



Network Branded Prepaid Card Association

20 F Street, NW, Suite 700

Washington, DC 20001

202.548.7200

February 10, 2017

Michael Paglialonga
New York State Department of Labor
Building 12, State Office Campus, Room 509
Albany, NY 12240

Re: Methods of Payment of Wages
Notice and Consent for Payroll Debit Cards and Direct Deposit
Filed via e-mail to regulations@labor.ny.gov

Dear Sir or Madam:

This letter is submitted on behalf of the Network Branded Prepaid Card Association (the "NBPCA")¹ in response to the New York Department of Labor's (the "Department") model templates for Notice and Consent for Payroll Debit Cards and Notice and Consent for Direct Deposit, which were recently published on the Department's website for notice and comment (the "Consent(s)"). The Consents follow and are intended to satisfy the notice and consent requirements of the Department's final rule governing methods of payment of wages, published in the New York State Register on September 6, 2016 (the "Final Rule"). While the NBPCA appreciates the opportunity to review and comment on the Consents, the NBPCA, along with other industry stakeholders, is concerned that the Consents prepared by the Department may be confusing to employees and cumbersome for employers. Moreover, the Consents prepared by the Department do not appear to actually satisfy the requirements of the Final Rule and thus any employers using them for that purpose may be in violation of the Department's requirements. For these reasons, the NBPCA is writing to offer an alternative form of consent that it has jointly prepared with the American Payroll Association ("APA") (the "Joint Consent").

¹ The NBPCA is a nonprofit, inter-industry trade association that supports the growth and success of network branded prepaid cards and represents the common interests of the many participants in this new and rapidly growing payments category. The NBPCA's members include banks and financial institutions, the major card networks, processors, program managers, marketing and incentive companies, card manufacturers, card distributors, payment industry consultants and law firms. The comments made in this letter do not necessarily represent the position of all members of the NBPCA.



Network Branded Prepaid Card Association

20 F Street, NW, Suite 700

Washington, DC 20001

202.548.7200

While the primary purpose of this letter is to address the serious deficiencies in the Department's proposed model Consents, the NBPCA also reiterates its significant concerns and reservations with the Final Rule as a whole. The NBPCA has expressed these concerns to the Department on a number of occasions including through detailed comment letters provided in response to the three proposed versions of the Final Rule previously issued by the Department. In particular, the NBPCA and its members continue to be concerned that the Department is treating payroll cards differently than other forms of wage payment in New York, and including much more onerous requirements than are typical in other states. This overly negative treatment of payroll cards by the Department risks the continued availability of an extremely beneficial and consumer friendly product that serves as a lifeline for New Yorkers who are unable or unwilling to secure a bank account or who cannot afford the high costs of cashing their paychecks. For a full, detailed explanation of the NBPCA's concerns with respect to the onerous requirements of the Final Rule, the NBPCA directs the Department to again review our previously submitted comment letters.

With respect to the model form offered by the NBPCA and other industry stakeholders, the NBPCA believes the Joint Consent appropriately addresses the interests of the Department in ensuring all of the Final Rule's requirements for notice and consent are provided to employees in a clear and conspicuous manner. Additionally, in contrast to the Department's Consents, the Joint Consent streamlines the Final Rule's requirements into a single, one page form, which the NBPCA believes is more employee friendly and less cumbersome for employers to comply with. The NBPCA asks the Department to adopt the Joint Consent as its "model consent" for purposes of complying with the Final Rule's notice and consent requirements for payroll debit cards and direct deposit and to further clarify that use of the Joint Consent by New York employers would create a "safe-harbor" for compliance with the notice and consent requirements of the Final Rule. Further, even if the Department decides not to adopt the form of Joint Consent included with this letter, we request that the Department clarify that an employer's use of the final version of the Department's model Consent form will still constitute a "safe-harbor" for compliance with the notice and consent requirements of the Final Rule. Each of these points is addressed in more detail below.

In addition to adopting the Joint Consent and clarifying that its use creates a safe-harbor for employers, the NBPCA also strongly urges the Department to extend the effective date of the Final Rule to a date is at least **6 months** following the date the Department issues its final model Consent form. Currently, the Final Rule will take effect on March 7, 2017. Given the immediacy of this effective date and the significant delays by the Department in issuing the model Consent forms for comment, even if the Department were able to somehow review all of the comments to its proposed Consents, revise the proposed Consents, and post them to the Department's website by this Monday, Feb. 13, employers would only have three weeks to review whether the new forms meet their compliance obligations and if so, integrate the final model Consent forms into



Network Branded Prepaid Card Association

20 F Street, NW, Suite 700

Washington, DC 20001

202.548.7200

the employers' hiring process and secure new consents from existing employees. Thus, even the best case scenario would leave employers with simply too little time to update their processes in order to comply with the Final Rule's notice and consent requirements. For this reason, the NBPCA strongly urges the Department to delay the effective date of the Final Rule.

The Joint Consent Satisfies the Notice and Consent Requirements of the Final Rule

The NBPCA believes the Joint Consent it has prepared with other industry stakeholders meets all of the notice and consent requirements of the Final Rule in a manner that is clear and conspicuous. In particular, the NBPCA notes that the Final Rule requires employers offering wage payment through any method other than cash or check, including both direct deposit and payroll debit cards, to provide employees with a written notice and consent form containing the following information: (i) a plain language description of the employee's wage payment options; (ii) a statement that the employee is not required to accept wages via direct deposit or via Payroll Card; (iii) a statement that the employee may not be charged fees for actions necessary to access their wages in full; and (iv) in the case of payroll debit cards, a list of fee-free ATM locations where the employee can access and withdraw wages within a reasonable travel distance of their home or work.²

The Joint Consent prepared by the industry stakeholders satisfies each of the above requirements. First, the Joint Consent includes a list of the various wage payment options that employers may offer to their employees along with a plain language description explaining to the employee that the list constitutes the employee's wage payment options. Second, the Joint Consent notifies the employee that payment of his or her wages by direct deposit or payroll debit card will require the employee's consent and that should the employee not consent, he or she will be paid via check or cash. Third, the Joint Consent notifies the employee that he or she may not be charged fees for actions necessary to access his or her wages in full and then provides a non-exhaustive listing of fees the employee will not be charged. Finally, in the case of payroll debit cards, the Joint Consent includes a number of ways for employers to provide employees with a list of fee-free ATM locations in a reasonable travel distance to the employee's home or place or work including by providing a specific address of such ATM location(s) on the Joint Consent form, attaching a listing of ATM locations to the form, or providing the employee with a website address the employee can access to obtain the list of ATMs.

By contrast, the Consents prepared by the Department fail to meet all of the Final Rule's required elements for notice and consent. For example, the Department's Consents do not include a means for employers to offer employees a list of the wage payment options that the employer offers. The NBPCA believes the failure of the Department's Consents to conform to the notice

² See the Final Rule, § 192-1.3, available at <https://docs.dos.ny.gov/info/register/2016/sept7/pdf/rulemaking.pdf>.



Network Branded Prepaid Card Association

20 F Street, NW, Suite 700

Washington, DC 20001

202.548.7200

and consent requirements of the Final Rule is particularly troubling. Many employers will likely use the Department's templates under a belief that the Department's forms will comply with the requirements of the Final Rule. By issuing model forms that fail to do so, the Department will cause employers relying on those Consents to inadvertently violate the Final Rule. The Joint Consent offered by the NBPCA and other industry stakeholders alleviates this concern by ensuring that all of the notice and consent requirements of the Final Rule are satisfied by the Department's own model Consent form.

In addition to meeting the notice and consent requirements contained in the Final Rule, the Joint Consent maintains additional items deemed important by the Department for inclusion in the model form. For example, the Joint Consent notifies employees that they may withdraw up to their full net wages or the balance in their payroll debit card account at least once each pay period and then provides a means for employers to provide a list of locations where such a withdrawal may take place. In addition, the Joint Consent notifies employees electing to receive wage via payroll debit card that they must wait 7 business days after the employer receives their consent to a payroll debit card before they are paid using that payment method and that, if the employee's payday falls within those 7 business days, the employee will receive their pay by check. Further, the Joint Consent also notifies employees that they may withdraw their consent to being paid via payroll debit card or direct deposit at any time, but their employer may take up to two pay periods to finalize this change.

The Joint Consent Streamlines the Elements and Requirements of the Department's Consents in a Manner that is More Easily Understood by Employees

The NBPCA is concerned that the Department's decision to provide two separate consent forms, one for direct deposit and one for payroll debit cards, would be confusing to employees, who may not understand why they are receiving two separate consent forms containing largely the same information.

In addition, the NBPCA believes that employee confusion would likely be compounded by certain inconsistencies between the Department's two Consent forms. For example, consider the Department's "direct deposit" Consent Form. In reviewing this form, it omits any mention of the requirement that an employee may not be charged fees for actions necessary to access his or her wages in full and contains a statement that an employee can withdraw his or her consent and discontinue their enrollment in a "payroll debit card" at any time. Aside from our earlier concern that an employer who follows the proposed Consent may violate the requirements of the Final Rule, the NBPCA is also concerned that an employee receiving the proposed Consent form would be confused as to why certain required disclosures and protections are included in the payroll debit card Consent form, but are not included in the direct deposit Consent form. Further, the NBPCA is concerned that employees receiving the direct deposit Consent form will be



Network Branded Prepaid Card Association

20 F Street, NW, Suite 700

Washington, DC 20001

202.548.7200

confused as to why that form provides information with respect to how the employee can withdraw from the alternative "payroll debit card" payment method.

By contrast, the NBPCA believes the Joint Consent alleviates any concerns over employee confusion by incorporating all of the required elements of the Final Rule into a single, one page form for the employee to review. Moreover, in addition to lessening the risk of employee confusion, as noted earlier, the Joint Consent would provide the added benefit of providing employers with a model form from the Department that conforms to the notice and consent requirements of the Final Rule. Therefore, the NBPCA believes the Joint Consent best addresses the Department's concerns by capturing all of the notice and consent requirements of the Final Rule, while also being more easily understandable for employees.

For the reasons stated above, the NBPCA asks the Department to adopt the Joint Consent as its "model consent" for purposes of complying with the Final Rule's notice and consent requirements and to further clarify that use of the Joint Consent by New York employers will create a safe-harbor for compliance with the notice and consent requirements of the Final Rule. Further, even if the Department decides not to adopt the form of Joint Consent included with this letter, the NBPCA requests that the Department clarify that an employer's use of the final version of the Department's model Consent form will still constitute a "safe-harbor" for compliance with the notice and consent requirements of the Final Rule. Finally, the NBPCA also strongly urges the Department to extend the effective date of the Final Rule to a date is at least **6 months** following the date in which the Department issues its final version of the model Consent form in order to provide employers with sufficient time to integrate the model form into their new hire process as well as secure necessary consents from existing employees.

The NBPCA appreciates the opportunity to review and provide comments to the Department regarding the model Consent forms, which are being adopted to help employers comply with the notice and consent requirements under the Final Rule. If you have any questions about the contents of either the Joint Consent or this letter, please do not hesitate to contact either Brad Fauss or Brian Tate at the numbers listed below.

[Continued on following page.]



Network Branded Prepaid Card Association

20 F Street, NW, Suite 700

Washington, DC 20001

202.548.7200

Sincerely,

Brad Fauss
President and CEO
NBPCA
(202) 548-7200

Brian Tate
VP of Government Relations
NBPCA
(202) 507-6181

Employer Information

Name:

Address:

Employee Work Location:

Phone:

Wage Payment Options

Your employer offers employees working in the State of New York the wage payment options checked below:

- Cash
- Check
- Direct Deposit
- Payroll Debit Card

Payment by direct deposit or a payroll debit card requires your written or electronic consent. If you do not consent, your employer will pay you in cash or by check as your employer has indicated above.

If you would like to receive your wages by direct deposit or a payroll debit card, please read and sign this form.

If this form is provided electronically, you have the right to print the form at work without cost to you.

Methods of Wage Payment Notice and Consent Form

Electronic Payment Rights

Should you select direct deposit or a payroll debit card, you may not be charged any fees for services that are necessary for you to access your wages in full. Prohibited fees on payroll debit cards include, but are not limited to: application fees, maintenance fees, overdraft fees, and fees for declined transactions at ATMs that do not provide free balance inquiries.

Should you select a payroll debit card, there must be one or more automated teller machines (ATMs) within a reasonable travel distance to your work or home that offers withdrawals at no cost to you. ATM(s) that provide such access can be found at the following location(s):

- _____
Specific Address
- Attached
- _____
Website

You may withdraw up to your full net wages or the balance in the payroll debit card account at least once each pay period at no cost as described below:

Future Changes in Selection

You may withdraw your consent for direct deposit or a payroll debit card at any time. Please note that it may take your employer up to two pay periods to finalize the change.

Employee Payment Selection and Consent

I have received information regarding my options for receiving pay from my employer, including the terms and conditions for those options.

I hereby give consent to the above listed employer to pay wages as follows:

- Direct Deposit to an account(s) designated by me in the attached direct deposit enrollment form.
- Payroll Debit Card.

Print Name

Employee Signature

Date

Your employer must wait 7-business days after receiving your consent to a payroll debit card before paying you using that payment method. If pay day falls within that period, you will receive your pay using another permissible method.

