

VOLUME 38, ISSUE 24

ISSUE DATE: DECEMBER 18, 2006

**RULE PROPOSALS**

**LABOR AND WORKFORCE DEVELOPMENT  
WAGE AND HOUR COMPLIANCE**

*38 N.J.R. 5311(a)*

**Proposed Amendments: N.J.A.C. 12:55-1.2 and 2.4**

**Wage Payments**

**Time and Mode of Payment**

Authorized By: David J. Socolow, Commissioner, Department of Labor and Workforce Development.

Authority: *N.J.S.A. 34:1-20, 34:1A-3(e), 34:11-4.4 and 34:11-4.11.*

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2006-410.

A **public hearing** on the proposed amendments will be held on the following date at the following location:

Tuesday, January 16, 2007  
10:00 A.M. to 12:00 Noon  
N.J. Department of Labor and Workforce Development  
John Fitch Plaza  
13th Floor, Auditorium  
Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 292-2789 if you wish to be included on the list of speakers.

Submit written comments by February 16, 2007 to:

David Fish, Regulatory Officer  
Office of Legal and Regulatory Services  
N.J. Department of Labor and Workforce Development  
PO Box 110 - 13th Floor  
Trenton, New Jersey 08625-0110  
Fax to: (609) 292-8246

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The agency proposal follows:

## Summary

The Department is proposing amendments to *N.J.A.C. 12:55-1.2* and *2.4* which would (1) require that an employer bear the burden of any fees associated with the return of a payroll check due to insufficient or uncollected funds, (2) allow for the payment of wages to an employee through direct deposit and through the use of a payroll debit card, and (3) permit employers to establish regular paydays less frequently than semimonthly for a certain class of employees, provided that those employees are paid in full at least once each calendar month on a regularly established schedule.

The Department is proposing the inclusion of definitions within *N.J.A.C. 12:55-1.2* for the following terms: "check-deposit-return fee," "direct deposit," "financial institution," and, "payroll debit card." Each of these terms is used within the proposed amendments to *N.J.A.C. 12:55-2.4*, discussed in detail below.

The Department is proposing new *N.J.A.C. 12:55-2.4(g)*, which would expressly state that a "check-deposit-return fee" is among the payroll-related charges for which an employer is responsible. Existing *N.J.A.C. 12:55-2.4(e)* already indicates that when a fee is charged for the cashing of a payroll check, the employer shall bear the burden of the fee. However, the Department has received a number of inquiries as to whether "a fee charged for the cashing of a payroll check" includes a fee assessed when the payroll check is returned due to insufficient or uncollected funds (in other words, when the payroll check has "bounced"). The Department does, in fact, consider such a fee to be included among the payroll-related fees for which an employer is responsible. Therefore, the Department is proposing that *N.J.A.C. 12:55-2.4(g)1* be added so as to reflect that an employer is responsible for paying a check-deposit-return fee that is assessed when a payroll check has been returned due to insufficient or uncollected funds.

In addition, since an employee who uses direct deposit will often have check-deposit-return fees automatically deducted from his or her account by his or her bank, the Department is proposing that *N.J.A.C. 12:55-2.4(g)2* be added so as to indicate the manner in which such fees (levied against those employees using direct deposit) shall be reimbursed by the employer (that is, how quickly the employer must reimburse the fee and that the fee shall not be paid to the employee as wages).

The Department is also proposing amendments to *N.J.A.C. 12:55-2.4(d)* and a new *N.J.A.C. 12:55-2.4(h)*, which would acknowledge, pursuant to *N.J.S.A. 34:11-4.2a*, that in lieu of paying wages directly to an employee by cash or by payroll check, an employer may arrange with a financial institution or financial institutions to pay the wages of an employee by direct deposit. Also in accordance with *N.J.S.A. 34:11-4.2a*, proposed new *N.J.A.C. 12:55-2.4(h)* would require that in order to pay an employee by direct deposit, the employer must first obtain written consent of the employee, must ensure that the employee's wages so deposited would be subject to withdrawal and other disposition by the employee to the same extent and in the same manner as if such deposit had been made directly to the employee by cash or payroll check, and must ensure that the employee shall, on timely notice to the employer, be permitted by the employer to discontinue the direct deposit arrangement. The Department would additionally require that the written consent mentioned above be obtained by the employer without intimidation, coercion, or fear of discharge or reprisal for refusal to accept the direct deposit arrangement, that the written consent not be made a condition of hire or continued employment, and that the employee must be furnished with a statement of deductions made from his or her wages for each pay period such deductions were made. The latter requirement regarding the statement of deductions is in accordance with *N.J.S.A. 34:11-4.6c*. The former requirements (those pertaining to the nature of the consent obtained by the employer) are not contained explicitly in the law. However, the Department believes that their inclusion within the rules is vital, since in order for consent to be meaningful it must be obtained without coercion or intimidation.

In addition, the Department is proposing new *N.J.A.C. 12:55-2.4(i)* so as to allow an employer, in lieu of paying wages directly to an employee by cash or payroll check, to pay the wages of an employee by causing the amount of such employee's wages to be deposited in a payroll debit card account. The use of payroll debit card accounts for the payment of wages is a relatively new practice. However, a number of states, including Pennsylvania, Delaware, Maine, Maryland, Michigan, and Virginia, have enacted laws or adopted regulations to expressly permit this practice.

The Department considers the use of payroll debit cards to be akin to the payment of wages through direct deposit, as permitted under *N.J.S.A. 34:11-4.2a*. Therefore, proposed *N.J.A.C. 12:55-2.4(i)* would impose the same conditions upon the use by employers of payroll debit cards as would be imposed by proposed *N.J.A.C. 12:55-2.4(h)* for the use by employers of direct deposit. Specifically, proposed *N.J.A.C. 12:55-2.4(i)* would require that the employee shall first consent in writing to the deposit of his or her wages in a payroll debit card account, that the consent must be obtained by the employer without intimidation or coercion, that the consent must not be made a condition of hire or continued employment, that the employee be permitted to withdraw his or her wages in full, in cash, without any fee and without any difficulty, that the employee be permitted to transfer his or her wages in full, without any fee and without difficulty

from the payroll debit card account to a personal bank account, that the employee be furnished with a statement of deductions made from his or her wages for each pay period such deductions were made, and that the employee must be permitted, on timely notice to the employer, to rescind his or her consent and, thereby, terminate the payment of wages by payroll debit card.

The Department is also proposing new *N.J.A.C. 12:55-2.4(j)*, which would state the general rule, under *N.J.S.A. 34:11-4.2*, that every employer shall pay the full amount of wages due his or her employees at least twice during each calendar month, and new *N.J.A.C. 12:55-2.4(k)*, which would set forth the exception to the general rule, namely, that an employer may establish regular paydays less frequently than semimonthly for employees who are exempt from overtime under *N.J.A.C. 12:56-7*, provided that the employee must be paid in full at least once each calendar month on a regularly established schedule.

*N.J.S.A. 34:11-4.2* already states that an employer may establish regular paydays less frequently than semimonthly for "bona fide executive, supervisory and other special classifications of employees." The Department is proposing new *N.J.A.C. 12:55-2.4(k)* so as to make clear that it considers the full range of employees for whom an employer may establish paydays less frequently than semimonthly, including the "other special classifications of employees" mentioned in *N.J.A.C. 34:11-4.2*, to consist of those employees who satisfy the overtime exemption criteria set forth at *N.J.A.C. 12:56-7*.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements, pursuant to *N.J.A.C. 1:30-3.3(a)5*.

### **Social Impact**

The proposed amendments to *N.J.A.C. 12:55-1.2* and *2.4* regarding the payment by employers of check-deposit-return fees would have a positive social impact in that they would eliminate any possible confusion among both employees and employers as to whether the Department considers check-deposit-return fees to be among the types of fees for which the employer is responsible. It has been the Department's practice, under existing *N.J.A.C. 12:55-2.4*, to consider such fees to be among the "fee[s] charged for the cashing of a payroll check" for which "the employer shall bear the burden." It is in the best interests of all concerned that the rules be amended so as to explicitly state this. Similarly, the proposed amendments to *N.J.A.C. 12:55-2.4* regarding an employer's right to establish paydays less frequently than semimonthly for certain classes of employees would have a positive social impact in that they would eliminate any possible confusion as to what constitutes "bona fide executive, supervisory and other special classifications of employees" for purposes of determining which employees must be paid twice per month and which employees may be paid less frequently than semimonthly.

The proposed amendments to *N.J.A.C. 12:55-1.2* and *2.4* pertaining to payment of wages through direct deposit and by use of payroll debit cards would also have a positive social impact. Specifically, proposed new *N.J.A.C. 12:55-2.4(h)* would reflect what already appears at *N.J.S.A. 34:11-4.2a* with regard to the permissibility of wage payments by direct deposit. Since existing *N.J.A.C. 12:55-2.4(d)* states that all wage payments shall be made in either cash or by payroll check, it is important that the statutory exception for use of direct deposit be included within *N.J.A.C. 12:55-2.4*. It is also important that the statutory conditions for use of direct deposit by employers be set forth clearly in the rules. Those conditions appear at proposed new *N.J.A.C. 12:55-2.4(h)1* through 6.

Similarly, proposed new *N.J.A.C. 12:55-2.4(i)* would benefit both employers and employees in that it would explicitly acknowledge the use of payroll debit cards as a type of direct deposit under the law. Proposed new *N.J.A.C. 12:55-2.4(i)*, like proposed new *N.J.A.C. 12:55-2.4(h)*, would also set forth conditions for the use by employers of payroll debit cards. Those conditions, proposed at *N.J.A.C. 12:55-2.4(i)1* through 6, are consistent with *N.J.S.A. 34:11-4.2a* and are intended to protect employees.

### **Economic Impact**

The proposed amendments pertaining to the payment by employers of check-deposit-return fees could arguably have a negative economic impact upon employers who maintain that the existing law and rules do not require that employers pay such fees. However, the Department has traditionally considered check-deposit-return fees to be among those fees for which the employer is currently responsible under *N.J.A.C. 12:55-2.4(e)*, as a "fee [ ] charged for the cashing of a payroll check." The proposed amendments simply eliminate any confusion as to this existing practice.

Similarly, employees should not be affected economically by the proposed amendments. However, whereas prior to the proposed amendments, an employee might have experienced some difficulty asserting his or her right to be free from the payment of such fees, in the event that the proposed amendments are ultimately adopted as rule, that employee would, it is hoped, no longer experience such difficulties.

The proposed amendments pertaining to the payment of wages by direct deposit and payroll debit cards should have a positive economic impact on both employers and employees. These amendments acknowledge and permit the use of improvements in technology regarding the payment of wages, while incorporating requirements and conditions which would protect the interests of employees. The Department believes that the proposed amendments strike the appropriate balance between being business friendly and protecting the rights of workers. The use of direct deposit and payroll debit cards eliminate many of the employer expenses associated with the production and distribution of payroll checks. Direct deposit and payroll debit cards also benefit employees in that they provide effective and easy means for many employees to receive their wages.

The proposed amendments regarding an employer's right to establish paydays less frequently than semimonthly for certain classes of employees would have a positive economic impact upon employers who would be able to limit employer expenses associated with the production and distribution of payroll checks to affected employees. Those same amendments would have no economic impact upon affected employees who, under the proposed amendments, would continue to be paid precisely the same amount of money in wages, but, at worst, would receive their paychecks once per month, rather than twice per month.

### **Federal Standards Statement**

The proposed amendments are governed by *N.J.S.A. 34:11-4.1* et seq. and are not subject to any Federal standards or requirements. Therefore, a Federal standards analysis is not required.

### **Jobs Impact**

The proposed amendments would have no impact on either the generation or loss of jobs.

### **Agriculture Industry Impact**

The proposed amendments would have no impact on the agriculture industry.

### **Regulatory Flexibility Analysis**

The proposed amendments would impose no reporting or recordkeeping requirements on small businesses as that term is defined in the Regulatory Flexibility Act, *N.J.S.A. 52:14B-16* et seq. With regard to compliance requirements, as indicated in the Summary above, all employers, including small businesses, would be required to pay any check-deposit-return fees associated with the payment of wages. Moreover, where an employer wishes to use either direct deposit or payroll debit cards for the payment of wages, the employer would be required to comply with the conditions set forth at proposed new *N.J.A.C. 12:55-2.4(h)1* through 6 (direct deposit) and *N.J.A.C. 12:55-2.4(i)1* through 6 (payroll debit cards). As indicated within the Economic Impact above, it is not anticipated that the proposed amendments would have any potential adverse economic impact on businesses, including small businesses. The only potential cost to small businesses resulting from the proposed amendments would be the payment of check-deposit-return fees, which the Department already considers to be among the payroll-related charges for which all employers, including small businesses, are responsible. The other amendments could only lessen the cost burden on small businesses, decreasing payroll expenses by permitting the use of alternative wage payment methods such as direct deposit and payroll debit card accounts and allowing for the payment of exempt workers once per month rather than once every two weeks. Furthermore, the proposed amendments would not require the use of professional services.

### **Smart Growth Impact**

The proposed amendments would not have an impact on the achievement of smart growth and the implementation of the State Development and Redevelopment Plan.

**Full text** of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

12:55-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

...

**"Check-deposit-return fee" means a charge which results from a payroll check having been returned due to insufficient or uncollected funds.**

...

**"Direct deposit" means payment of the wages of an employee by causing the amount of such employee's wages to be deposited in an account or accounts maintained in a financial institution or financial institutions in the name of the employee.**

...

**"Financial institution" means any State-chartered or Federally-chartered institution authorized to accept deposits in New Jersey.**

...

**"Payroll debit card" means a magnetically encoded card issued by a financial institution, which provides an employee with the means of obtaining the full amount of all wages earned in a pay period in a form that is equivalent to payment in lawful money of the United States (that is, cash), payment by check or payment by direct deposit.**

12:55-2.4 Time and mode of payment

(a)-(c) (No change.)

(d) [Payment] **Except under the circumstances set forth in (h) and (i) below, payment** of wages shall be in lawful money of the United States or with checks drawn on [banking] **financial** institutions where suitable arrangements are made for the cashing of such checks by employees without difficulty and for the full amount for which they were drawn.

(e)-(f) (No change.)

**(g) The employer shall be responsible for payment of check-deposit-return fees.**

**1. When an employee with direct deposit has his or her account debited with a check-deposit-return fee, the employer shall reimburse the employee as soon as possible, but no later than the next regularly scheduled payday,**

**2. Reimbursement by the employer under (g)1 above shall be for the full amount of the check-deposit-return fee and shall not be paid to the employee as wages.**

**(h) In lieu of paying wages directly to an employee in the manner prescribed in (d) above, an employer may arrange with a financial institution or financial institutions to pay the wages of an employee by direct deposit, provided that all of the following conditions are met:**

**1. The employee shall first consent in writing to the direct deposit of his or her wages;**

**2. Consent under (h)1 above shall be obtained by the employer without intimidation, coercion, or fear of discharge or reprisal for refusal to accept the direct deposit arrangement;**

**3. Consent under (h)1 above shall not be a condition of hire or continued employment;**

**4. The employee's wages so deposited shall be subject to withdrawal and other disposition by the employee to the same extent and in the same manner as if such deposit had been made directly by the employee under (d) above;**

**5. The employee shall be furnished with a statement of deductions made from his or her wages for each pay period such deductions were made; and**

**6. The employee shall, on timely notice to the employer, be permitted by the employer to elect not to have his or her wages deposited in the manner prescribed in this subsection and to be paid his or her wages directly in the manner provided under (d) above or as provided under (i) below.**

**(i) In lieu of paying wages directly to an employee in the manner prescribed in (d) above, an employer may pay the wages of an employee by causing the amount of such employee's wages to be deposited in a payroll debit card account, provided that all of the following conditions are met:**

**1. The employee shall first consent in writing to the deposit of his or her wages in a payroll debit card account;**

**2. Consent under (i)1 above shall be obtained by the employer without intimidation, coercion, or fear of discharge or reprisal for refusal to accept the payroll debit card account deposit arrangement;**

**3. Consent under (i)1 above shall not be a condition of hire or continued employment;**

**4. The employee shall be permitted, using the payroll debit card, to both:**

**i. Withdraw his or her wages in full, in lawful money of the United States (that is, in cash) without any fee and without difficulty; and**

**ii. Transfer his or her wages in full, without any fee and without difficulty, from the payroll debit card account to an account maintained in a financial institution in the name of the employee;**

**5. The employee shall be furnished with a statement of deductions made from his or her wages for each pay period such deductions were made; and**

**6. The employee shall, on timely notice to the employer, be permitted by the employer to elect not to have his or her wages deposited in the manner prescribed in this subsection and to be paid his or her wages directly in the manner provided under (d) above or in the manner provided under (h) above.**

**(j) Except under the circumstances set forth in (k) below, an employer shall pay the full amount of wages due his employees at least twice during each calendar month, on regular paydays designated in advance by the employer.**

**(k) An employer may establish regular paydays less frequent than semimonthly for employees who are exempt from overtime under N.J.A.C. 12:56-7, provided that the employee shall be paid in full at least once each calendar month on a regularly established schedule.**