ECKERT SEAMANS
ATTORNEYS AT LAW

JANUARY 2014

LABOR AND EMPLOYMENT ALERT

HEADS UP -- FOR CLIENTS WHO PAY EMPLOYEES VIA PAY CARDS

Recently, some state Attorneys General are scrutinizing whether companies who utilize employee pay cards (debit-type cards used in lieu of paper paychecks or direct deposit) are in compliance with state labor and consumer protection laws. Three New York Times stories with more background are attached.

The New York, Attorney General, for example, recently sent a request for documents to a firm client, asking for information related to the pay card process. Areas of interest include potential hidden transaction fees not disclosed to employees, training methods for employees who are not accustomed to computer use, provision for multi-language training, and the use of electronic paystubs.

Resolution of these issues for our client is moving forward.

Any company using pay cards should review its internal processes at this juncture. Please note that the federal agency, the Consumer Financial Protection Bureau (CFPB) has guidelines and is taking a voluntary compliance approach, at least at this juncture.

For further information, please contact Tony Troy at 804.788.7751, whose focus is state Attorney General issues, or Sandy Garfinkel at 412.566.6868.

The New York Times

Paid via Card, Workers Feel Sting of Fees

By JESSICA SILVER-GREENBERG and STEPHANIE CLIFFORD
Published: June 30, 2013

A growing number of American workers are confronting a frustrating predicament on payday: to get their wages, they must first pay a fee.

For these largely hourly workers, paper paychecks and even direct deposit have been replaced by prepaid cards issued by their employers. Employees can use these cards, which work like debit cards, at an A.T.M. to withdraw their pay.

But in the overwhelming majority of cases, using the card involves a fee. And those fees can quickly add up: one provider, for example, charges $1.75 to make a withdrawal from most A.T.M.'s, $2.95 for a paper statement and $6 to replace a card. Some users even have to pay $7 inactivity fees for not using their cards.

These fees can take such a big bite out of paychecks that some employees end up making less than the minimum wage once the charges are taken into account, according to interviews with consumer lawyers, employees, and state and federal regulators.
Devonte Yates, 21, who earns $7.25 an hour working a drive-through station at a McDonald's in Milwaukee, says he spends $40 to $50 a month on fees associated with his JPMorgan Chase payroll card.

"It's pretty bad," he said. "There's a fee for literally everything you do."

Certain transactions with the Chase pay card are free, according to a fee schedule.

Many employees say they have no choice but to use the cards: some companies no longer offer common payroll options like ordinary checks or direct deposit.

At companies where there is a choice, it is often more in theory than in practice, according to interviews with employees, state regulators and consumer advocates. Employees say they are often automatically enrolled in the payroll card programs and confronted with a pile of paperwork if they want to opt out.

"We hear virtually every week from employees who never knew there were other options, and employers certainly don't disabuse workers of that idea," said Deyanira Del Rio, an associate director of the Neighborhood Economic Development Advocacy Project, which works with community groups in New York.

Taco Bell, Walgreen and Wal-Mart are among the dozens of well-known companies that offer prepaid cards to their workers; the cards are particularly popular with retailers and restaurants.

And they are quickly gaining momentum. In 2012, $34 billion was loaded onto 4.6 million active payroll cards, according to the research firm Aite Group. Aite said it expected that to reach $68.9 billion and 10.8 million cards by 2017.

Companies and card issuers, which include Bank of America, Wells Fargo and Citigroup, say the cards are cheaper and more efficient than checks — a calculator on Visa's Web site estimates that a company with 500 workers could save $21,000 a year by switching from checks to payroll cards. On its Web site, Citigroup trumpets how the cards "guarantee pay on time to all employees."

The largest issuer of payroll cards is NetSpend, based in Austin, Tex. Chuck Harris, the company's president, says it attracts companies by offering convenience to employees and cost savings to employers.

"We built a product that an employer can fairly represent to their employees as having real benefits to them," he said.

Sometimes, though, the incentives for employers to steer workers toward the cards are more explicit. In the case of the New York City Housing Authority, it stands to receive a dollar for every employee it signs up to Citibank's payroll cards, according to a contract reviewed by The New York Times. (Sheila Stainback, a spokeswoman for the agency, noted that it had an annual budget of $3 billion and that roughly 430 employees had signed up for the card.)

For Natalie Gunshannon, 27, another McDonald's worker, the owners of the franchise that she worked for in Dallas, Pa., she says, refused to deposit her pay directly into her checking account at a local credit union, which lets its customers use its A.T.M.'s free. Instead, Ms. Gunshannon said, she was forced to use a payroll card issued by JPMorgan Chase. She has since quit her job at the drive-through window and is suing the franchise owners.

"I know I deserve to get fairly paid for my work," she said.

The franchise owners, Albert and Carol Mueller, said in a statement that they comply with all employment, pay and work laws, and try to provide a positive experience for employees. McDonald's itself, noting that it is not named in the suit, says it lets franchisees determine employment and pay policies.

Some employers and card issuers say that the payroll cards are useful for low-wage workers who do not have bank accounts. They also say that the fees on the cards are usually lower than those associated with check-cashing services, which are often the only other option for people who do not have bank accounts.

"An unbanked employee is likely to be subject to a check-cashing fee when they try to cash a payroll check," said Nina Das, a Citigroup spokeswoman. She said that "someone cashing a payroll check for $500 would end up paying $15 at a 3 percent check-cashing fee."

This population — people who tend to use few, if any, bank services — is swelling. About 10 million households in the United States do not use a bank at all, up from nine million four years ago, according to estimates from the Federal Deposit Insurance Corporation. And 24 million households that do have a bank account still use expensive financial services like prepaid cards, the agency said.

For banks that are looking to recoup billions of dollars in lost income from a spate of recent limits on debit and credit card fees, issuing payroll cards can be lucrative — the products were largely untouched by recent financial regulations. As a result, some of the nation's largest banks are expanding into the business, banking analysts say.

The lack of regulation in the payroll card market, while alluring for some of the issuers, can potentially leave cardholders swimming in fees. Take the example of inactivity fees that penalize customers for infrequently using their cards. The Federal Reserve has banned such fees for credit and debit cards, but no protections exist on prepaid cards. Cards used by more than two dozen major retailers have inactivity fees of $7 or more, according to a review of agreements.
Some employees can also be hit with $25 overdraft fees, called "balance protection," on some of the prepaid cards. Under the Dodd-Frank financial overhaul law, banks with more than $10 billion in assets are barred from levying overdraft fees on customers' checking accounts.
Many fees are virtually impossible to dodge, some employees say. A Victoria's Secret employee, Bintou Kamara, for example, said it cost her $1.50 just to transfer money from her Citi payroll card to her checking account.

"I just make such little money that it seems like a lot to pay just to get access to it," said Ms. Kamara, 23, who works as a sales clerk in New York.

Naoki Fujita, a policy associate at Retail Action Project, an advocacy group for retail workers, said, "These are people who can least afford to fork over huge fees."

On some of its payroll cards, NetSpend charges $2.25 for out-of-network A.T.M. withdrawals, 50 cents for balance inquiries via a representative, 50 cents for a purchase using the card, $5 for statement reprints, $10 to close an account, $25 for a balance-protection program and $7.50 after 60 days of inactivity, according to an April presentation by the company reviewed by The Times.
Patrick Brown, NetSpend's senior vice president, said the company was "passionate that consumers can access their wages free of charge," providing an A.T.M. navigator to help employees find fee-free cash machines.

Some large retailers, like Home Depot, Wal-Mart, Walgreen and Limited Brands, the parent company of Victoria's Secret, say they let employees choose whether they will receive their wages through direct deposit or a prepaid card, along with checks in some cases.

In other cases, employees say that while they do get some free cash withdrawals at certain A.T.M.'s, it is difficult to find the right machines in their neighborhoods. Ms. Das of Citigroup said that its "payroll card holders have access to over 27,000 A.T.M.'s across the country."

Problems arise, though, when employers mandate the use of prepaid cards. In 25 states, employers are allowed to forgo paper checks and offer direct deposit or payroll cards; in the remaining states, regulations are less clear and employers are taking a risk by not offering a paper-check option, too, according to research by Madeline K. Aufseeser, an analyst at Aite. It is unclear how many employers offer payroll cards.

For low-wage employees, the fees can lead to unusual solutions.

Krystal McLemore, 22, makes $7.65 an hour at a Taco Bell in St. Louis. She said she was told to sign up for a payroll card. (Taco Bell says it “offers direct deposit and a voluntary option of payroll cards as an added convenience” for employees.)

But she grew tired of being charged $1.75, in addition to the A.T.M.’s fees, to withdraw cash. After a tip from a co-worker, Ms. McLemore realized she could reduce her charges if she took out all her wages once a month. Now, supplied with one of the most modern banking products, Ms. McLemore has a decidedly old-fashioned way of handling her pay: it is stacked in a shoe box in her closet in $10s and $20s.

“It costs too much to get my money,” she said.

The New York Times

Payroll Cards Are Under Scrutiny by New York's Attorney General

By JESSICA SILVER-GREENBERG
Published July 2, 2013

Eric T. Schneiderman, New York's attorney general, has sent letters to 20 employers seeking information on the cards, which can incur fees.

New York's top prosecutor is investigating some of the state's largest employers over their use of A.T.M.-style cards to pay their hourly employees.

The New York attorney general, Eric T. Schneiderman, has sent letters seeking information to about 20 employers, including McDonald's, Walgreenand Wal-Mart, say people briefed on the matter.

The inquiry by Mr. Schneiderman comes as a growing number of companies are abandoning paper paychecks and direct deposit to offer prepaid cards. But consumer lawyers, employees, and state and federal regulators have said that in the vast majority of cases, use of the cards can generate a range of fees — 50 cents for a balance inquiry and $2.25 for an out-of-network A.T.M. Those fees can quickly devour the pay of part-time and low-wage workers.

And many employees say that they have no alternative. Even at companies where there is a choice, it is often elusive. Worried about imperiling their jobs, some employees say they are terrified of requesting another option, according to interviews with consumer advocates. Other employees say that they are automatically enrolled in the payroll-card programs and forced to navigate a bureaucratic maze if they want to opt out.

The surge in payroll cards and the problems associated with them were the subject of an article in The New York Times on Monday.

One of the employers contacted by the attorney general's office, Walgreen, said that the company provided a payroll card as one option among many. The Walgreen's spokesman, James W. Graham, added that the company "created a payroll card program for our employees with the specific intention of providing terms as favorable to our employees as possible, if they choose to be paid that way."
McDonald's declined to comment on the investigation. Wal-Mart did not immediately respond to requests for comment, but said in an earlier statement that the company allowed employees to choose whether to receive wages through direct deposit or a prepaid card.

Some employers and card issuers, like Citigroup, JPMorgan Chase andNetSpend, have said that the payroll cards are a useful tool for low-wage workers who do not have bank accounts. They also say that the fees on the cards are usually lower than those associated with check-cashing services — often the only other option for people who do not have bank accounts. The card providers and employers also note that there are free ways for employees to gain access to their pay.

Mr. Schneiderman’s office is examining whether the companies have violated state labor laws, say the people briefed on the matter who were not authorized to discuss the investigation publicly. Under New York law, employees must give their explicit consent before companies can credit funds to a payroll card.

His office is also investigating whether the employers are forcing workers to use payroll cards as a condition of their employment, these people said. State law also requires that employees have an option for getting their wages without incurring any fees.

“We are concerned about excessive or insufficiently disclosed fees which may unduly reduce employees’ take home pay,” Mr. Schneiderman’s office told employers, according to letters reviewed by The Times.

In the first stage of the inquiry, the attorney general is collecting more information about the use of payroll cards. His office is ordering employers to turn over documents that prove employees have given consent before being enrolled in the cards.

The prosecutor is also examining fee schedules to determine how the fees are accrued. The companies are required to also provide “a summary report of all fees paid by employees” that add up “as a result of payroll cards which they have been issued,” the letters said.

The Times article highlighted the case of Natalie Gunshannon, 27, who made $7.44 an hour working at a McDonald’s franchise in Dallas, Pa. Saying she was forced to use a payroll card issued by JPMorgan, Ms. Gunshannon quit her job and sued the franchise owners.

On Monday, the owners of the McDonald’s franchise, Albert and Carol Mueller, announced that they were changing their policy and would offer direct deposit and paper paychecks to their employees. Ms. Gunshannon’s lawsuit, which seeks punitive damages, is still going forward, her lawyer said.

The New York Times

16 Senators Seek Inquiry of A.T.M.-Style Pay Cards

By JESSICA SILVER-GREENBERG
Published July 11, 2013

Richard Durbin, left, and Charles Schumer, center, are among the senators asking for the study.

Sixteen Democratic senators are asking regulators to examine the use of A.T.M.-style cards to pay hourly employees.

In a letter on Thursday, the senators urged Richard Cordray, the director of the Consumer Financial Protection Bureau, and Seth D. Harris, the acting secretary of the Labor Department, to "take swift action to protect American workers."

Across the country, a growing number of companies are doing away with paper paychecks and, in some instances, direct deposit, to offer prepaid cards.

The problem, though, according to consumer lawyers and employees, is that in the vast majority of cases, using the cards can generate large fees — 50 cents for a balance inquiry and $2.25 for an out-of-network automated teller machine, for example. For part-time and low-wage workers, the fees, which can be difficult to escape, quickly devour much of the money deposited on the cards.

Worried about drawing unwanted scrutiny that might threaten their jobs, some employees say they are reluctant to request another option. Other employees say that while there is a choice, they are automatically enrolled in the payroll-card programs. Getting out, these employees say, can be difficult and confusing.

Card issuers and employers note that payroll cards are a valuable tool for low-wage workers. They also say the fees on the cards are usually lower than those charged by check-cashing services — often the only other option for people who do not have bank accounts. The card providers and employers also note that there are free ways for employees to gain access to their pay.

The Network Branded Prepaid Card Association, a trade group that represents the prepaid industry, said it urged its members to clearly outline any fees associated with the cards to ensure that employees understand every aspect of the card.

"We strive to ensure we set a high bar with our best practices for our members," said Judith E. Rinearson, a lawyer with the trade group.

The surge in payroll cards and the problems associated with them was the subject of a front-page article in The New York Times last month.

In their letter, the lawmakers referred to the article in The Times, noting that it had been jarring to learn from the article that "some workers incur so many fees in the course of using their payroll cards that their net income ends up below the minimum wage."

The senators, including Richard J. Durbin of Illinois, Charles E. Schumer of New York and Joe Manchin III of West Virginia, asked the regulators to examine whether workers understood the fees associated with the cards. The lawmakers also asked the Consumer Financial Protection Bureau to make a systematic study of the fees, according to the letter.

Senator Elizabeth Warren, a Democrat from Massachusetts, who helped create the new consumer protection agency, also signed the letter.
Mr. Manchin said, "Americans work hard every day and their pay must be protected from high fees, unfair choice and improper commissions. It is clear that prepaid payroll cards must be investigated further."

The most vexing aspect of the cards, the lawmakers said, was that employees might be "coerced or inappropriately pressured into using them." Employees, the letters says, "should have the right not to use such a card and to instead receive their pay via a paper check or direct deposit."

To address the issue, the lawmakers asked the Consumer Financial Protection Bureau to clarify what laws govern the issuance of payroll cards.

"We believe it would go a long way toward protecting workers if the bureau would clearly and specifically state its view on what is and is not allowed" under the primary federal law that governs the electronic transfer of funds.

In their letter, the lawmakers noted that the "vast majority of employers make a good-faith effort to comply with the law in paying their employees."