

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

ROBERTA REARDON, Commissioner of the
New York State Department of Labor,

Petitioner,

For a Judgment Pursuant to CPLR Article 78,

- against-

GLOBAL CASH CARD, INC. and NEW YORK
STATE INDUSTRIAL BOARD OF APPEALS,

Respondents.

ORDER TO SHOW
CAUSE

Index No. 02643-17

RJI No.

Upon the annexed affirmation of Adrienne J. Kerwin, sworn to the 17th day of April, 2017, the verified petition dated April 17, 2017 and all attached exhibits, and sufficient cause having been alleged therefore, let the respondents show cause at a term of the court to be held in the Albany County Courthouse, Eagle Street, Albany, New York on June 16, 2017, why an order should not be made annulling the February 16, 2017 Resolution and Decision of respondent New York State Industrial Board of Appeals; it is hereby

ORDERED, that sufficient cause having been shown, service of a copy of this Order to Show Cause, and the papers upon which it is granted, by personal service on the respondent New York State Industrial Board of Appeals pursuant to CPLR 308 on or before April 24, 2017 be deemed good and effective service, and it is further

ORDERED, that sufficient cause having been shown, a service of a copy of this Order to Show Cause, and the papers upon which it is granted, by depositing a true copy

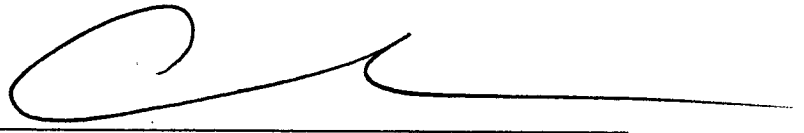
thereof in a post office box in the City of Albany, a depository under exclusive care and custody of the United States Postal Service, directed to respondent Global Cash Card, Inc., at the address 7 Corporate Park, Suite 130, Irvine, California 92606 on or before April 24, 2017 be deemed good and effective service, and it is further

ORDERED, that petitioner shall serve the stipulated agency record, her memorandum of law and any supporting affidavits and exhibits upon counsel for the respondents by personal service or overnight mail on or before **April 24, 2017**, and it is further

ORDERED, that respondents shall serve any papers in opposition upon counsel for the petitioner by personal service or overnight mail on or before **May 29, 2017**, and it is further

ORDERED, that reply papers by the petitioner, if any, shall be served upon counsel for the respondents by personal service or overnight mail on or before **June 12, 2017**.

Dated:



Hon.
Hon. Christina L. Ryba
Supreme Court Justice

X personal
appearances not
required on the
return date unless
directed by assigned judge

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

ROBERTA REARDON, Commissioner of the New York State
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Petitioner,

For a Judgment Pursuant to CPLR Article 78,

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GLOBAL CASH CARD, INC. and NEW YORK STATE
INDUSTRIAL BOARD OF APPEALS,

Respondents.

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VERIFIED PETITION

Index No. 02643-17
RJI No.

The Petition of ROBERTA REARDON, Commissioner of the New York State Department of Labor, by her attorney, ADRIENNE J. KERWIN, Assistant Attorney General, of Counsel to the Office of the Attorney General, respectfully states as follows:

1. This Petition is made by petitioner, New York State Department of Labor ("DOL") Commissioner ROBERTA REARDON, ("Commissioner"), seeking a judgment pursuant to CPLR Article 78, challenging a February 16, 2017 Resolution and Decision by respondent NEW YORK STATE INDUSTRIAL BOARD OF APPEALS ("Board"), which invalidated 12 NYCRR Part 192 ("the Rules" or "Wage Payment Rules").
2. The sources of knowledge for this Petition are (1) the Stipulated Record before the Board¹ ("Stipulated Record"); (2) the expertise of the respondent Commissioner and DOL staff;

¹ The Stipulated Record, incorporated herein by reference, will be filed and served by petitioner in accordance with the terms of the Order to Show Cause.

(3) all relevant DOL documents maintained in the ordinary course of business; and (4) and communications with relevant New York State personnel.²

JURISDICTION AND VENUE

3. The court has jurisdiction over this proceeding pursuant to CPLR § 7804(b) and Labor Law § 102(1).

4. Petitioners herein challenge a February 16, 2017 determination of respondent Board pursuant to CPLR § 7803(3) on the basis that the determination was affected by an error of law and was arbitrary and capricious.

5. The venue of this proceeding is based on where the principal office of the respondent is located pursuant to CPLR § 506(b) and § 7804(b).

PARTIES

6. Petitioner Roberta Reardon is the Commissioner of the New York State Department of Labor and maintains her principal place of business in the City of Albany, County of Albany.

7. Respondent State of New York Industrial Board of Appeals is a New York State statutorily-created independent review agency charged with reviewing the validity of certain rules, regulations and orders of the Commissioner of the New York State DOL. Board's principal place of business is located in the City of Albany, County of Albany.

8. Respondent Board is named as a party herein pursuant to CPLR 7§ 802(a).

9. Upon information and belief, respondent Global Cash Card, Inc. ("Global Cash Card") is a corporation organized under the laws of the State of Nevada, with its principal place of business located in Irvine, California, that does business in New York State and/or has business

² Supporting affidavits, incorporated herein by reference, will be filed and served by petitioner in accordance with the terms of the Order to Show Cause.

contacts in New York State by virtue of providing goods and/or services to New York state residents and/or corporations and/or their agents.

10. Respondent Global Cash Card is not an employer whose payment of wage practices are regulated by Part 192 of the Labor Law.

11. Respondent Global Cash Card was not a “duly authorized agent” of a “person in interest” authorized by Labor Law § 101(1) to petition the Board in the present matter.

12. Respondent Global Cash Card is named as a party herein as an interested party under CPLR 7802(a) as it was a party to the administrative proceeding below.

RELEVANT STATUTORY AND REGULATORY BACKGROUND

A. Promulgation and Review of DOL Rules and Regulations Generally

13. Labor Law § 21(11) authorizes the Commissioner to “issue such regulations concerning any provision of this chapter [the Labor Law] as [s]he finds necessary and proper.” Labor Law § 199 specifically confers similar authority “for the purpose of carrying out the provisions of [Labor Law Article 6].”

14. Such “rules” as defined by State Administrative Procedure Act (“SAPA”) § 102(2), must be adopted through SAPA § 202 procedures, and can be challenged for failure to do so pursuant to SAPA § 202(8).

15. As to a substantive challenge SAPA § 205 states:

Unless an exclusive procedure or remedy is provided by law, judicial review of rules may be had upon petition presented under article seventy-eight of the civil practice law and rules, or in an action for a declaratory judgment.... Nothing in this section shall be construed to grant or deny to any person standing. . .

16. Labor Law Article 3 provides an exclusive procedure to review DOL regulations: the Board’s consideration subject to a subsequent Article 78 proceeding. See NYLL § 102.

17. As stated in Labor Law § 101(1), “any person in interest or his duly authorized agent may petition the board for a review of the validity or reasonableness of any rule, regulation or order made by the commissioner.”

18. Labor Law § 103(1) states that unless declared invalid in a proceeding pursuant to the Labor Law, regulations “shall be valid. Except as otherwise provided in this chapter, no court shall have jurisdiction to review or annul any such. . . regulation.”

B. Article 6 of the Labor Law

19. Labor Law § 191 requires that the full amount of wages earned be paid within the statutorily prescribed time period.

20. Labor Law § 192 prohibits wage payment by direct deposit in a bank or other financial institution without advance written consent from employees.

21. Labor Law § 193 prohibits deductions from, or charges against, wages except for specified purposes.

C. Promulgation of 12 NYCRR Part 192

22. Beginning in 2001, DOL’s counsel’s office issued eight opinion letters outlining the permissible methods of wage payment through payroll cards under Labor Law Article 6. (Stipulated Record, Exhibits B through I, pages 5-29.)

23. All the letters made clear both that Labor Law § 192 prohibits such payment except to employees who provide advance written consent, and that such consent is not sufficient for the program to be legal.

24. The first three letters were issued between 2001 and 2003, when debit cards were viewed as a new arrangement for paying wages, and before any legislation concerning payroll cards had been introduced in New York. (Stipulated Record, pages 5-10.)

25. No one, including Global Cash Card, challenged these letters or DOL's power to interpret Article 6 to prohibit employers from charging fees that limit their employees' access to full wages.

26. Pursuant to the authority granted by Labor Law § 21(11), the Commissioner published a Notice of Proposed Rulemaking in the New York State Register on May 27, 2015, to add a new Part 192 to Title 12 of the New York Codes, Rules and Regulations ("NYCRR") titled "Methods of Payment of Wages" to codify and clarify the methods that employers may use to provide reasonable access to the full amount of wages.

27. DOL published the required notice, rulemaking statements and the text of the proposed rule and accepted public comments, as required by SAPA.

28. On October 28, 2015, DOL published a Notice of Revised Proposed Rulemaking in the New York State Register that included a formal assessment of the comments received, and revisions to the proposed rule.

29. On June 15, 2016, DOL published a second Notice of Revised Proposed Rulemaking in the New York State Register, which provided a formal assessment of the comments received, and revised the rule to reflect the input received by such comments.

30. On September 7, 2016, Respondent published a Notice of Adoption of the addition of Part 192 of Title 12 of the NYCRR in the New York State Register.

31. The Notice of Adoption provided a formal assessment of the comments received, and adopted the rule with non-substantial changes made to reflect the input received by such comments.

32. The Wage Payment Rules were to become effective March 7, 2017, and codified at 12 NYCRR part 192. A copy of the Rules is annexed hereto at **Exhibit A**. They included, *inter*

alia, many provisions relating to wage payment through payroll debit cards, among them provisions prohibiting charging employees certain fees associated with use of such cards. *See id.*

THE ADMINISTRATIVE PROCEEDING BELOW

33. By petition dated October 21, 2016, respondent Global Cash Card commenced a challenge to the regulations before respondent Board alleging that the Wage Payment Rules, as they relate to payment of wages by payroll debit card, are invalid because they (1) constitute a usurpation of the State legislature's non-delegable policymaking authority; (2) are preempted by federal law; and (3) are otherwise unreasonable.

34. In opposition to the petition, the Commissioner argued that (1) the Wage Payment Rules only regulate employers — not banks or other third party providers of services to employers, such as Global Cash Card — and therefore Global Cash Card lacked standing; (2) the Board lacked jurisdiction to decide the constitutional claims raised by Global Cash Card; and (3) the Wage Payment Rules are valid and reasonable.

35. After briefing by the parties on a Stipulated Record and oral argument, respondent Board, by Resolution of Decision dated February 16, 2017, revoked the regulations on the grounds that they “exceed [the Commissioner’s] rulemaking authority under Labor Law 199 by regulating banking services.” A copy of the Resolution of Decision is annexed hereto at **Exhibit B**.

GROUNDS FOR RELIEF³

36. Respondent Board's determination that respondent Global Cash Card had standing to challenge the Wage Payment Rules before the Board is contrary to law and arbitrary and capricious.

37. Respondent Board's determination that the Wage Payment Rules go beyond the scope of the Labor Law is contrary to law and arbitrary and capricious.

38. Respondent Board's determination that the Wage Payment Rules violate the separation of powers doctrine is contrary to law and arbitrary and capricious.

39. Respondent Board's determination revoking the Wage Payment Rules in their entirety was contrary to law and arbitrary and capricious.

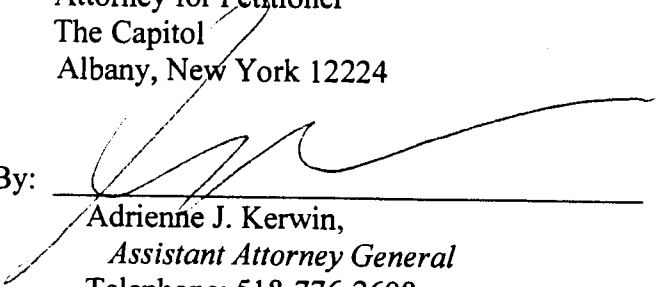
WHEREFORE, a judgment should be entered pursuant to CPLR Article 78, (1) annulling the February 16, 2017 Resolution and Decision of respondent Board and (2) granting the petitioner any further relief that the court deems just, proper and equitable.

³ Petitioner's Memorandum of Law in support of the Petition, incorporated herein by reference, will be filed and served in accordance with the terms of the Order to Show Cause.

Dated: Albany, New York
April 17, 2017

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Petitioner
The Capitol
Albany, New York 12224

By: _____

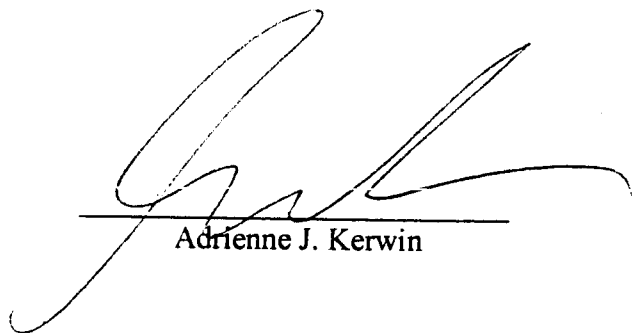

Adrienne J. Kerwin,
Assistant Attorney General
Telephone: 518-776-2608
Fax: 518-915-7738
Email: Adrienne.Kerwin@ag.ny.gov

VERIFICATION

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

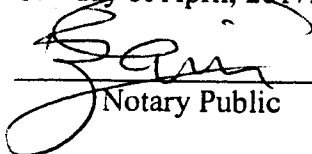
ADRIENNE J. KERWIN, being duly sworn, swears, pursuant to CPLR 3020(d)(2), that she (1) is the attorney for Petitioner **ROBERTA REARDON**, Commissioner of the New York State Department of Labor; (2) is acquainted with the facts alleged herein; (3) has read the foregoing petition; and (4) knows upon information and belief, as stated therein, the contents thereof to be true.

Dated: Albany, New York
April 17, 2017



Adrienne J. Kerwin

Sworn to before me this
17th day of April, 2017.


Notary Public

BRITTANY ERICSEN
Notary Public, State of New York
Reg No. 01ER6308680
Qualified in Saratoga County
Commission Expires July 28, 2018

Exhibit A

Part 192 Methods of Payment of Wages

Subpart-1 General Provisions

§192-1.1 Permissible Methods of Payment

Employees may be paid wages by employers using the following permissible methods:

- (a) Cash;
- (b) Check;
- (c) Direct Deposit; or
- (d) Payroll Debit Card.

§192-1.2 Definitions

For the purposes of this part:

- (a) Payroll Debit Card shall mean a card that provides access to an account with a financial institution established directly or indirectly by the employer, and to which transfers of the employee's wages are made on an isolated or recurring basis.
- (b) Consent shall mean an express, advance, written authorization given voluntarily by the employee and only given following receipt by the employee of written notice of all terms and conditions of the method of payment. Consent may be withdrawn at any time, provided however, that the employer shall be given a reasonable period of time, but no longer than two full pay periods, to finalize such change.
- (c) No Cost shall mean that an employee can access his or her wages, in full, without encumbrances, costs, charges, or fees.
- (d) Local Access shall mean that the employee is provided with access to his or her wages, at a facility or machine which is located within a reasonable travel distance to the employee's work location or home, and without unreasonable restraint by the employer or its agent.
- (e) Employee shall be as it is defined in Section 190 of the Labor Law and shall not include any person employed in a bona fide executive, administrative, or professional capacity whose earnings are in excess of the dollar threshold contained in Section 192(2) of the Labor Law, or an employee working on a farm not connected with a factory.
- (f) Direct Deposit shall mean the transfer of wages into an account, of the employee's choosing, of a financial institution.
- (g) Reasonable Intervals shall mean not less frequently than annually.
- (h) Negotiable instrument shall be as it is defined in Section 3-104 of the New York State Uniform Commercial Code.

§192-1.3 Written Notice and Consent

(a) Notice of methods of payment. An employer who uses methods of payments other than cash or check shall provide employees with a written notice that identifies the following:

- (1) a plain language description of all of the employee's options for receiving wages;
- (2) a statement that the employer may not require the employee to accept wages by payroll debit card or by direct deposit;

(3) a statement that the employee may not be charged any fees for services that are necessary for the employee to access his or her wages in full; and

(4) if offering employees the option of receiving payment via payroll debit card, a list of locations where employees can access and withdraw wages at no charge to the employees within reasonable proximity to their place of residence or place of work.

(b) Consent. An employer who offers one or more methods of payment of wages that require consent shall obtain such consent in writing and shall ensure that:

(1) It obtains the employee's informed consent without intimidation, coercion, or fear of adverse action by the employer for refusal to accept payment of wage by direct deposit or payroll debit card; and

(2) Does not make payment of wage by direct deposit or payroll debit card a condition of hire or of continued employment.

(c) Electronic. The written notice and written consent may be provided and obtained electronically so long as an employee is provided with the ability to view and print both the notice and the consent while the employee is at work and without cost to the employee, and the employee is notified of his or her right to print such materials by the employer through such electronic process.

(d) Language. The written notice and written consent shall be provided in English and in the primary language of the employee when a template notice and consent in such language is available from the commissioner.

§192-1.4 Prohibited practices

An employer and its agent shall not engage in unfair, deceptive or abusive practices in relation to the method or methods of payment of wages. No employer or his agent, or the officer or agent of any corporation, shall discharge, penalize or in any other manner discriminate against any employee because such employee has not consented to receive his or her wages through direct deposit or payroll debit card.

Subpart-2 Methods of Payment

§192-2.1 Payment of Wages by Check

When paying wages by check, an employer shall ensure that:

(a) The check is a negotiable instrument; and

(b) The employer does not impose any fees in connection with the use of checks for the payment of wages, including a fee for replacement of a lost or stolen check.

§192-2.2 Payment of Wages by Direct Deposit

When paying wages by direct deposit, an employer shall ensure that:

(a) It has consent from the employee;

(b) A copy of the employee's consent must be maintained by the employer during the period of the employee's employment and for six years following the last payment of wages by direct deposit. A copy of the employee's written consent must be provided to the employee; and

(c) Such direct deposit is made to a financial institution selected by the employee.

§192-2.3 Payment of Wages by Payroll Debit Card

(a) When paying wages by payroll debit card, an employer shall ensure that:

- (1) It has consent from the employee;
- (2) It provides the information referenced in Section 192-1.3(a) and receives consent at least seven business days prior to taking action to issue the payment of wages by payroll debit card, during such seven business days the employee's consent shall not take effect

(b) An employer shall not deliver payment of wages by payroll debit card unless each of the following is provided:

- (1) Local Access to one or more automated teller machines that offers withdrawals at no cost to the employee;
- (2) At least one method to withdraw up to the total amount of wages for each pay period or balance remaining on the payroll debit card without the employee incurring a fee;

(c) An employer or agent shall not charge, directly or indirectly, an employee a fee for any of the items listed in this subsection. Inclusion in this subsection does not impose any separate or independent obligation to provide services, nor does it relieve an employer or agent from compliance with this Part or any Federal or State law or regulations:

- (1) Application, initiation, loading, participation or other action necessary to receive wages or to hold the payroll debit card;
- (2) Point of sale transactions;
- (3) Overdraft, shortage, or low balance status;
- (4) Account inactivity;
- (5) Maintenance;
- (6) Telephone or online customer service;
- (7) Accessing balance or other account information online, by Interactive Voice Response through any other automated system offered in conjunction with the payroll debit card, or at any ATM in network made available to the employee;
- (8) Providing the employee with written statements, transaction histories or the issuer's policies;
- (9) Replacing the payroll debit card at reasonable intervals;
- (10) Closing an account or issuing payment of the remaining balance by check or other means; or
- (11) Declined transactions at an Automated Teller Machine that does not provide free balance inquiries.
- (12) Any fee not explicitly identified by type and by dollar amount in the contract between the employer and the issuer or in the terms and conditions of the payroll debit card provided to the employee.

(d) An employer or its agent shall not deliver payment of wages by payroll debit card account that is linked to any form of credit, including a loan against future pay or a cash advance on future pay. Nothing in this subsection shall prohibit an issuer from covering an occasional inadvertent overdraft transaction if there is no charge to the employee.

(e) An employer shall not pass on any of its own costs associated with a payroll debit card account to an employee, nor may an employer receive any kickback or other financial remuneration from the issuer, card sponsor, or any third party for delivering wages by payroll debit card.

(f) An employer or its agent shall not deliver payment of wages by payroll debit card unless the

agreement between the employer and issuer requires that the funds on a payroll debit card shall not expire. Notwithstanding this requirement, the agreement may provide that the account may be closed for inactivity provided that the issuer gives reasonable notice to the employee and that the remaining funds are refunded within seven days.

(g) At least thirty days before any change in the terms and conditions of a payroll debit card takes effect, an employer must provide written notice in plain language, in the employee's primary language or in a language the employee understands, and in at least 12-point font of any change to the terms or conditions of the payroll debit card account including any changes in the itemized list of fees. If the issuer charges the employee any new or increased fee before thirty days after the date the employer has provided the employee with written notice of the change in accordance with the provisions of this subsection, the employer must reimburse the employee for the amount of that fee.

(h) Where an employee is covered by a valid collective bargaining agreement that expressly provides the method or methods by which wages may be paid to employees, an employer must also have the approval of the union before paying by payroll card.

Exhibit B

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:

GLOBAL CASH CARD, INC.,

Petitioner,

To Review Under Section 101 of the Labor Law:
REGULATIONS REGARDING METHODS OF
PAYMENT OF WAGES ADOPTED SEPTEMBER 7,
2016 TO BE CODIFIED AS PART 192 OF TITLE 12
OF THE NEW YORK CODE OF RULES AND
REGULATIONS;

- against -

THE COMMISSIONER OF LABOR,

Respondent.

DOCKET NO. PR 16-120

RESOLUTION OF DECISION

APPEARANCES

Hinman Straub P.C., Albany (*David B. Morgen* of counsel), for petitioner.

Pico Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Michael O. Paglialonga* of counsel), for respondent.

WHEREAS:

On October 21, 2016, petitioner Global Cash Card, Inc. filed a petition with the Industrial Board of Appeals pursuant to Labor Law § 101 for review of regulations related to methods of payment of wages adopted by respondent Commissioner of Labor on September 7, 2016. Respondent filed an answer to the petition on November 23, 2016, and petitioner filed a reply to the answer on December 14, 2016. The parties filed a stipulated record on December 13, 2016 pursuant to Board Rule (12 NYCRR) § 65.37. The parties filed legal briefs on January 12, 2017, and upon notice to the parties, oral arguments were heard by the Board on January 25, 2017, at the Board's offices in New York, New York. The petition alleges the regulations are invalid or unreasonable because they exceed respondent's authority and violate separation of powers between the executive and state legislature, are preempted by federal banking law, and include vague and unreasonable provisions. We find as discussed below that the regulations are invalid and we revoke them.

PR 16-120

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THE REGULATIONS ON REVIEW

The regulations on review regarding methods of payment of wages were adopted by respondent on September 7, 2016, and are to be codified as 12 NYCRR part 192. Petitioner does not allege respondent failed to follow the State Administrative Procedure Act in proposing and adopting the challenged regulations. The specific rules challenged read as follows:

“§ 192-1.2 Definitions

“For the purposes of this part:

“(a) Payroll Debit Card shall mean a card that provides access to an account with a financial institution established directly or indirectly by the employer, and to which transfers of the employee’s wages are made on an isolated or recurring basis.

“

“(d) Local Access shall mean that the employee is provided with access to his or her wages, at a facility or machine which is located within a reasonable travel distance to the employee’s work location or home, and without unreasonable restraint by the employer or its agent.

“

“§ 192-1.3 Written Notice and Consent

“

“(d) Language. The written notice and written consent shall be provided in English and in the primary language of the employee when a template notice and consent in such language is available from the commissioner.

“§ 192-1.4 Prohibited practices

“An employer and its agent shall not engage in unfair, deceptive or abusive practices in relation to the method or methods of payment of wages. No employer or his agent, or the officer or agent of any corporation, shall discharge, penalize or in any other manner discriminate against any employee because such employee has not consented to receive his or her wages through direct deposit or payroll debit card.

“§ 192-2.1 Payment of Wages by Check

“When paying wages by check, an employer shall ensure that:

“(a) The check is a negotiable instrument; and

“(b) The employer does not impose any fees in connection with the use of checks for the payment of wages, including a fee for replacement of a lost or stolen check.

“

“§ 192-2.3 Payment of Wages by Payroll Debit Card

PR 16-120

- 3 -

“(a) When paying wages by payroll debit card, an employer shall ensure that:

“

“(2) It provides the information referenced in Section 192-1.3(a) of this Part and receives consent at least seven business days prior to taking action to issue the payment of wages by payroll debit card, during such seven business days the employee’s consent shall not take effect.

“(b) An employer shall not deliver payment of wages by payroll debit card unless each of the following is provided:

“(1) Local Access to one or more automated teller machines that offers withdrawals at no cost to the employee;

“(2) At least one method to withdraw up to the total amount of wages for each pay period or balance remaining on the payroll debit card without the employee incurring a fee;

“(c) An employer or agent shall not charge, directly or indirectly, an employee a fee for any of the items listed in this subsection. Inclusion in this subsection does not impose any separate or independent obligation to provide services, nor does it relieve an employer or agent from compliance with this Part or any Federal or State law or regulations:

“(1) Application, initiation, loading, participation or other action necessary to receive wages or to hold the payroll debit card;

“

“(4) Account inactivity;

“(5) Maintenance;

“(6) Telephone or online customer service;

“(7) Accessing balance or other account information online, by Interactive Voice Response through any other automated system offered in conjunction with the payroll debit card, or at any ATM in network made available to the employee;

“(8) Providing the employee with written statements, transaction histories or the issuer’s policies;

“

“(10) Closing an account or issuing payment of the remaining balance by check or other means; or

“(11) Declined transactions at an Automated Teller Machine that does not provide free balance inquiries.

“

“(g) At least thirty days before any change in the terms and conditions of a payroll debit card takes effect, an employer must provide written notice in plain language, in the employee’s primary language or in a language the employee understands, and in at least 12-point font of any change to the terms or conditions of the payroll debit card account including any changes in the itemized list of fees. If the issuer charges the employee any new or increased fee before 30 days after the date the employer has provided the employee with written notice of the change in accordance with the provisions of

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- 4 -

this subsection, the employer must reimburse the employee for the amount of that fee.

"(h) Where an employee is covered by a valid collective bargaining agreement that expressly provides the method or methods by which wages may be paid to employees, an employer must also have the approval of the union before paying by payroll card."

The regulations go into effect on March 7, 2017.

STATUTORY AUTHORITY

Labor Law § 101 (1) provides in relevant part that:

"Except where otherwise prescribed by law, any person in interest or his duly authorized agent may petition the board for a review of the validity or reasonableness of any . . . regulation . . . made by the commissioner under the provisions of this chapter. Such petition shall be filed with the board no later than sixty days after the issuance of such . . . regulation."

Labor Law § 21 (11) provides in relevant part that the Commissioner of Labor "[m]ay issue such regulations governing any provision of [the Labor Law] as he finds necessary and proper."

Labor Law § 191 states in relevant part that:

"1. Every employer shall pay wages in accordance with the following provisions

"a. Manual worker.--(i) A manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned; provided however that a manual worker employed by an employer authorized by the commissioner pursuant to subparagraph (ii) of this paragraph or by a non-profitmaking organization shall be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly.

"....

"d. Clerical and other worker.--A clerical and other worker shall be paid the wages earned in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer.

"2. No employee shall be required as a condition of employment to accept wages at periods other than as provided in this section."

Labor Law § 192 (1) provides that "[n]o employer shall without the advance written consent of any employee directly pay or deposit the net wage or salary of such employee in a bank or other financial institution."

PR 16-120

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Labor Law § 199 provides that “[t]he commissioner may issue such rules and regulations as he determines necessary for the purposes of carrying out the provisions of [Article 6].”

STANDING UNDER LABOR LAW § 101

We reject respondent’s challenge to petitioner’s standing. Petitioner is a Nevada corporation with a principal place of business in Irvine, California. Petitioner is a payroll debit card vendor providing custom payroll debit card programs to employers in New York. Respondent alleges petitioner does not have standing to petition the Board for review of the regulations. We disagree. Petitioner has standing in this proceeding as an “interested person” because the regulations govern the conduct of petitioner inasmuch as it is an “agent” of employers it has contracted with to issue payroll debit cards to employees in New York (*see* Labor Law § 101 [1] [any person in interest may petition the Board for review of the validity or reasonableness of any regulation made by the Commissioner of Labor under the Labor Law]).

STIPULATED RECORD

On December 13, 2016, the parties filed a stipulated record pursuant to Board Rule (12 NYCRR) § 65.37. The record contains 987 pages, and consists of the text of the regulations under review, 12 NYCRR part 192; eight opinion letters issued by respondent between 2001 and 2010 on the subject of payment of wages by payroll debit card; notice of proposed rulemaking published May 27, 2015; revised notice of proposed rulemaking published October 28, 2015; second revised notice of rulemaking published June 15, 2016; notice of adoption of 12 NYCRR part 192 published September 7, 2016; written public comments in support of and opposed to the proposed regulations; the Governor’s press release published May 27, 2015; the Governor’s press release published September 8, 2016; reply affidavit of Joseph M. Purcell, chief operating officer of Global Cash Card, Inc.; and Global Cash Card’s payroll debit card terms and conditions.

A January 15, 2010 opinion letter by respondent concerning payment of wages by payroll debit card reads in relevant part that:

“the payment of wages via debit cards is governed by Sections 191, 192, and 193 of the Labor Law. As relevant to this follow-up inquiry, Section 191 requires the timely payment in full of an employee’s agreed upon wages without encumbrances. In this regard, the Department interprets that Section to require that employees paid via debit card be provided with an effective means by which to make an unlimited number of withdrawals on that card without incurring fees. Such withdrawals may be provided by a bank teller and/or through the use of ATMs. For example, if employees are able to make withdrawals from a bank teller, the employer is not required to ensure any free ATM transactions,”

(DOL opinion letter No. RO-09-0158 [January 15, 2010]).

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By notice of proposed rulemaking published May 27, 2015, respondent proposed to add Part 192 to Title 12 NYCRR on the subject of methods of payment of wages, including payment of wages by payroll debit card. The notice explained that the regulation "provides clarification and specification as to the permissible methods of payment, including payroll debit cards" and "provides clear rules governing the payment of wages via payroll debit cards, a method of payment that was not specifically addressed in anything other than Departmental guidance document."

In a revised notice of proposed rulemaking published October 28, 2015, respondent made several changes to the language of the proposed regulations based on public comments received during the comment period. Respondent received comments expressing concern that respondent was making rules regulating financial services. The revised notice of rulemaking stated with respect to such comments:

"Comment 15:

"The proposed rule transfers banking law compliance onto employers.

"Response 15:

"The Department disagrees. The proposed rule is concerned with Labor Law requirements, not banking law requirements."

Senator Martins, chairperson of the Senate Standing Committee on Labor and Senator Murphy, chairperson of the Senate Administrative Regulations Review Commission, together, submitted a public comment, dated July 28, 2015, stating in relevant part:

"The Department cites Labor Law-sections 21 and 199 as its statutory authority to promulgate methods of payment of wages regulations. After researching sections 21 and 199, we are concerned that the Department has overstepped its statutory authority by attempting to regulate the specifics surrounding the use of payroll cards or pay cards.

"A payroll card account is a financial service product like any other checking or savings account offered by a financial institution. After providing free and clear access to an employee's wages once per pay period, the following requirements placed on a payroll card account appear to be beyond the Department's authority: unlimited in-network withdrawals, payroll statements to be monthly or every 3 months for periods of inactivity (paper or electronic at the employee's discretion), unlimited transaction histories for 12 months (paper or electronic at the employee's discretion), and daily or per transaction electronic balance notifications. In addition, prohibitions on fees for declined transactions, other transactions, account inactivity, written statements and in-network ATM balance inquiries appear to be beyond DOL's authority to regulate.

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"DOL seeks to adopt regulations that are duplicative of, or in conflict with, federal regulations. The Consumer Financial Protection Bureau (CFPB) regulates consumer financial products through Regulation E which includes payroll card accounts. Regulation E already addresses investigations into reported problems with payroll card accounts. Regulation E requires a consumer to notify a financial institution of an error or fraudulent activity promptly. Upon notification, the institution has 10-days to complete the investigation, but may be granted a 45-day extension. DOL would require all investigations to be completed within 10-days without an extension available.

"The Changes in Terms & Conditions of Agreement section appears duplicative with federal regulation. Regulation E requires card issuers to provide consumers with a 21-day advanced notice of changes. The DOL proposal would require employers, not card issuers, to provide consumers with 30-day advance notice.

"Also, Periodic Statements & Transaction Histories requirements appear to conflict with federal regulation. Regulation E does not require written periodic statements if the card issuer offers account balance through telephone, 60 days of electronic account history of transactions, written account history of transaction, and if requested by the consumer, the issuer may charge for written statements. The proposed rule by DOL would require written statements, written monthly statements if requested, 12 month written transaction history if requested, and no limit as to how many can be requested per year, all free of charge.

"The CFPB recently proposed changes to Regulation E. As a result, we would urge DOL to delay adoption of its rule proposal until further research can be done as to how Regulation E changes would affect the DOL proposal.

"At present time there does not appear to be sufficient data demonstrating that there are significant problems with New Yorkers using payroll cards. While we believe that companies and employees should have the option to use payroll cards in New York State, we also believe that the proposed rule will be burdensome to the issuing financial institutions. This burden may cause such a problem that financial institutions will stop issuing pay cards, which would result in the opposite effect that the Department is trying to achieve.

"As a result of the aforementioned problems, we recommend the Department to seek advice of the Department of Financial Services and the institutions issuing payroll cards, so that a revised rule can

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be adopted that will help both employees and employers without overly burdening the institutions that they rely on.”

By letter dated July 31, 2015, Assembly Members Robinson, chairperson of the Assembly Standing Committee on Banks, Titus, chairperson of the Assembly Standing Committee on Labor, and Zebrowski, chairperson of the Assembly Administrative Regulations Review Commission, together, sent a public comment to respondent, stating in relevant part that:

“We appreciate the complexity of developing regulations on payroll cards, which involves not only laws on payment of wages, but also Federal and state laws and regulations governing financial services. We urge DOL to consult with the Department of Financial Services to ensure that its rules do not duplicate or conflict with banking regulations.”

In a second revised notice of rulemaking published June 15, 2016, respondent again made changes to the proposed regulations based on comments received from the public. Respondent acknowledged that comments had been submitted expressing concern over the rule requiring unlimited free ATM withdrawals. The second revised notice of rulemaking states:

“Comment 1:

“The requirement that employees be provided unlimited withdrawals at least one local ATM machine is burdensome.

“Response 1:

“The Department disagrees. This requirement ensures that employees are able to access their wages in a free and effective way in line with the requirements of Article 6 of the Labor Law.”

The regulations were adopted on September 7, 2016.

PROPOSED LEGISLATION ON PAYROLL DEBIT CARDS

2007 NY Assembly Bill A7701 authorized employers to pay employees through the use of a payroll card. This bill was proposed because under existing law it is unclear whether and to what extent employers may pay employees by debit card. The bill, among other things, provided for payment of wages in full without fees at least once per pay period, that payment by debit card must be voluntary, that the employer or payroll card issuer may not charge certain fees to the employee related to the use of a payroll card, including initiation fees, inactivity fees and fees for the use of customer service, and the issuer may not deduct fees that were not disclosed to the employee. This bill was not enacted into law (*see* 2007 NY Assembly Bill A7701 and memorandum in support).

2011 NY Assembly Bill A6894-A clarified methods for payment of wages and authorized payment of wages by payroll cards. The bill added a new section to Labor Law § 192 governing payment of wages by payroll card. The bill provided, among other things, that employees must be

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allowed at least one withdrawal or transfer every pay period up to the entire amount of wages free of charge, fees charged by the payroll card issuer are not deemed deductions from wages that violate Labor Law §§ 191 or 193, and wages paid by debit card must be insured by the Federal Deposit Insurance Corporation. This bill was not enacted into law (*see* 2011 NY Assembly Bill A6894-A and memorandum in support).

2013 NY Assembly Bill A6419-B clarified methods for payment of wages and authorized the payment of wages by use of payroll cards. The bill was proposed in order to make New York's law consistent with other states with respect to payment of wages by payroll card. The bill, among other things, provided that employees must be allowed at least one withdrawal or transfer up to the entire amount of wages, fees charged by the card issuer are not deemed deductions from wages in violation of Labor Law §§ 191 or 193, employees must be provided a means to check their account balance free of charge, and wages paid by debit card must be insured. This bill was not enacted into law. (*see* 2013 Assembly Bill A6419-B and memorandum in support).

2014 NY Senate Bill S7790 authorized and regulated the use of payroll cards. The bill was introduced to clarify and update New York Labor Law on proper use of payroll debit cards and added new sections to the Labor Law on payment of wages by payroll debit card, including numerous proposals made by the Attorney General. The bill included provisions that employees must be provided with at least one network of automatic teller machines that provides withdrawals or balance inquires at no cost, at least two free out of network withdrawals per pay period, and a method for an employee to withdrawal his or her entire weekly wages without a fee. This bill has not been enacted into law (*see* 2014 NY Senate Bill S7790; 2014 NY Assembly Bill A10056; memorandum in support of 2014 NY Assembly Bill A10056).

2015 NY Assembly Bill A3109-A clarified methods for the payment of wages and authorized the payment of wages by use of payroll cards. The bill contained provisions that employees must be able to make at least one withdrawal or transfer in each payroll period without charge up to the full amount of wages for that week and one withdrawal at an in-network automatic teller machine each pay period without charge, a means for checking the card's account balance free of charge irrespective of the number of inquiries made, and prohibits an employer from using a payroll card program that charges fees for such services as point of sale transactions and account maintenance. The bill also required a payroll card program to provide certain notices and protections, and that the wages be insured. This bill was not enacted into law (*see* 2015 NY Assembly Bill A3109-A and memorandum in support).

2015 NY Assembly Bill A5968 authorizes and regulates the use of payroll card accounts. The bill includes provisions that employees paid by payroll debit card must be provided with at least one network of automatic teller machines that provide free cash withdrawals and balance inquiries, and a method for an employee to withdrawal his or her entire net wages each pay period without fees. The bill was not enacted into law (*see* 2015 NY Assembly Bill A5968 and memorandum in support).

2015 NY Assembly Bill A6608 specifies conditions for the payment of wages to employees by direct deposit to a payroll debit card. The bill requires among other things that employees must be provided at least one network of automatic teller machines located in reasonable proximity to the place of employment or residence that provides unlimited cash withdrawals at no cost to the employee, unlimited balance inquiries at no cost to the employee, and at least one reasonably

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convenient method in addition to the free automatic teller machines for an employee to withdraw his or her entire wages each pay period without incurring a fee. This bill was not enacted into law (see 2015 NY Assembly Bill A6608 and memorandum in support).

2015 NY Assembly Bill A6811, introduced at the request of the Attorney General, authorized and regulated the use of payroll card accounts. The bill was substantially similar to 2015 NY Assembly Bill 5968 and 2014 Senate Bill S7790. The bill was not enacted into law (see 2015 NY Assembly Bill A6811 and memorandum in support).

2015 NY Senate Bill S4685-A, also introduced at the request of the Attorney General, authorized and regulated the use of payroll card accounts. The bill, which was substantially similar to 2015 NY Assembly Bills 5968, A6811, and 2014 NY Senate Bill 7790, was not enacted into law (see 2015 NY Senate Bill S4685-A and memorandum in support).

ANALYSIS

The Board makes the following findings of fact and law pursuant to Board Rule (12 NYCRR) § 65.39:

Article 6 of the Labor Law governs payment of wages. Labor Law § 191 requires prompt and full payment of wages, Labor Law § 193 prohibits employers from making unlawful deductions from an employee's wages, and Labor Law § 192 provides the manner in which an employer may pay wages to an employee. Labor Law § 199 provides that "[t]he commissioner may issue such rules and regulations as he determines necessary for the purposes of carrying out the provisions of [Article 6]" (see also Labor Law § 21 [11] [Commissioner of Labor may issue such regulations governing any provision of the Labor Law as she finds necessary and proper]). The regulations under review relate to methods of payment of wages and require employers to provide access to one or more automatic teller machines that offer withdrawals at no cost to the employee (12 NYCRR 192-2.3 [b] [1]) and prohibit payroll debit card issuers from charging an employee certain fees related to use of a payroll debit card (*id.* § 192-2.3 [c]). We find the regulations are invalid because they exceed respondent's rulemaking authority under Labor Law § 199 by regulating banking services. The regulations go beyond the statutory language of Article 6, specifically that of Labor Law § 192, which governs the relationship between employers and employees, by placing restrictions on financial institutions.

Labor Law § 192 currently does not prohibit payment of wages by payroll debit card with an employee's consent because the statute allows for payment by direct deposit of wages into a bank or other financial institution. A bank or other financial institution includes a payroll debit card to which wages may be legally directly deposited. Prior to adoption of the regulations, respondent recognized that the statute allowed for payment by payroll debit card as long as certain conditions were met. Respondent's most recent opinion letters held that payment of wages by debit card is not prohibited by Labor Law § 191 so long as employees have an effective means by which to make an unlimited number of withdrawals on the card without incurring fees by bank teller or automatic teller machine. Respondent reasoned that "[f]or example, if employees are able to make withdrawals from a bank teller, the employer is not required to ensure any free ATM transactions. However . . . the location at which free withdrawals may be made must be located within a reasonable distance of the employee's worksite." (DOL opinion letter No. RO-09-0158). The

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regulations, by prohibiting all fees associated with use of a payroll debit card, depart significantly from the plain language of the statute and respondent's prior position on the subject.

Respondent's prohibitions against fees charged by and other activities of debit payroll card vendors and issuers is not within her purview. In New York, the Department of Financial Services regulates banks and financial institutions and the fees they may charge for banking services (*see generally* Banking Law, art 2), including fees related to checking accounts to which employers may legally direct deposit wages (Banking Law § 14-f; 3 NYCRR 9.3) and licensed check cashers where employees may choose to cash their paychecks (Banking Law § 372). We find the fees associated with use of a payroll debit card are similar to fees associated with checking accounts and licensed check cashers, and, therefore, are not subject to regulation by respondent. Because the statute already allows employers to pay wages by payroll debit card with an employee's consent, the regulations are invalid to the extent they prohibit otherwise lawful conduct by financial institutions for providing banking services. Restrictions or requirements placed on the employer that are consistent with the statute are, of course, valid, but these regulations go beyond regulation of the employment relationship and into the area of banking law, which is outside respondent's competence and expertise in the regulation of employment and occupational safety and health.

Our view that the regulations exceed respondent's authority and are beyond the scope of the statute is supported by the legislature's efforts to amend the statute as well as public comments on the regulations made by members of the legislature as part of the rulemaking process. Several bills proposed in the legislature addressing the issue of payment of wages by payroll debit card have failed to gain sufficient support to be enacted into law (*see e.g.* 2011 NY Assembly Bill A6894-A; 2013 NY Assembly Bill A6419-B; 2014 NY Senate Bill S7790; 2015 NY Assembly Bill A3109-A; 2015 NY Assembly Bill A5968; 2015 NY Assembly Bill A6608; 2015 NY Assembly Bill A6811; 2015 Senate Bill S4685-A). That at least eight bills on identical subject matter as the regulations were introduced during such a short period of time contemporary to the time period during which the regulations were proposed and adopted demonstrates that the issue of payment of wages by payroll debit card is a matter of public concern being debated within the legislature. The legislature's failure to amend the statute demonstrates their satisfaction with the current statutory language or their inability to reach consensus on the manner in which payroll debit cards should be regulated under the Labor Law, if at all. Public comments submitted by members of the legislature to respondent during the rulemaking process both in support of and opposed to the regulations further support that the legislature has not been able to settle this issue. Assembly Members Robinson, Titus, and Zebrowski, respectively the chairs of the assembly banking, labor, and regulations review committees co-signed a public comment urging respondent to consult with the Department of Financial Services to ensure its rules do not duplicate or conflict with banking regulations and offering suggestions for clarifying and improving the proposed regulations. Senators Martins and Murphy, chairs respectively of the senate labor and regulations review committees submitted a joint-comment recommending respondent seek the advice of the Department of Financial Services to revise the regulations. As discussed above, we find that the regulations exceed respondent's rulemaking authority and encroach upon the jurisdiction of banking and financial services regulators.

Although we find the regulations are invalid because they exceed the jurisdiction delegated to respondent by the legislature, we recognize respondent has a well-founded concern that low-wage workers without access to traditional bank accounts will be coerced by their employers to

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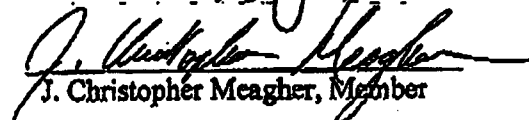
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receive their wages by payroll debit card at a significantly lower payroll cost to the employer, and that employees paid by payroll debit card may be subject to excessive or hidden fees when accessing their wages. It is already illegal for an employer to require an employee to receive wages by payroll debit card. Labor Law § 192 requires the advance consent of an employee before an employer may make payment of wages by payroll debit card. With respect to fees that employees must pay when using payroll debit cards to access their wages, it is illegal for an employer to make any direct or indirect charge to an employee to receive his or her wages (Labor Law § 193) and these same employees already face the possibility of paying fees to licensed cash checkers if they choose to use their services to cash their paychecks. The regulations, however, prohibit financial institutions such as petitioner from charging fees for banking services to employees using payroll debit cards. While these fees may be excessive in respondent's view and disproportionately impact the most vulnerable workers in the state, she does not have authority to act in this area.

NOW, THEREFORE, IT IS HEREBY RESOLVED AND ORDERED THAT:

1. The regulations regarding methods of payment of wages adopted September 7, 2016 to be codified as 12 NYCRR part 192 are revoked; and
2. The petition for review be, and the same hereby is, granted.




Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

RECUSED



Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
in New York, New York, on
February 16, 2017.

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Dated and signed by the Members
of the Industrial Board of Appeals
in Utica, New York, on
February 16, 2017.


CERTIFICATION

STATE OF NEW YORK)
)
INDUSTRIAL BOARD OF APPEALS) ss:

I, Devin A. Rice, an attorney licensed to practice in all the courts of the state of New York and Counsel to the New York State Industrial Board of Appeals, do hereby certify that:

The attached is a true copy of a Resolution of Decision dated February 16, 2017, in the Matter of the Petition of GLOBAL CASH CARD, INC., filed under IBA Docket Number PR 16-120 which I have compared with the original in this office and which I do hereby CERTIFY to be a true and correct transcript thereof.

IN WITNESS WHEREOF, I set my hand and the seal of the Industrial Board of Appeals, this 16th day of February, 2017.



Devin A. Rice
Counsel