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DATE: October 11, 2016

TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Managers, Human Resources Directors and Controllers

FROM: Kane Kessler, P.C.
[Labor and Employment Practice Group](#)

RE: **New York Issues Final Regulations on Wage Payment Methods**

On September 7, 2016, the New York State Department of Labor (“DOL”) published final regulations that clarify the law regarding certain wage payment methods, including direct deposit of wages and payroll debit cards. The regulations become effective on March 7, 2017.

Direct Deposit

Under New York law, employers are permitted to pay wages by direct deposit but only if the employee gives consent in writing. Consent is not required from employees who qualify as bona fide executive, administrative, or professional employees and whose earnings are in excess of \$900 a week.

The new regulations require employers to provide a written notice of the terms and conditions of payment before paying wages by direct deposit, and the employee’s written 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.” Employees have the right to revoke the consent. The DOL states in its comments to the new law that it intends to publish templates of the required written notice, which will contain all of the information necessary for compliance with the law. We will distribute such templates as soon as they are available.

Payroll Debit Card

New York also permits employers to use payroll debit cards as a method of wage payment so long as the employee is provided with the terms and conditions, and so long as the employee provides written consent, to such method of payment at least seven days prior to the employer taking any action to issue payment by payroll debit card. Additional requirements under the regulations include:

- **Local access to a no fee ATM:** Employers must ensure that the employee has local access to at least one automated teller machine that offers withdrawals at no cost to the employee. Local access is

defined as being located “within a reasonable travel distance” to the employee’s home or work and access that is without “unreasonable restraint by the employer or its agent”;

- **No-fee access to total amount of wages:** Employers must ensure that at least one method is available for employees to withdraw up to the total amount of wages for each pay period or balance remaining on the payroll debit card without incurring a fee;
- **Debit card cannot be linked to any form of credit:** Employers must prohibit the use of a 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;
- **No other fees charged for use of the debit card:** Employers are prohibited from charging employees fees for using payroll debit cards or certain related activity, such as those for telephone or online customer service, maintenance, inactivity, balance inquiries, overdraft or low balance status, declined transactions, or account closings;
- **Funds shall not expire:** An employer must enter into an agreement with the issuer of funds that provides that funds on a payroll debit card may not expire. The agreement may, however, state that an account may be closed for inactivity with reasonable notice to the employee and return of any remaining funds with seven days;
- **No additional costs passed on to employees:** The regulations prohibit employers from passing on costs associated with a payroll debit card account to employees or receiving kickbacks or financial remuneration from the issuer, card sponsor, or any third party that delivers wages via payroll cards; and
- **Approval by the Union for employees covered by a CBA:** Where an employee is covered by a collective bargaining agreement that expressly provides the methods of wage payment, the employer is required to obtain consent from the union before utilizing payroll debit cards.

Written Notice and Consent

The new regulations require that employers that use methods of payments other than cash or check provide employees with written notice that includes:

- A plain language description of all the employee’s options for receiving wages;
- A statement that the employer may not require employees to accept wages by either payroll debit card or direct deposit;
- A statement that employees may not be charged for any services necessary to access their wages in full; and
- If offering employees the option to receive payment via payroll debit card, a list of locations where employees can access and withdraw wages at no charge within a reasonable proximity to their place of residence or place of work.

Written notice and consent may be provided and obtained electronically, so long as an employee is provided with the ability to view and print a copy of the notice and consent without charge while at work. An employer may not make payment of wages by either direct deposit or payroll debit card a condition of employment or of continued employment. Finally, an employer may not obtain an employees’ informed written

consent to receive wages by direct deposit or payroll debit card by intimidation, coercion, or fear of adverse action for refusing to accept payment of wages by such methods.

The DOL has stated, however, that if an employer obtained an authorization to pay wages by direct deposit or debit card prior to the effective date of these regulations, such authorizations will be valid so long as the employee was expressly notified of his or her right to withdraw consent through such notices/authorizations.

If the DOL determines that an employer has violated a provision of these regulations and other provision of the Labor law, the DOL will direct payment of wages, benefits, or supplements due, plus liquidated damages in the amount of 100 percent of unpaid wages, as well as interest. If the employer previously has been found in violation of the Act or certain other wage payment laws or regulations, or has committed a willful or egregious violation, the DOL also will assess a civil penalty in an amount not to exceed double the total amount of wages, benefits, or supplements found to be due.

New York State Record Retention Requirements

Employers are required to maintain certain records for specified time periods under various federal and state laws. As a reminder, below are New York State's specific record retention requirements regarding wages. Please note that we generally recommend that records be maintained for one year beyond the statutorily required minimum retention periods:

1. Methods of Payment of Wages: The new regulations described above require that the employee's written 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 . . ."
2. Wage Theft Protection Act: Employers must retain payroll records and all acknowledgment notices obtained by the Employer under the WTPA's notice provisions for six years.
3. Hospitality Wage Order: Employers who operate tip sharing or tip pooling system must maintain the following records for six years: (i) a daily log of the tips collected by each employee on each shift, whether by cash or credit card; (ii) a list of occupations that the Employer deems eligible to collect tips via tip pooling or tip sharing; (iii) the share (%) of tips that each occupation is scheduled to receive from the tip pool to share; (iv) the amount in tips that each employee receives from the pool or share by date.

After the retention periods described above have passed, it is important to dispose of any documents containing sensitive information in a proper manner. The Federal Trade Commission's ("FTC's") "Disposal Rule" requires all employers, regardless of size, to shred or effectively destroy any document or other media containing personal information derived from a consumer report before discarding it. Identifying information could include such data as a person's name, social security number, driver's license number, phone number, physical address, and email address. Failure to comply with this regulation could result in civil liability of up to \$1,000 per employee, plus actual damages resulting from the employer's failure to protect the information.

Similarly, New York State also requires businesses to dispose of records containing individuals' "personal identifying information" in a secure fashion under N.Y. Gen. Bus. L. 399-h. The "Disposal of Personal Records Law" requires all for-profit entities that have obtained personal identifying information, including social security numbers, driver's license numbers, mother's maiden names, account numbers and ATM access codes, to destroy such information once it is no longer needed, in one of certain specified ways.

Businesses may shred such records, destroy the personal identifying information, modify the records to make the personal identifying information unreadable, or take other “actions consistent with commonly accepted industry practices” to ensure that no unauthorized person will have access to the information. Violations of the statute are punishable by fines up to \$5,000 per violation, as well as injunctive relief.

If you have any questions, please do not hesitate to contact [David R. Rothfeld](#), [Robert L. Sacks](#), [Lois M. Traub](#), [Alexander Soric](#), [Michael C. Lydakis](#), [Jaclyn Ruocco](#) or [Jennifer Schmalz](#).

cc: Joseph E. Spinnato, President
Vijay Dandapani, Chairman

This memo is provided for informational purposes only.

It is not intended as legal advice and readers should consult counsel to discuss how these matters relate to their individual circumstances.