protections, they also require employers to provide employees educational materials and simple disclosures. These standards are effective for new employers in July 2014; present employers have until October 2014 to comply.[52]

Tips for Advocates

Advocates assisting workers in using payroll cards may be able to assert state-law claims against employers that enter into payroll-card contracts with problematic features, such as fees banned by a state's payroll-card law or fees that cause employees to be paid below a state's minimum wage. Employers may also be liable for forcing or steering employees to use payroll cards or for limiting employees' access to pay stubs under relevant state law. State wage and hour laws or even Unfair or Deceptive Acts or Practices laws may apply, depending on the state.[53]

Advocates can also help workers submit complaints to the Consumer Financial Protection Bureau if they are having problems with a national bank issuing a payroll card.[54] If an employer is forcing an employee to use a payroll card, the employer may be in violation of the Electronic Fund Transfer Act and Regulation E and subject to Consumer Financial Protection Bureau enforcement action.

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45 Ariz. Rev. Stat. § 23-351 (2013); Colo. Rev. Stat. § 8-4-102(2.5) (2013); 19-1000-1324 Del. Code Regs. (2013); Fla. Stat. § 532.01 (2013); Idaho Admin. Code r.16.03.13.305 (2013); Kan. Stat. Ann. § 44-314 (2013); Me. Rev. Stat. Ann. tit. 26, §§ 663(5), 665(1) (2013); Md. Code Ann., Lab. & Empl. § 3-502(e) (2013); Mich. Comp. Laws § 408.476 (2013); Minn. Stat. § 177.255 (2013); Nev. Admin. Code § 608.135(2) (2013); N.H. Rev. Stat. Ann. §§ 275:42-43 (2013); N.J. Admin. Code §§ 12:55-1.2, 2.4 (2013); N.D. Cent. Code § 34-14-02 (2013); Or. Rev. Stat. § 652.110 (2013); Tenn. Code Ann. § 50-2-103 (2013); Utah Admin. Code r. 610-3-22 (2013); Vt. Stat. Ann. tit. 21, § 342 (2013); Va. Code Ann. § 40.1-29 (2013); Wash. Rev. Code. Ann. § 41.04.240 (2013); W. Va. Code Ann. § 21-5-3 (2013); Wyo. Stat. Ann. § 9-1-403(b) (2013).

46 See Hawaii Department of Labor and Industrial Relations, Wage Standards Division, Direct Deposits, Debit Cards, Electronic Pay Statements ([April 3,] 2014). However, Hawaii is changing course. On April 3, 2014, Hawaii issued amended guidance suspending the use of payroll cards as of September 1, 2014 (see Hawaii Department of Labor and Industrial Relations, Amended Notice Re Department of Labor and Industrial Relations Guidelines on the Use of Payroll Debit Card (April 3, 2014)). This was done while payroll-card legislation was pending in the state legislature. In May, that legislation, H.B. 1814, passed. The bill allows for payroll cards with informed written consent and carries additional protections. It had not been signed by the governor as of June 25, 2014. (Updates on this legislation are available at Hawaii State Legislature, HB1814 HD2 SD2 CD1 (n.d.).) See also Illinois Department of Labor, Fair Labor Standards Division, Electronic Payroll Debit/Credit Cards for Payment of Wages ([April 17,] 2014); [Iowa Workforce Development, Labor Services Division,] Iowa Division of Labor Wage FAQs ([2014]); Montana Department of Labor and Industry, Employment Relations Division, Electronic Wage Payments FAQs ([June 19,] 2014); New York Department of Labor, Request for Opinion: Paycards/Debit Cards (Oct. 29, 2009); North Carolina Department of Labor, Wage and Hour Bureau, Debit/Payroll Card Payment (Aug. 30, 2005); Oklahoma Office of Attorney General, Attorney General Opinion 09-31 (Nov.17, 2009); Texas Department of Labor, Electronic Fund Transfer of Wages ([Dec 10, 2013]).

47 Kan. Stat. Ann. § 44-314(f)(2) (2013); Minn. Stat. § 177.255(12) (2013); Vt. Stat. Ann. tit. 21, § 342(2)(L) (2013); Wyo. Stat. Ann. § 9-1-403(b) (2013).

48 Three states go further by requiring an employee's voluntary written consent before issuing wages on a payroll card and stating that consent cannot be a condition of hire or continued employment (see Minn. Stat. § 177.255(6) (2013); N.J. Admin. Code. § 12:55-2.4(i)(2) (2013) ; Vt. Stat. Ann. tit. 21, § 342(2)(C) (2013)).

49 S.B. 415, 2013–2014 Reg. Sess. (Wis. 2013).

50 H.B. 1404, 2014 Reg. Sess. (N.H. 2014).

51 Press Release, MasterCard, MasterCard Introduces Payroll Card Standards (Dec. 13, 2013).

52 *Id.*

53 E.g., in California a business that violates state law may be additionally liable for engaging in "unfair practices" (see Cal. Bus. & Prof. Code § 17200 (2013)).

54 See Consumer Financial Protection Bureau, Submit a Complaint (n.d.) (click on "Bank account or service").

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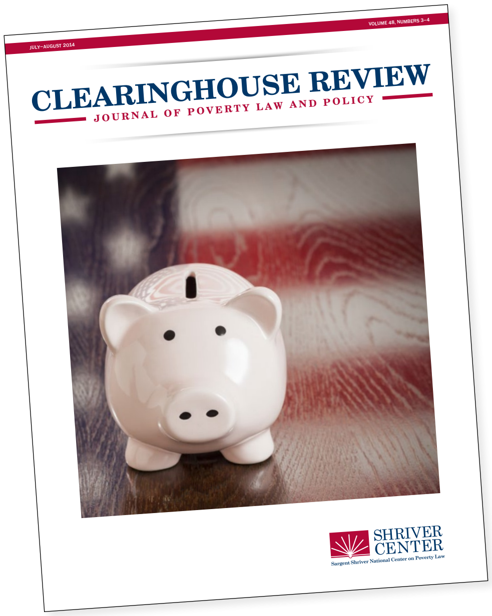

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