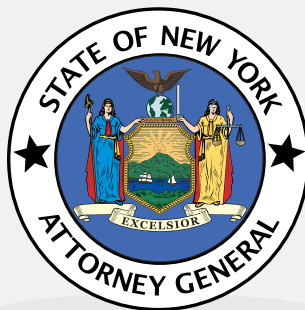


Pinched by Plastic:

The Impact of Payroll Cards on Low-Wage Workers



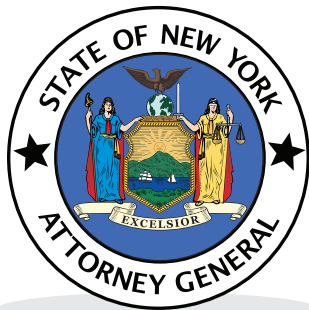
From the Office of:

New York State Attorney General
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New York State Attorney General

| The Labor Bureau |

6/12/14



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EXECUTIVE SUMMARY

Employers in New York State and nationwide increasingly use payroll cards to pay wages. These cards can lead to numerous benefits for employers and employees, including cost savings for employers and convenience and lowered expenses for those employees who might otherwise use check cashing outlets. Payroll cards can be helpful for delivering wages in inclement weather or a disaster, and paperless payroll also brings environmental benefits.

Despite these advantages, payroll cards can present serious problems for employees, especially low-wage or limited English proficient (LEP) workers, and those without internet or smartphone access. Virtually all payroll card programs charge fees for card-related activities, and these fees can add up, reducing the meager take-home pay received by the lowest paid workers in the state.

In response to requests from the Office of the New York State Attorney General (“OAG”), 38 national and regional employers voluntarily submitted information on their use of payroll cards. A review of their responses revealed:

- Cardholder employees receive insufficient and confusing information about how to obtain their wages without paying a fee. Available information frequently comes in small type buried in a cardholder agreement, instead of as a clear, easy-to-read list.
- Many payroll card programs charge fees for common transactions, including ATM use, point-of-sale transactions, and customer service. An overdraft of as little as \$5.00 can trigger a fee as high as \$25.00 in programs that charge for overdraft service. Employees without internet access can be charged simply to learn their account balance.
- Employers sometimes steer or require workers to receive wages by payroll card. Forty percent of employers surveyed did not provide employees the option to receive their wages through a traditional paper check and another 31% discouraged the selection of a paper check.
- In a subset of employers who provided particularly detailed fee information, three out of four cardholder employees incurred a fee of some kind. In some programs, the average per-employee fees ran as high as \$20.00 per month.

Attorney General Eric Schneiderman has proposed the Payroll Card Act to address the shortcomings in payroll card programs. Its provisions would protect the rights of workers and prevent the unfair reduction of their wages through fees, including:

- Requiring employers to allow employees to elect whether to be paid through a payroll card, direct deposit, or to receive a paper check;
- Mandating that employees receive clear and appropriate notice of payroll card program terms and conditions, including potential fees and how to avoid them; and

- Prohibiting employers from using payroll card programs that charge certain types of fees, and requiring employers to use payroll card programs with at least one network of ATMs where employees can obtain access to their wages without paying a fee.

I. Introduction

A payroll card is a prepaid debit card used by employers as a means to pay wages to employees, typically as an alternative to direct deposit and/or a traditional paper check. Each payday, a cardholder employee's wages are deposited electronically into a payroll card account. The payroll card account is typically held in a bank selected by the employer or by the payroll card vendor that was chosen by the employer to issue cards to employees. The employee can access the funds in the account by using the payroll card. The payroll card functions in a manner similar to bank-issued debit cards in that the employee can use the payroll card to withdraw funds from an ATM, make point-of-sale purchases, and electronically transfer funds, among other functions.

Employer usage of payroll cards as a method to pay wages has increased significantly in recent years. Nationally, an estimated 5.8 million workers received their wages via payroll cards in 2013, and that number is expected to increase to 10.8 million by 2017.¹

When compared to alternatives such as check cashing services, payroll cards can be a less costly wage payment option for employees, particularly if those employees take advantage of the fee-free services associated with the card. In addition, unlike a basic checking account at a bank, payroll cards are not subject to minimum balance or creditworthiness requirements, which can be difficult for some workers to fulfill. Payroll cards allow cardholder employees to enter into the "financial mainstream," in that they can use the cards to make purchases online, pay bills and utilities, and rent cars, for example. Some payroll card companies have also started offering additional services to cardholders, such as financial literacy modules and online budget management tools.

Payroll cards are cost-effective for employers. According to Visa, a payroll card deposit costs an employer \$0.35 compared to \$2.00 to issue a paper check, and Visa reports that employers who have switched to payroll cards have saved up to 65% in payroll processing costs.² Because payment is made electronically, the employee is able to access his or her wages on payday regardless of whether the employee is scheduled to work that day, is traveling, or cannot come to the workplace due to inclement weather or a natural disaster. Paperless payment also brings environmental benefits.

Nonetheless, while some workers can successfully navigate the payroll card system and use their cards without incurring any fees, payroll cards can present significant challenges for many workers, particularly low-wage workers and those with limited financial and literacy skills.³ Many employers do not offer their employees a meaningful

¹ Halah Touryalai, *Are Hourly Workers Being Short-Changed? The Truth About Payroll Cards*, FORBES (July 23, 2013, 11:57 AM), <http://www.forbes.com/sites/halahtouryalai/2013/07/23/are-hourly-workers-being-short-changed-the-truth-about-payroll-cards> (citing study by Aite Group).

² Visa Payroll Card: Reinvent Payday With An Easier, More Cost-Effective Way to Pay and Get Paid (2010), available at <http://usa.visa.com/download/business/visa-payroll-profile.pdf> (last visited June 11, 2014).

³ A subset of employers surveyed by the OAG provided detailed fee information that included the number of employees that were able to use their payroll cards without incurring a fee. *Infra* note 11. Within this subset, approximately 25-30% of employees successfully utilized their payroll cards without any fees.

choice as to whether they would like to enroll in a payroll card program in the first place. In many instances, workers who do not sign up for direct deposit are automatically issued a payroll card without the option of receiving a traditional paycheck. Employers typically use only one payroll card vendor, so employees do not have any choice regarding the terms and conditions of the payroll card program through which they will receive their wages.

Many payroll card transactions, including ATM withdrawals, point-of-sale purchases, balance inquiries, and account transfers can only be undertaken after incurring a fee. Fees can have a real effect on take home pay of low-wage workers. Unlike other forms of pre-paid debit cards, such as gift cards for example, the fees associated with payroll cards are particularly problematic because they are deducted directly from the wages earned by employees and thus impact their basic livelihoods.

Payroll cards can be especially challenging for certain groups of employees, including those with limited literacy, limited English proficiency, or limited computer or internet access. For workers with limited financial literacy, understanding the fee structures and methods of avoiding fees can be difficult and the restrictions themselves can be complex and burdensome. Information about fees is usually not disclosed until after the employee receives the card, and it is frequently presented in small font in a manner that is difficult to read and fully understand. Many payroll card programs do not provide cardholder employees with cost-free access to live customer service or to non-electronic means of obtaining account balance information.

With the emerging technology of payroll cards, new laws are needed to specifically address some of the problems resulting from payment of wages in this manner. New legislation would provide clarity to employers, employees, and payroll card vendors on this issue. The intent of Attorney General Schneiderman's Payroll Card Act is to fill these gaps in the law.

II. Methodology

This report was prepared by the Labor Bureau of the Office of the New York State Attorney General to highlight areas where payroll cards have been problematic for workers and to introduce the Attorney General's policy recommendations for payroll card use by employers in New York. The policy recommendations, which form the basis for Attorney General Schneiderman's proposed Payroll Card Act, were informed by the practices of 38 corporate employers who voluntarily responded to a letter from the OAG requesting information about their practices with regard to payment of wages by payroll cards. The recommendations also address matters raised in complaints that were received by the Labor Bureau from cardholder employees concerning their employer's payroll card programs.

In 2013, the Labor Bureau began looking into payroll card practices by employers in New York State after receiving information that certain elements of payroll card programs were in violation of state labor law. Beginning in July 2013 and continuing

into the fall of 2013, the OAG issued letters and/or subpoenas to 47 corporate employers selected as a result of employee complaints, referrals from advocacy groups, and information gathered online regarding major corporations that use payroll cards to pay at least some employees' wages.⁴ The letters solicited information regarding the employers' procedures for obtaining employee consent to be paid with a payroll card, fee information provided to cardholder employees, the ability of cardholder employees to withdraw wages without incurring a fee, a report of fees incurred by cardholder employees, and other data related to employee payroll card use.

The OAG received responses to all inquiries. This report utilizes data from 38 of the 47 employers, as eight of the employers indicated that they did not employ workers in New York State or did not pay their New York State employees with payroll cards, and one company with a very small payroll card program did not provide sufficient information to be included in this report. The targeted employers responded in multiple formats and in varying levels of detail, often depending on the type of payroll card program offered by that employer. In some instances, due to the varying nature of the responses received, certain data was only available from a smaller subset of employer responses. Where the Labor Bureau used information from the smaller subset of responses to identify a wider pattern or trend among payroll card programs, this is noted within the report. Because of the confidential nature of the information provided voluntarily by these employers, the report does not list any employers by name. Instead, it refers to the employers as Company A, Company B, etc.

As used in this report, the term "payroll card vendor" refers to the financial institution through which the employer contracts to provide payroll cards to its employees; in some cases the "payroll card vendor" is a bank and in other cases it is a business that acts as a third-party intermediary between the employer and a bank. Similarly, the names of specific payroll card vendors are not disclosed within the report because of the spirit of cooperation in which information about payroll card programs was provided to the OAG by these vendors.

For purposes of this report, the responses from the 38 employers were computed and analyzed to understand the landscape of payroll card use in New York State. In addition to reviewing responses to inquiries, the Attorney General's Office met and/or communicated with a number of employers, payroll card vendors, and employees prior to preparing this report. Payroll card programs were evaluated in light of state and federal worker and consumer protection laws. Common patterns and practices among the payroll card vendors were used to develop the policy recommendations that informed the proposed Payroll Card Act.

While technology is changing the ways in which workers are paid, it is essential that the law keep pace with these developments in order to ensure that the most vulnerable workers are not left behind.

⁴ Specifically, the OAG issued 45 letters and two subpoenas.

III. Impact of Payroll Cards on Employees' Take Home Pay

One of the most significant drawbacks to payroll card programs for workers is the extent to which fees are imposed on cardholder employees for use and maintenance of the cards. It is true that many fees --with the exception of overdraft fees-- are typically less than \$10.00, but these fees accumulate, and for low-wage workers, they can represent the equivalent of several hours of work and result in a meaningful reduction in actual take home pay.⁵

New York Labor Law requires employers to provide employees with at least one fee-free way to access their wages each pay period. Because the Labor Law was enacted before the existence of payroll cards, it does not specifically address payroll card use by employers and is silent as to whether employers may use payroll card programs that charge certain categories of fees. The New York State Department of Labor ("NYSDOL") has interpreted the law to prohibit certain fees deemed essential for employees to access their wages: for example, fees for maintenance of the account, or card replacement fees (cardholder employees must be provided with a free replacement card at reasonable intervals).⁶ Account closing fees would also fall into that category as they deny employees the ability to access their wages in full. There currently are no restrictions relating to other fees, including ATM fees, overdraft fees, or balance inquiry fees. Although general consumer protection law requires that card terms and conditions, including fees, be disclosed to cardholders, there is no specific provision within the Labor Law requiring that this information be disclosed to cardholder employees in a manner that is clear and easy to understand.

Attorney General Schneiderman's Payroll Card Act would codify into law the NYSDOL-prohibited fees and would, for the first time, prohibit a number of fees, including fees for loading funds onto the card, in-network ATM use, fees for contacting customer service, and any fees not previously disclosed to the cardholder employee, among others. The Payroll Card Act would also require employers to provide information about fees and card terms and conditions to employees in a manner that is clear and conspicuous and, for fee information, in at least 14-point font.

⁵ Government agencies use prepaid cards as a means of delivering unemployment insurance and other public benefits. Such use of prepaid cards, and any resulting fees, are beyond the scope of this report, which focuses solely on the use of prepaid or payroll cards in the employment context. However, governmental entities must conduct their business, including selection of prepaid card providers, based on a process transparent to the public and to legislators, while employers selecting a payroll card vendor face no such constraints. Perhaps for this and other reasons, a recent report from the National Consumer Law Center found that fees charged to unemployment benefit recipients had been considerably reduced in recent years. LAUREN K. SAUNDERS & JILLIAN McLAUGHLIN, NAT'L CONSUMER LAW CTR., SURVEY OF UNEMPLOYMENT PREPAID CARDS: STATES SAVE WORKERS MILLIONS IN FEES; THUMBS DOWN ON RESTRICTING CHOICE 1 (2013), available at <http://www.nclc.org/images/pdf/pr-reports/report-prepaid-card-2013.pdf> (last visited June 11, 2014).

⁶ N.Y. LAB. LAW § 191; *see also* N.Y. STATE DEP'T OF LABOR, OPINION LETTER RO-08-0001 (Oct. 29, 2009), available at Payroll card report june 12 FINAL.doc[hereinafter OPINION LETTER RO-08-0001].

A. Methods to Access Wages

All of the employers surveyed for this report used payroll card vendors that allowed cardholder employees at least one free withdrawal each pay period. The fee-free methods for withdrawing wages included one or more of the methods below, depending on the program:

- **ATM withdrawals:** The employee can use his or her payroll card to withdraw wages from any ATM. Some programs provide a free network of ATMs, as described in more detail within this report.
- **Over-the-counter (“OTC”) teller withdrawal at a Visa or MasterCard member bank:** The cardholder employee can visit a Visa or MasterCard member bank (depending on the program) and withdraw wages directly from a teller.
- **Convenience check:** A convenience check is a check, drawn upon an employee’s payroll card account, that is filled out and cashed by the employee.
- **Electronic (Automated Clearinghouse or “ACH”) transfer to a bank account of the cardholder’s choice:** Similar to direct deposit, the employee can automatically transfer funds from his or her payroll card account to another bank account.
- **United States Postal Service (“USPS”) money order:** A few programs allow cardholders to receive wages in the form of a money order from the USPS.

As a practical matter, these methods of accessing wages vary in levels of convenience for cardholder employees. Figure 1 shows a breakdown of the various ways that employees at four companies obtained access to their wages over a one-year period. Because a cardholder employee may choose to access wages through more than one method, the total percentages in each column exceed 100% for two of the four companies. As Figure 1 shows, ATM withdrawals were the most popular method for these employees to access their wages. It is worth noting that out-of-network ATM withdrawals exceeded in-network ATM withdrawals by significant percentages across all four companies. Overall, ATM withdrawals far outpaced alternative methods such as OTC cash withdrawals, money orders from USPS, and convenience checks. Convenience checks were the least popular option, with no more than two employees in any company using the checks over the course of the year.

FIGURE 1⁷
Preferred Employee Method for Cash Withdrawals
July 1, 2012 - June 30, 2013

Cash Withdrawal Method	Company A	Company B	Company C	Company D
Out of Network ATMs	61%	67%	61%	46%
In Network ATMs	29%	44%	49%	25%
Over the Counter Cash Withdrawal	4%	7%	9%	9%
USPS Money Order	3%	5%	6%	3%
ACH Transfer to Bank Account	<1%	1%	3%	10%
Convenience Check	<1%	<1%	N/A	<1%

Use of OTC cash withdrawals did not exceed 10% in any of the four companies, nor did use of USPS money orders, transfers to bank accounts, or convenience checks. This corroborates what has been recounted anecdotally by cardholder employees. Workers reported difficulties accessing wages via OTC withdrawal through a bank teller because banks and/or tellers appeared to be unfamiliar with these procedures and may have been hesitant to provide funds to individuals who were not bank members.⁸ ACH transfers, where provided to cardholders without a fee, might take at least one business day or longer to complete the transfer of funds to the employee's account.⁹ For employees paid on a Friday, this would mean that they might wait until the following Monday at the earliest before they could access their wages. Convenience checks, for the reasons described within this report, are insufficiently convenient for workers, particularly those with limited financial and literacy skills.

B. Poorly-Disclosed Fees Hit Low Wage Workers Hard and Reap Profits for Payroll Card Vendors

Despite offering at least one fee-free withdrawal option per pay period, a number of the payroll card vendors charged fees for other services. Frequently, the fees were

⁷ Four of the thirty-eight employers provided the OAG with highly detailed transaction and fee information for cardholder employees that included the number of employees that had engaged in a particular transaction at least once. The OAG used these numbers to examine the most popular methods of cash access for cardholder employees. Although this evaluation is based on data provided by only four employers, these four companies are large national retailers with a presence in New York State and the figures represent the practices of 8,070 cardholder employees from July 1, 2012 through June 30, 2013. Two of these employers had more than one type of payroll card program in place; for these employers, figures for the program with the highest number of participating employees were used.

⁸ The OAG has learned of two payroll card vendors that have recently begun issuing informational fliers to banks explaining the program and providing cardholder employees with similar fliers to give to tellers to make this a viable option for withdrawing wages.

⁹ In one payroll card program, not included among the four companies in Figure 1, ACH transfers can take up to 5 business days.

inadequately disclosed to employees. Some fees – such as “monthly maintenance” fees and closing fees – were simply unavoidable and, as described below, are prohibited by the NYSDOL's Opinion Letter on this issue.¹⁰ For the employers that provided data on fees per employee, approximately 70-75% of workers receiving wages on a payroll card incurred at least one type of fee.¹¹

While many of the fees may appear modest, they add up quickly; not only for low-wage workers, but also for payroll card vendors who reap a handsome profit based on the fees. It is worth noting that some employers did use programs that charged very few fees to their employees; in some programs, fees (including all types of fees) were as low as an average of \$15.00 per employee per year. However, many employers used programs that charged workers significant fees. Fees were highest in the programs that included overdraft protection, where average fees (including all types of fees) could range as high as \$20.00 per employee *per month*. For a minimum wage worker at such a company in 2012-2013, \$20.00 was equivalent to almost three hours of work per month. Attorney General Schneiderman's Payroll Card Act is critical to ensure that no employees will have to pay such fees to access wages or as a result of misleading or poorly-disclosed fee information.

1. Prohibited Fees

Thirty-six of the thirty-eight employers -- or 95% of the total -- utilized a program that charged a monthly maintenance fee, an inactivity fee for current employees, an account closing fee, a card replacement fee, or some combination of these fees. These fees are prohibited under the NYSDOL's interpretation of the New York Labor Law, but are not expressly addressed by explicit language within the Labor Law. The Payroll Card Act would codify the NYSDOL's interpretation of the Labor Law, address any potential ambiguity in the law, and enable effective enforcement where appropriate.

Monthly Maintenance Fees: A monthly maintenance fee is a fee that is assessed to the cardholder employee each month simply for possessing the card, regardless of whether or how many times the employee uses the card. Where a worker has been given no real alternative to receiving pay through a payroll card, a monthly maintenance fee is effectively a penalty paid by the employee to receive his or her wages. It should be noted that use of monthly maintenance fees may be diminishing: none of the surveyed employers used a program that charged such a fee for current employees, although at least three programs charged a monthly fee for former employees who chose to keep the card.

¹⁰ OPINION LETTER RO-08-0001, *supra* note 6.

¹¹ This data was based on six employers representing a total of almost 4,000 cardholder employees. These employers provided data that included the number of cardholder employees that had incurred fees in comparison to the number of employees that had avoided fees. The remaining employers that provided fee information did not distinguish between the number of employees that had incurred or avoided fees. Instead, the data was typically broken down by type of transaction. The fee rate of 70-75% of employees for the six employers was corroborated through in-person conversations with various payroll card vendors.

Closing Fees: A closing fee is a fee that is charged to employees who wish to close their payroll card account and receive a check for the balance on the card. The NYSDOL's Opinion Letter prohibits fees that deny the ability of employees to receive their wages in full.¹² For the same reasons that an employer cannot charge an employee an "exit" fee to leave employment or collect a final paycheck, closing fees associated with a payroll card deny employees the full payment of their wages and would be prohibited under the analysis in the NYSDOL's Opinion Letter. Eleven of the surveyed employers used a program that charged a closing fee to cardholder employees. Of these, two programs charged a \$3.00 closing fee, four programs charged a \$5.00 closing fee, four programs charged a \$10.00 closing fee, and one charged a \$15.00 closing fee.

Inactivity Fees: An inactivity fee is a monthly fee that is charged to the card after a certain period of non-use, when there is no activity (deposits, withdrawals, expenditures) on the card.¹³ This period can range anywhere from 30 days to one year, depending on the program. This non-use could result from a variety of reasons; for example, an employee leave of absence or an employee who opts for a different method of payment. Insofar as an inactivity is a form of monthly maintenance fee for current employees, this fee is prohibited by the NYSDOL's Opinion Letter.¹⁴ However, often inactivity fees are only triggered after the termination of employment, typically because the employee is no longer receiving deposits on the card. Unfortunately, former employees generally do not receive any additional notification of this fee beyond what they received when they first initiated their payroll card account, and may not be aware of fees newly relevant to them upon separation from their employment. Thirty of the 38 surveyed employers used a program that charged an inactivity fee; in all circumstances this fee could also be applicable to former employees, but none of the surveyed employers provided additional notices to employees upon the termination of the employment relationship informing them of the inactivity fee.

Card Replacement Fee: A card replacement fee is a fee to replace a lost or stolen card. The NYSDOL's Opinion Letter requires the replacement of cards at reasonable intervals without cost to the employee. Over half of employers used programs that provided cardholder employees with at least one free replacement card per year. The remaining employers used programs that charged for replacement cards even though the cards are essential for employees to access their wages. For programs that charged such fees, the fee to replace a card could be as low as \$3.50 or as high as \$15.00, depending on the program. Fees were higher for cards sent via expedited mail, ranging from \$10.00 - \$35.00, depending on the program

¹² See OPINION LETTER RO-08-0001, *supra* note 6 ("...fees for services that are essential for an employee to access his or her wages in full are prohibited in that they deny the employee the full and timely payment of his or her wages.")

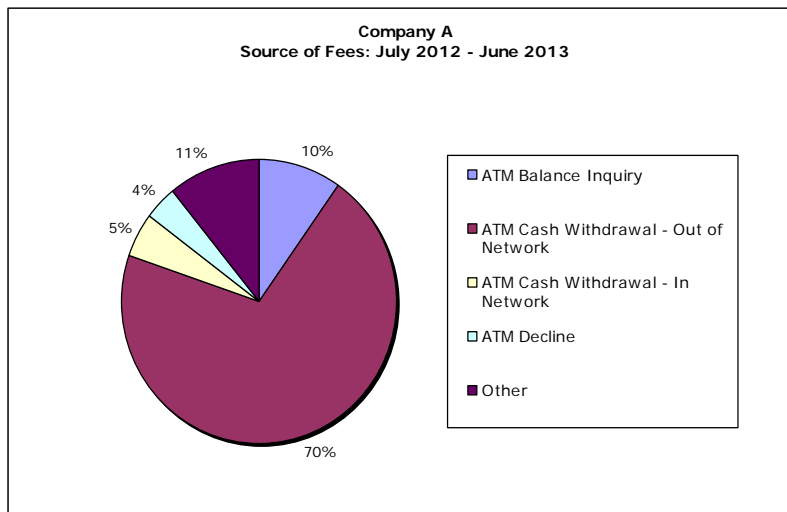
¹³ Some payroll card materials refer to the inactivity fee as a "monthly maintenance fee," as it is in fact a monthly maintenance fee that is triggered after a certain period of non-use. To avoid confusion, this report shall refer to any fee triggered after a certain period of inactivity as an "inactivity fee."

¹⁴ See OPINION LETTER RO-08-0001, *supra* note 6 (prohibiting fees for maintenance of the account).

2. ATM Fees

As previously noted, ATMs are the most common way that cardholder employees access their wages. Nonetheless, employees frequently incur fees for their ATM transactions. In some cases, it is because the payroll card vendor does not offer unlimited, in-network ATM withdrawals; in other programs, it may be that ATM fee information is not adequately disclosed, that the ATMs are not conveniently located for cardholder employees, or that cardholder employees have not been informed of locations of fee-free ATMs. ATM use represents a considerable revenue stream for payroll card vendors. In the case of Company A illustrated in Figure 2, its payroll card vendor received almost \$70,000 in fees for transactions undertaken by fewer than 5,000 cardholder employees from July 2012 through June 2013, and ATM withdrawals made up 75% of this vendor's fees from Company A employees. Total ATM transactions, including balance inquiries and declined ATM transactions, were almost 90% of the fees.¹⁵ The numbers are particularly notable when one considers that the \$70,000 in total fees earned by this vendor comes from the paychecks of workers primarily earning minimum wage-- the equivalent of over 9,000 hours of work at the then-applicable New York State (and current federal) minimum wage of \$7.25 per hour.

FIGURE 2



a. Nature of ATM Fees

Any person -- whether a cardholder employee or a regular bank customer - who uses an ATM has the possibility of incurring at least two different types of fees: (1) the fee assessed by the person's own bank or payroll card provider, and (2) a separate fee assessed by the owner of the ATM. For bank customers, both types of fees can typically be avoided if a person

¹⁵ This number does not include any amounts charged by owners of out-of-network ATMs.

stays within his or her bank's network: the bank does not charge a fee, and the owner of the ATM (in this case, also the bank) does not charge a fee.

This is not always true of payroll card programs. Where the employer's program provides a network of ATMs but does not allow unlimited free withdrawals, cardholder employees are charged a fee by the payroll card vendor if they make more than one ATM withdrawal per pay period, even if they stay within the network. This fee would be in addition to any separate fee assessed by the owner of the ATM. The network only allows the cardholder employee to avoid the second fee.

As an example, 36 out of 38 surveyed employers used a program that offered a network of ATMs, which shall be referred to herein as the "A" Network. However, 18 out of these 36 programs charged cardholder employees a fee if they made more than one ATM withdrawal per pay period, regardless of where the withdrawal was made. If those employees wished to make more than one ATM withdrawal during a pay period, they would be charged a fee by the payroll card vendor ranging from \$.75 - \$3.00 per transaction, depending on their program. In those 18 programs, cardholder employees could then be subject to an *additional* surcharge assessed by the owner or operator of the ATM if they used an ATM outside of the "A" Network. As structured in these 18 programs, use of an ATM within the "A" Network only allows cardholder employees to avoid the second fee -- but they are still charged the first. In the event of an out-of-network ATM withdrawal, a cardholder employee could pay anywhere from \$1.50 to \$6.00 in combined fees (a \$.75 - \$3.00 fee charged by payroll card vendor and a \$.75-\$3.00 fee charged by ATM owner).

b. The "A" Network

All but two employers used payroll card vendors that used the "A" Network as their network of ATMs. The "A" Network is an extensive network with many locations throughout the state, and the network's ATMs are located inside retailers such as convenience stores, pharmacies, or local establishments. There are specific challenges associated with the "A" Network. Unlike networks of bank ATMs that are clearly demarcated by signage for the bank itself, a cardholder employee would not be immediately aware that there was an "A" Network ATM available inside a particular establishment without checking the "A" Network's website, mobile phone application, or approaching the establishment itself. Because the ATMs are located inside business establishments, they can only be accessed during the hours that those establishments are open to the public. Cardholder employees who need to withdraw cash wages during other times would be required to use an out-of-network ATM. Finally, while the "A" Network has a sizeable presence in metropolitan areas, the network has significantly fewer locations in small towns and rural areas,

including certain parts of upstate New York, which may lead to employees using ATMs that are more conveniently located near their homes or places of employment.

c. Insufficient Disclosures

Most employers surveyed for this report did a poor job of providing cardholder employees with information about their network of ATMs, including those employers that used the “A” Network. Typically, the employer or the payroll card vendor’s materials simply listed the network and in some cases, included a link to the network’s website. Employees would be better served with materials that also included clear, easy-to-read information such as a list of locations close to the employer’s business, maps, and hours of operation.

3. Access to Account Information: A Penalty for Workers on the Wrong Side of the Digital Divide or With Limited English Language Proficiency

Research suggests that 37% of adults making under \$30,000 per year do not have access to the internet at home, and 24% of these adults do not have internet access at all.¹⁶ Unfortunately for these individuals, the transition to an electronic payroll has led many payroll card vendors to move away from providing cardholder account information in paper format. Every payroll card vendor used by the surveyed employers provided free account balance information through an automated telephone line and via the internet, but 74% of them charged a fee for paper statements ranging from \$0.50 to \$5.00 per statement per month, or an overall average fee of \$3.00 for monthly paper statements. Of these vendors, few allowed a free one-time paper statement upon request, which means that workers in these payroll card programs had few options for accessing account information in paper format without incurring a fee.

Internet and text messages are increasingly popular means of accessing account information; however, for workers with limited computer or cellular phone access, it can be difficult to find out the exact balance in their accounts or view their transactions without incurring a fee. Payroll card vendors do typically offer an automated phone line for checking balance information, but this may not always be accessible to workers with limited English proficiency.¹⁷ Insufficient access to account information can lead to a high occurrence of fees and, in some cases, overdraft fees, as described in the following section. Inadequate access to account information also inhibits employees' ability to report fraudulent charges.

¹⁶ KATHRYN ZICKUHR, PEW RESEARCH CTR., WHO’S NOT ONLINE AND WHY (Sept. 25, 2013), *available at* http://www.pewinternet.org/~media/Files/Reports/2013/PIP_Offline%20adults_092513_PDF.pdf.

¹⁷ Although most of the surveyed programs provided services in both English and Spanish, none of the programs provided services in any other languages, regardless of the language(s) typically used by the employer to communicate employment-related policies to his or her employees.

A popular and convenient method for employees to access their account information is through a balance inquiry via an ATM, but thirty-two out of thirty-eight payroll card vendors charged cardholder employees an average of \$1.00 for ATM balance inquiries. This leaves a cardholder employee wishing to find out his or her account balance with few fee-free alternatives.

4. Overdraft Fees

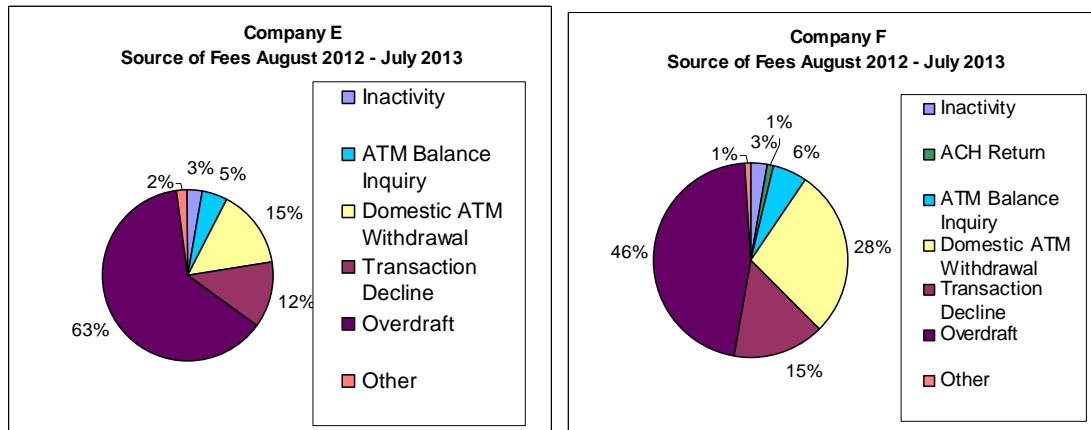
More than one-third of employers used payroll card programs that included overdraft or negative balance fees. An employee who exceeds his or her account balance by \$5.00 may face an overdraft fee of \$25.00, which would typically be paid back automatically within one or two weeks, when the next wage payment is loaded onto the payroll card. In financial terms, that is the equivalent of charging \$25.00 for a two-week (or shorter) \$5.00 loan -- an astronomical rate of interest. An employee making the New York State and federal minimum wage in 2012-2013 would need to work more than three hours to cover the cost of such a fee. Overdraft charges can cost workers hundreds of dollars in fees each year when provided through a payroll card account *or* a bank account. In 2010, the Consumer Financial Protection Bureau found, in a study focused on bank accounts, that consumers who had heavily used overdraft protection in the first half of 2010 and declined it after it became optional in 2010 reduced their overdraft and insufficient fund fees, on average, by more than \$450.00 in the second half of 2010.¹⁸

a. Payroll Card Vendors Receive Substantial Fees from Overdraft Charges

Even more than ATM fees, overdraft fees provide a significant source of revenue for those payroll card vendors that charge such fees. Figure 3 illustrates two employers whose payroll card vendors charge overdraft fees. In both cases, overdraft fees comprised over 40% of the fees assessed by the payroll card vendor; in the case of Company E, overdraft fees and declined balance fees made up 75% of their vendor's revenue. Company F's payroll card vendor received over \$200,000 in overdraft fees alone from August 2012 - July 2013, with an average of 2,570 accounts open each month. This is an average of approximately \$77.82 per worker, or over 10 hours of work per person at the then-applicable New York State (and current federal) minimum wage of \$7.25 per hour. Companies E and F both pay many of their workers at or just slightly above the federal minimum wage.

¹⁸ CONSUMER FIN. PROT. BUREAU, CFPB STUDY OF OVERDRAFT PROGRAMS: A WHITE PAPER OF INITIAL DATA FINDINGS 38 (2013), *available at* http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf.

FIGURE 3



b. Overdraft Fees Are Not Well-Disclosed

It is unclear how effectively workers are informed about the drawbacks of overdraft protection as a general matter, but it is quite clear that certain features of overdraft protection are not adequately disclosed. For example, where there are multiple transactions in a single day and at least one of the transactions exceeds the balance on the account, some banks process the largest charge first.¹⁹ This may lead to multiple overdraft fees as follows: an employee with \$10.00 remaining in the account makes two purchases for \$1.00 each and later in the day, a \$15.00 purchase. The bank may process the \$15.00 charge first, leading to an overdraft fee, and then the two smaller charges are processed, leading to two additional overdraft fees, for a total of \$45.00 in fees for \$12.00 in purchases. These practices are particularly harmful to low-wage workers, who often live paycheck to paycheck. Where these practices take place, they are insufficiently disclosed to cardholders as they are buried within the small text of the cardholder agreement.

Moreover, at least two of the eight payroll card vendors involved in the survey did not follow Federal Reserve rules requiring financial institutions to obtain consumers' consent before enrolling them in overdraft protection.²⁰ These two payroll card vendors charged a "negative balance fee," without first allowing the cardholder employee to opt in.

¹⁹ Halah Touryalai, *Yes, Banks are Reordering Your Transactions and Charging Overdraft Fees*, FORBES (June 11, 2013, 3:54 PM), <http://www.forbes.com/sites/halahtouryalai/2013/06/11/yes-banks-are-reordering-your-transactions-and-charging-overdraft-fees/>.

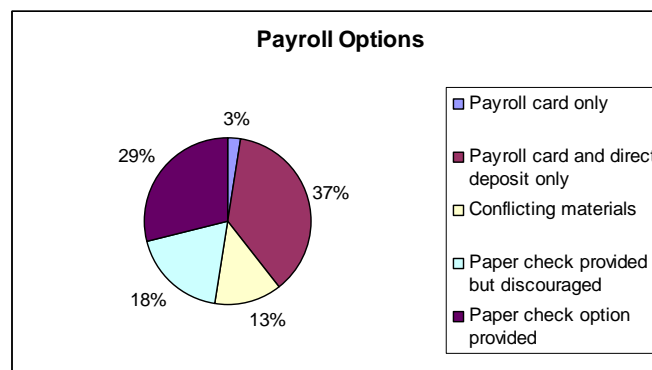
²⁰ Among its provisions, Regulation E includes the requirement that any overdraft protection must be provided to cardholders on an opt-in basis. Regulation E, 12 C.F.R. § 205.17 (2010).

C. Employees Frequently Are Not Offered True Alternatives to Payroll Cards

When employers offer their employees payment of wages through a payroll card, their employees without bank accounts, or “unbanked” employees, are frequently given no other alternative but to agree to receive wages on the payroll card. Requiring employees to receive wages on a payroll card is not limited to the unbanked, however; one of the surveyed employers actually required *all* workers to be paid by payroll cards, even those with bank accounts who might have otherwise chosen direct deposit. The remaining employers did offer direct deposit in addition to payroll cards, although workers without bank accounts are not able to take advantage of this option.

Nineteen of the surveyed employers did not offer employees the opportunity to be paid wages by a third option, such as a traditional paper check, or provided conflicting information, *e.g.*, the employer stated it provided paper checks to employees, but the materials provided to employees did not list this option. The remaining eighteen employers offered employees a traditional paper check, although at least seven of these presented employees with information that discouraged or created obstacles to the selection of a paper check option, calling into question the level of consent that was obtained.²¹ Figure 4 depicts the various payment alternatives offered by the employers surveyed for this report.

FIGURE 4



At least 33 out of the 38 employers surveyed for this report used a payroll card program that offered “convenience checks,” or blank checks that are filled out by employees and drawn upon their payroll card accounts.²² Several employers have pointed to convenience checks as evidence of a paper check option available to employees. Of the 33 employers that used payroll card programs with convenience checks, 14 failed to offer any paper check option at all. An additional eight employers out of the 33 purported to

²¹ As an example, several employers offered new hires the option of selecting payment of wages via direct deposit or payroll cards through an online portal. If the employee wanted to receive wages via a paper check, he or she could not select that option and had to speak to a manager instead.

²² The determination that a particular employer’s payroll card program offered convenience checks was made if the convenience check option was explicitly stated in the materials submitted by the employer in its response to the OAG.

offer a paper check option but either discouraged that selection or provided materials with conflicting information. Of the remaining five employers whose materials did not explicitly state the availability of convenience checks, one failed to offer any paper check option at all and four offered a paper check option but discouraged that option or presented conflicting materials.

Convenience checks can be cumbersome for employees. Once employees enroll in the payroll card program, they usually receive a small number of convenience checks in the mail along with their cards, typically two to six checks. If employees require additional convenience checks, they must call their payroll card vendor or visit an online portal to order additional checks. Then they must wait for the checks to arrive and must repeat this process again when the checks run out.

In order to access funds with a convenience check, the employee must first determine the amount that can be drawn with the check. Unlike a traditional check that is drawn upon a bank account, convenience checks have a number of restrictions. Often, they can only be made out in the exact amount --to the penny-- of the employee's last wage statement or the exact balance of the employee's account. Employees are required to confirm this amount and, depending on the program, may do so by contacting customer service or accessing their latest wage statement electronically. Employees typically must then obtain a second piece of information, an authorization code, by calling a phone number indicated in the instructions accompanying the check. This means that a worker usually will be required to make at least one, and in some cases two phone calls before he or she can fill out the check. Most convenience checks require an *additional* number -- an account number, often the account number associated with the payroll card -- to be included on the check as well.²³ Once the employee has obtained the authorization code, the amount for which the check will be written cannot be changed. The employee must transcribe the code, account number, and the correct dollar amount onto the check and present it at a bank or check cashing establishment to receive the wages. The directions that accompany convenience checks are complex and typically presented in small font. If the employee does not follow these steps correctly, some programs charge up to \$25.00 for a returned check.

For workers with limited financial and literacy skills, this process can be significantly cumbersome, time-consuming, and confusing. Presumably in part for these reasons, at least one state has expressly determined that it is the employer's obligation to pay employees' wages in a timely manner, and that convenience checks impermissibly transfer the responsibility for issuing a paycheck to employees who are not otherwise responsible for payroll preparation functions.²⁴

²³ See, e.g., *How Do Comchecks Work?*, RCG LOGISTICS, <http://www.rcgauto.com/blog/how-do-comchecks-work/> (offering instructions on how to use convenience checks offered by one vendor) (last visited June 11, 2014).

²⁴ Montana's Department of Labor has expressly stated that convenience checks impermissibly transfer payroll responsibilities onto the worker. See *Electronic Wage Payments in Montana FAQ* available at <http://erd.dli.mt.gov/labor-standards/electronic-wage-payment-faqs> (last visited June 12, 2014).

The “inconvenience” of these checks is evident in their low rate of use among cardholder employees. Although the OAG did not request information on the use of convenience checks in its letters to the surveyed employers, three companies voluntarily included this information in their responses to the OAG. Combined, more than 6,000 employees in New York State were enrolled in payroll card programs through these three companies from July 1, 2012 through June 30, 2013, but the companies reported a collective total of only four employees ever using convenience checks during this period.

IV. Current Legal Standards Applicable in New York State and Their Limitations

A number of laws firmly constrain what employers may do when they choose to pay wages through a payroll card program. Employers must ensure that their programs do not contain provisions that violate the law. Where a fee structure or other aspect of the program is set by the payroll card vendor and not the employer, it is the employer’s responsibility to choose a vendor that complies with the law or to negotiate the terms and conditions of their agreement accordingly.

A. Prohibited Fees

Section 191 of the New York Labor Law requires the timely payment, in full, of an employee’s wages; therefore, employers must provide workers with at least one fee-free way to access their full wages each pay period.²⁵ As discussed earlier in this report, there are certain fees that are essential to employees’ access to wages and prohibited under the NYSDOL’s interpretation of Section 191, including maintenance fees, closing fees, and fees to replace cards at reasonable intervals.²⁶ The Attorney General’s Payroll Card Act would prohibit other types of fees that are equally problematic for workers, including account loading fees, in-network ATM fees, overdraft fees, and fees to access account information.

B. Consent

Section 192(1) of the Labor Law provides that “[n]o employer shall without the advance written consent of any employee directly pay or deposit the net wages or salary of such employee in a bank or other financial institution.” This language encompasses the payment of wages via a payroll card program.²⁷ The law protects employees who do not wish to participate in electronic payroll, and requires employers to obtain advance written consent before paying an employee’s wages by payroll cards.

Several employers and payroll card vendors have indicated that convenience checks should be accepted as a substitute for paper checks for those employees seeking to opt out of electronic payment. This position raises significant legal issues under Section 192(1). It is problematic because convenience checks operate not particularly like a paper check, but rather in much the same way as a payroll card, in that the net wages of

²⁵ See N.Y. LAB. LAW § 191.

²⁶ OPINION LETTER RO-08-0001, *supra* note 6.

²⁷ *Id.*

an employee are directly deposited in a bank or other financial institution via a payroll card account. Accordingly, the Section 192(1) prohibition against depositing wages in a bank or financial institution should apply to convenience checks.²⁸ The position also raises significant policy issues because, quite simply, they are “inconvenient.” As previously noted, when given the option to use convenience checks, only four out of over 6,000 cardholder employees chose this option over a one-year period.

Attorney General Schneiderman’s Payroll Card Act would strengthen the existing consent provisions within the Labor Law. It would require an employer to disclose certain information prior to obtaining employee consent, including card terms and conditions in the language that the employer typically uses to communicate employment-related policies to its employees. The law would allow employees to withdraw previously-granted consent and to be paid through another method within two pay periods. The law would also require employers to offer employees the alternative of payment via a traditional paper check *in addition to* payroll cards and direct deposit and would specifically provide that convenience checks alone could not fulfill the requirement of a traditional paper check option.

C. Unlawful Deductions

While it is permissible for a third party bank or financial institution to charge fees for non-essential services under §191 of the New York Labor Law, it is impermissible for these funds to be remitted, directly or indirectly, to the employer.²⁹ Section 193 of the New York Labor Law prohibits deductions from an employee’s wages by an employer except where either specifically authorized by law or authorized by the employee in writing, for the benefit of the employee, or for other specified purposes enumerated in the statute. None of the fees related to the use of a payroll card would be permissible under §193 if they were charged directly by the employer (as opposed to the vendor) because they are not authorized by the statute or for the benefit of the employee.

A review of the contracts between the surveyed employers and their payroll card vendors revealed that some employers receive a per-employee fee or a signing bonus from the vendor after a certain number of employees sign up for the card. None of the contracts indicated that these fees or bonuses were directly correlated to the payroll card fees incurred by employees. Nonetheless, these rewards programs may violate §193 if the employer, directly or indirectly, receives a portion of the fees remitted to the payroll card

²⁸ At least two government agencies have found that wages that are deposited into a payroll card account should be treated as “deposits” for legal purposes. FDIC NEW GENERAL COUNSEL’S OPINION NO. 8, STORED VALUE CARDS AND OTHER NONTRADITIONAL ACCESS MECHANISMS, FIL-129-2008 (Nov. 13, 2008), available at <http://www.fdic.gov/news/news/financial/2008/fil08129.html>. In 2008, the California Division of Labor Standards Enforcement (DLSE) issued an Opinion Letter noting, in reference to direct deposit and payroll cards, “in both described programs, the employer directly deposits payroll into an employee’s account established at the program bank.” See CAL. DEP’T OF INDUS. RELATIONS DIV. OF LABOR STANDARDS ENFORCEMENT OPINION LETTER 2008.07.07, at 6 (July 7, 2008), available at <https://www.dir.ca.gov/dlse/opinions/2008-07-07.pdf>.

²⁹ See *Angello v. Labor Ready, Inc.*, 7 N.Y.3d 579, 584 (2006) (discussing unlawful deductions from an employee’s wages under § 193).

vendors, and Attorney General Schneiderman's Payroll Card Act would expressly prohibit this type of practice.

D. Account Information

Federal law, through Regulation E, sets forth the obligations of financial institutions related to electronic funds transfers, including payroll card accounts.³⁰ Among its many provisions, Regulation E contains rules about the types of account information that must be made available to cardholders. Section 205.18(b) of the regulation requires a financial institution that issues payroll cards to provide consumers with periodic monthly statements containing their account transaction information or, in the alternative, make information available through the following means:

- (i) The consumer's account balance, through a readily available telephone line;
- (ii) An electronic history of the consumer's account transactions, such as through an Internet Web site, that covers at least 60 days preceding the date the consumer electronically accesses the account; and
- (iii) A written history of the consumer's account transactions that is provided promptly in response to an oral or written request and that covers at least 60 days preceding the date the financial institution receives the consumer's request.³¹

As stated earlier in this report, 74% of employers used vendors that charged for monthly paper statements, with fees ranging from \$0.50 to \$5.00 per statement per month. Every vendor used by the surveyed employers complied with the first two prongs of Section 205.18(b) by providing free account balance information through an automated phone line and via the internet. Nonetheless, employers frequently used vendors that failed to provide, at no cost to the employee, the third item listed in §205.18(b) --paper statements upon request-- even though these vendors also charged for monthly paper statements. Although Regulation E does not specifically address whether fees may be assessed for account information required, the Federal Reserve Board has provided some guidance on this issue. The Federal Reserve Board cautioned that "...charging fees to consumers who make occasional requests for written history could have a chilling effect on consumers' ability to obtain information about their transactions and thus, to exercise their error resolution rights."³² It is also in the interest of the employer and the payroll card vendor to provide ready account information access to cardholder employees, as this allows them to promptly identify and dispute unauthorized or fraudulent transactions. Attorney General Schneiderman's Payroll Card Act would require all three of these alternatives to be provided to cardholder employees at no cost.

³⁰ 12 C.F.R. §205.18(a) (2007).

³¹ 12 C.F.R. §205.18(b) (2007).

³² Requirements for Financial Institutions Offering Payroll Card Accounts, 71 Fed. Reg. 51444 (Aug. 30, 2006).

V. Policy Recommendations - Blueprint for Legislation

Attorney General Eric Schneiderman has proposed the Payroll Card Act, which, if passed, would increase protections for workers, clarify ambiguities in the law, and ensure that payroll cards offer a convenient and beneficial method for workers to access their pay. The Payroll Card Act would set explicit and specific baseline requirements for employers wishing to pay wages through payroll cards. This proposal would benefit not only employees, by protecting their hard-earned wages, but also employers, who will have clear guidelines regarding what is and is not permitted and therefore will be able to use payroll cards without unknowingly violating state law.

The Payroll Card Act would protect workers' wages and provide clarity to employers concerning payment of wages via payroll cards by enacting the following provisions:

Mandating that employers obtain the employee's written, informed consent to participate in a payroll card program. The Payroll Card Act would require employers to obtain consent without intimidation, coercion, or fear of adverse action by the employer for refusal to accept payment via a payroll card. The employer could not make participation in a payroll card program a condition of hire or continued employment.

Requiring employers to provide adequate notice of the terms and conditions of the card, including any and all fees, *before* the employee selects a wage payment method. The Payroll Card Act would require fees to be disclosed on a clear, conspicuous, and itemized list in at least 14-point font. Under the Act, employees would have to be provided with a plain language description of all of the methods available to access wages, including the locations of any free ATMs. The notice would also have to provide employees with information on how to check their balance and close their accounts without incurring a fee, as well as any time limitations to dispute a charge or expenditure to an employee's payroll card account. All information would be required to be provided in the language that the employer typically uses to convey employment-related information to the employee.

Requiring employers to select a payroll card vendor that provides one free network of ATMs, and also a limited number of free out-of-network transactions each pay period. Because employees overwhelmingly withdraw their wages and check balances via an ATM, the Payroll Card Act would require employers to select a program that includes at least one network of ATMs that offers unlimited withdrawals and balance inquiries at no cost to the cardholder employee. The network would have to provide reasonably convenient proximity and access in relation to the employee's place of employment or place of residence. The Payroll Card Act also proposes that employees be provided with a limited number of free out-of-network transactions.

Prohibiting employers from using a payroll card vendor that charges a fee for services that are essential to employees' access to their wages. These include:

- Fees for withdrawing the entire net pay for each pay period;
- Inactivity, dormancy, or other fees that result from card non-use;
- Account maintenance or monthly maintenance fees;
- Initiation, participation, loading, or other fees to receive wages;
- Account closing fees; or
- A fee for a replacement card if it is the first lost or stolen card reported within 12 months.

Prohibiting employers from using a payroll card vendor that charges overdraft or negative balance fees. Overdraft fees can cost cardholders hundreds of dollars each year. The Payroll Card Act would prohibit employers from selecting a payroll card program that includes such a fee.

Requiring employers to select a payroll card vendor that provides employees with ample access to account information. Under the Payroll Card Act, each cardholder employee would have to be provided with free periodic monthly statements. In the alternative, the employer could select a program that provides the employee with access, free of charge, to:

- A telephone line available 24 hours per day, 7 days per week. Such a telephone line could be automated but with capacity in the language(s) the employer normally uses to communicate employment-related policies to its employees;
- An online account center or information service providing free access to transaction history for the past 24 months; and
- A non-electronic, written history of the cardholder employee's account transactions to be provided promptly in response to an oral or written request and that would cover at least 60 days preceding the date that a payroll card issuer received the employee's request.

Mandating that traditional paper checks be provided to those employees who choose not to receive wages via a payroll card or direct deposit. Under the Payroll Card Act, employees would have to be given the option to receive a traditional paper check if they did not wish to participate in electronic payroll. Furthermore, information about payroll card fees would have to be disclosed before the employee was required to make a selection.

Prohibiting employers from using a payroll card vendor that charges fees for transactions commonly undertaken by cardholders. In order to afford employees the convenience associated with debit cards, the Payroll Card Act would exempt the following transactions from fees. These include:

- ATM balance inquiries;
- PIN or signature debit transactions;
- Signature credit transactions; or
- Declined transactions.

Requiring that employers select a payroll card vendor that provides free customer service. The employer would be required to ensure that employees could access customer service without a charge.

Mandating that, at the termination of the employment relationship, employers provide the cardholder employees with written notice regarding the terms and conditions of the card, including any fees that apply to former employees. The notice would have to inform employees that they could, at no cost, terminate the payroll card and receive the full balance payable by check. It would also be required to contain the terms and conditions, including any and all fees and costs, related to maintaining a payroll card account upon the termination of the employment relationship in at least 14-point font.

Prohibiting an employer from receiving from the payroll card vendor any portion of payroll card-related fees paid by its employees. The Payroll Card Act would further prohibit any employer from receiving compensation based upon the number of employees that consent to be paid via payroll card. These types of arrangements can result in coercion or pressure on employees to sign up for the card against their will.

Requiring employers to respect employee privacy. Under the Payroll Card Act, cardholders' personal or transactional information could not be used by payroll card vendors or disclosed to third parties for marketing purposes unless required by law or authorized by the cardholder. Information from employee transactions could not be accessed by employers or used as a basis for adverse employment actions.

The requirements proposed in the Payroll Card Act would protect employees' hard-earned wages while still allowing payroll card programs to function effectively. And materials received by the OAG illustrate that a payroll card vendor can indeed offer payroll cards with few fees and remain profitable. For example, one employer's program allowed for free in-network ATM withdrawals, Visa member bank cash withdrawals, balance inquiries at any ATMs, point-of-sale transactions, live customer service, paper statements, and lost/stolen card replacement, among other services. Under this employer's program, essentially all of the basic services were provided at no cost to the employee, with the exception of out-of-network ATM withdrawals.

VI. Conclusion

While payroll cards can be beneficial in numerous ways, they also have drawbacks for many low-wage workers, especially the 24% of low-income adults who lack internet access. Attorney General Schneiderman's Payroll Card Act would protect workers' earnings while providing clear guidance to employers about the rules of the game. Attorney General Schneiderman's proposal can also serve as a model for other states as they grapple with how best to balance the need to protect the earnings of the workforce while also benefiting from the best aspects of new technology.