

OPINION NO. 2012-018**Syllabus:**

2012-018

1. A direct deposit payroll policy established by a county auditor pursuant to R.C. 9.37(G) may specify procedures for the direct deposit of a county employee's compensation into an account to which the employee has access when a county employee fails to comply with a direct deposit payroll policy, or provides incorrect information in an attempt to comply with a direct deposit payroll policy. A direct deposit payroll policy may not include procedures that contravene federal or state law. (1996 Op. Att'y Gen. No. 96-055 (syllabus, paragraph 2), overruled because of statutory change.)
2. A county appointing authority may implement a progressive discipline policy and impose discipline on the employees of his office that do not comply with a county auditor's direct deposit payroll policy established pursuant to R.C. 9.37(G).

To: James J. Mayer, Jr., Richland County Prosecuting Attorney, Mansfield, Ohio

By: Michael DeWine, Ohio Attorney General, May 31, 2012

June 2012

You have requested an opinion about a county auditor's implementation of a direct deposit payroll policy for county employees adopted pursuant to R.C. 9.37(G), as enacted in Sub. H.B. 225, 129th Gen. A. (2011) (eff. March 22, 2012). You ask whether a county auditor may use measures such as escrowing, withholding, depositing a county employee's compensation into an account with a financial institution held for the benefit of the employee, or a combination of those measures when a county employee fails to comply with the direct deposit payroll policy. You also ask whether a county auditor may establish a progressive discipline policy that includes withholding an employee's compensation if he continues to fail to comply with a direct deposit payroll policy.¹

Statutory Authority for Direct Deposit of County Funds: R.C. 9.37

The procedures for the payment of county obligations by the direct deposit of funds by electronic transfer are set forth in R.C. 9.37. Any public official that is required or permitted to make a payment by check or warrant may instead make the payment "by direct deposit of funds by electronic transfer, if the payee provides a written authorization designating a financial institution and an account number to which the payment is to be credited." R.C. 9.37(B). For the purposes of R.C. 9.37, "public official" is defined as "any elected or appointed officer, employee, or agent of the state, any state institution of higher education, any political subdivision, board, commission, bureau, or other public body established by law." R.C. 9.37(A). A county auditor may issue electronic warrants for the payment of county obligations by direct deposit in accordance with the rules adopted by the Director of Budget and Management. R.C. 9.37(F). A county auditor also may adopt a direct deposit payroll policy that requires all county employees to provide written authorization designating a financial institution and an account into which their compensation shall be deposited. R.C. 9.37(G).²

Duties of County Auditor With Respect to Compensation of County Employees

In order to determine what mechanisms a county auditor may adopt to

¹ It is clear from your letter that your focus is county employees who do not comply with the requirements of a direct deposit payroll policy and are not exempted from complying with the policy. Therefore, we will not address the circumstances in which a policy adopted pursuant to R.C. 9.37(G) may exempt a county employee from a direct deposit payroll requirement.

² Prior to the enactment of R.C. 9.37(G), the Attorney General considered whether a county auditor may impose a requirement that all county employees receive their compensation by direct deposit. 1996 Op. Att'y Gen. No. 96-055, at 2-211. In that opinion, the Attorney General concluded that the law did not permit a county auditor to establish a direct deposit payroll policy for all county employees. *Id.* at syllabus, paragraph 2. Given the enactment of R.C. 9.37(G), syllabus paragraph 2 of 1996 Op. Att'y Gen. No. 96-055, concluding that R.C. 9.37(B) does not allow a county auditor to require that all county employees receive their compensation by direct deposit, is overruled.

implement and enforce the county's direct deposit payroll policy, it is helpful to consider both the duties of a county auditor with respect to the compensation of county employees and the practical advantages of a direct deposit payroll policy. The office of county auditor is established by R.C. 319.01. *See* 1994 Op. Att'y Gen. No. 94-066, at 2-324. Among other duties, a county auditor initiates the payroll process for county officers and county employees. *See generally* R.C. 307.55(A) (“[n]o claims against the county shall be paid otherwise than upon the allowance of the board of county commissioners, upon the warrant, including an electronic warrant authorizing direct deposit for payment of a county obligation in accordance with division (F) of [R.C. 9.37], of the county auditor, except in those cases in which the amount due is fixed by law or is authorized to be fixed by some other person or tribunal, in which case it shall be paid upon the warrant of the auditor upon the proper certificate of the person or tribunal allowing the claim”); R.C. 319.16 (a county auditor is required to “issue warrants, including electronic warrants authorizing direct deposit for payment of county obligations . . . on the county treasurer for all moneys payable from the county treasury”); R.C. 321.15 (money from the county treasury may not be paid without a warrant or an electronic warrant authorizing payment of a county obligation by direct deposit from the county auditor); R.C. 325.17 (the compensation of employees of county officers is “paid biweekly from the county treasury, upon the warrant of the county auditor”); 2009 Op. Att'y Gen. No. 2009-033, at 2-218.

“[I]n carrying out statutory duties, the county auditor is authorized to establish procedures to facilitate the performance of the duties and increase the efficiency of the office.” 2004 Op. Att'y Gen. No. 2004-022, at 2-188. The implementation of a direct deposit payroll policy facilitates the performance of a county auditor's duties and improves the efficiency of his office. Direct deposit eliminates the need to generate a paper check for each employee. In turn, it is reasonable to expect that the county auditor's expenses related to the administration of payroll are reduced by eliminating the cost of printing paper checks or warrants and minimizing associated labor costs. The Ohio Legislative Service Commission (LSC) noted in the December 19, 2011, Fiscal Note and Local Impact Statement for Sub. H.B. 225 (in enacting R.C. 9.37(G)):

[a]lthough LSC does not have any specific savings estimates from counties that have direct deposit policies, we reviewed the state experience when it implemented a statewide direct deposit policy for state employees in 2002. At that time, the cost of issuing a paper check was ten cents per check and the cost of an electronic funds transfer was four cents per transaction, thus yielding savings of six cents per pay check issued to state employees. Assuming 26 pay periods in a year, the total savings was then assumed to be \$1.56 per employee per year.

In addition to the potential cost savings, direct deposit by electronic transfer is more convenient for an employee and a county auditor. Because an employee's compensation is directly and immediately deposited into the employee's bank ac-

count and the auditor no longer needs to wait for outstanding checks to clear, the county auditor's efficiency in accounting for county funds is improved. The employee also avoids traveling to a bank to deposit or cash a check. Finally, the direct deposit of compensation may provide greater security by diminishing the opportunities for the theft or fraudulent cashing of checks. These advantages of direct deposit should inform the direct deposit payroll policy adopted by a county auditor.

County Auditor's Authority to Credit County Employees' Compensation by Direct Deposit when Direct Deposit Payroll Policy is Not Followed

The office of county auditor is created by statute, and thus he "has only those powers and duties expressly granted by statute or necessarily implied from such express grants." 1994 Op. Att'y Gen. No. 94-066, at 2-324; *see also* 2004 Op. Att'y Gen. No. 2004-022, at 2-187 ("the county auditor . . . [has] only the authority that [he is] granted by statute, either expressly or by implication as necessary to carry out the express authority"). It has been recognized that "[i]f . . . the General Assembly has granted an officer or entity authority to perform a particular function without specific directions as to the manner of performing that function, the officer or entity may exercise a reasonable discretion in its performance." 1994 Op. Att'y Gen. No. 94-066, at 2-324; *see also Federal Gas & Fuel Co. v. City of Columbus*, 96 Ohio St. 530, 541, 118 N.E. 103 (1917) (if a statute grants the power to perform a certain act "without placing any limitations as to the manner or means of doing it, certainly the grantee of such power is naturally and necessarily vested with a wide discretion to do such incidental things as are reasonably and manifestly in the grantee's interests"); *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6 (1917) (the statutory granting of power "may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective"); *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 11-12, 112 N.E. 138 (1915) (if neither the state's constitution, nor the state's General Assembly, provides direction as to how an officer is to carry out his authority, "it necessarily follows that the officer who is required to perform this duty has implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method of doing the thing commanded"), *aff'd sub nom. Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *Jewett v. Valley Railway Co.*, 34 Ohio St. 601, 608 (1878) ("[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner"); 2011 Op. Att'y Gen. No. 2011-031, at 2-253; 2011 Op. Att'y Gen. No. 2011-027, at 2-225; 2007 Op. Att'y Gen. No. 2007-001, at 2-11; 2006 Op. Att'y Gen. No. 2006-052, at 2-527 to 2-528.

R.C. 9.37(G) authorizes a county auditor to establish a direct deposit payroll policy for all county employees. However, the General Assembly has not specified the terms that a county auditor must include in a policy or the means of implementing and enforcing a policy. The General Assembly, therefore, intends for a county auditor to craft the specific terms of a direct deposit payroll policy, including the means of implementing and enforcing the policy. In other words, the authority of a

county auditor to establish a direct deposit payroll policy carries with it the authority to develop procedures to ensure the direct deposit of the compensation of all county employees. *See* 2011 Op. Att’y Gen. No. 2011-031, at 2-253 (“an express authority to do an act carries with it the authority to do the necessary incidental acts to accomplish the purpose for which the express authority was given as fully as though each such incidental detail were expressly authorized in separate and distinct terms,” quoting 1973 Op. Att’y Gen. No. 73-057, at 2-218). The authority of a county auditor to establish a direct deposit payroll policy is rendered inconsequential if a county auditor is not permitted to establish reasonable means to implement the policy without having to resort to the issuance of a check upon the failure of an employee to comply with the policy. *See State ex rel. Hunt v. Hildebrant*, 93 Ohio St. at 12 (“[i]t would be the merest folly to command [an officer] to do a particular thing and then withhold from him the power to do it”).

Your opinion request asks what measures a county auditor may include in a direct deposit payroll policy to ensure that the compensation of all county employees is directly deposited. Specifically, you inquire whether a county auditor may adopt the procedures implemented by the State of Ohio for the direct deposit of the compensation of state employees. You also ask whether a county auditor may escrow or withhold the compensation of a county employee who does not comply with the policy. Finally, you ask whether a county auditor may implement a combination of those measures when an employee fails to comply with the policy.³

We will first consider whether a county auditor’s direct deposit payroll policy may adopt the same procedures used by the State of Ohio for the direct deposit of the compensation of state employees. To answer that question we must first explain the procedures used by the Director of Budget and Management and the Director of Administrative Services to pay the compensation of state employees by direct deposit. The requirement for the payment of the compensation of state employees by direct deposit is found in R.C. 124.151(B)(1), which provides:

[t]he compensation of any employee who is paid by warrant of the director of budget and management shall be paid by direct deposit. Each such employee shall provide to the appointing authority a written authorization for payment by direct deposit. The authorization shall include the designation of a financial institution equipped to accept direct deposits and the number of the account into which the deposit is to be made. The authorization shall remain in effect until

³ We understand the phrase “fails to comply” to mean that a county employee does not follow the procedures included in a county auditor’s direct deposit payroll policy. For example, a county employee may fail to comply with the policy when he refuses to provide written authorization designating a financial institution and account number. He also may fail to comply when he provides written authorization, but incorrectly provides either the name of a financial institution or an account number. An employee who fails to comply is referred to in this opinion as a “non-complying” employee.

withdrawn in writing by the employee or until dishonored by the financial institution.

R.C. 124.151(B)(1) requires the Director of Administrative Services to provide by rule adopted under R.C. Chapter 119 procedures to accomplish the direct deposit of a non-complying employee's compensation. Those procedures appear in 2 Ohio Admin. Code 123:1-35-05.

Rule 123:1-35-05(B) requires an employee in a covered position⁴ to complete and submit documentation authorizing the direct deposit of the employee's compensation into a financial institution of the employee's choosing or into a financial institution chosen by the Director of Budget and Management for the employee's benefit within two weeks of appointment to the position. If an employee subject to the direct deposit requirement fails to comply with rule 123:1-35-05(B)'s directive, the appointing authority of the employee shall cause the direct deposit of the employee's compensation into the financial institution designated by the Director of Budget and Management for the employee's benefit. Rule 123:1-35-05(D). An employee who fails to provide written authorization for the direct deposit of his compensation or comply with the requirements of the financial institution designated by the Director of Budget and Management or the Department of Administrative Services, is subject to "progressive discipline for cause, up to and including removal." Rule 123:1-35-05(C). Any discipline imposed for a violation of the requirement to provide a written authorization shall be imposed in accordance with R.C. 124.34 or an applicable collective bargaining agreement. *Id.*

Under the state's direct deposit program, all covered employees shall have their compensation directly deposited into an account at a financial institution. Aside from a limited exception applicable to employees appointed before June 5, 2002, who are "public employees" as defined by R.C. 4117.01, and whose collective bargaining agreement does not require direct deposit of compensation, no circumstances are identified in R.C. 124.151 or rule 123:1-35-05 in which a covered employee is exempt from the direct deposit requirement and may be issued a paper check or warrant in lieu of having his compensation paid by direct deposit. If a state employee does not provide the written authorization required by R.C. 124.151 and rule 123:1-35-05(B)(1), the employee's compensation is directly deposited into an account at a financial institution and is made available to the employee through a

⁴ For purposes of 2 Ohio Admin. Code 123:1-35-05, "covered position" is defined as:

any position with an underlying action of hire with a reason of established term, external interim, fixed-term per diem, fixed-term salaried, permanent, or project employee; or an action of temporary assignment with a reason of internal interim where the compensation for said position is paid by warrant of the director of budget and management.

Rule 123:1-35-05(A)(1).

PayWorks payroll debit card. Department of Administrative Services, Human Resources Policies, Mandatory Direct Deposit, Instructions for HR Officers, <http://das.ohio.gov/LinkClick.aspx?fileticket=1fcnD4qbvck=&tabid=342> (last visited May 22, 2012) (state employees that do not comply with mandatory direct deposit are required to enroll in the PayWorks payroll debit card program, which “allows the State of Ohio to credit an employee’s net pay to the card instead of issuing a warrant”). The non-complying employee has access to his compensation even though a paper check is not issued to him.

With this understanding of the procedures applicable to the payment of the compensation of state employees by direct deposit, we shall now determine whether a county auditor may adopt those same procedures as part of a direct deposit payroll policy established pursuant to R.C. 9.37(G). The rules governing personnel practices adopted under Chapter 123:1 of the Ohio Administrative Code by the Division of Human Resources of the Department of Administrative Services, including the rules governing the direct deposit requirements for the compensation of state employees, are applicable to county boards of commissioners, and the elected officials, boards, agencies, or appointing authorities of a county “unless the board, elected official, agency, or appointing authority adopts other rules in accordance with [R.C. Chapters 124 and 325].” 2 Ohio Admin. Code 123:1-1-07. Thus, a county auditor, as an elected official of a county, *see* R.C. 319.01, has the authority to include measures in a direct deposit payroll policy established pursuant to R.C. 9.37(G) that are the same as those promulgated by the Department of Administrative Services in rule 123:1-35-05 to accomplish the direct deposit of a non-complying state employee’s compensation.

This means that a county auditor may require that all county employees provide written authorization for the direct deposit of their compensation into either an account at a financial institution designated by the employee or into an account at a financial institution designated by the county auditor. A county auditor’s direct deposit payroll policy may also provide that if a county employee fails to comply with the policy, a county auditor will cause a non-complying county employee’s compensation to be directly deposited into an account held for the benefit of the employee at a financial institution chosen by the county auditor. Access to the compensation deposited in the account held for the benefit of the county employee may be enabled through a debit card issued to the employee.

We now turn to whether a county auditor’s direct deposit payroll policy may allow escrowing or withholding a non-complying county employee’s compensation. “Escrow” is defined as:

1. A legal document or property delivered by a promisor to a third party to be held by the third party for a given amount of time or until the occurrence of a condition, at which time the third party is to hand over the document or property to the promisee . . . 2. An account held in trust or as security . . . 4. The general arrangement under which a legal document or property is delivered to a third person until the occurrence of a condition.

Black's Law Dictionary 624 (9th ed. 2009); *see also Squire v. Branciforti*, 131 Ohio St. 344, 353, 2 N.E.2d 878 (1936) (definition of escrow is “[a] written instrument which by its terms imports a legal obligation, and which is deposited by the grantor . . . with a stranger or third party, to be kept by the depository until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee”); *accord Webb v. Pewano Ltd.*, 12th Dist. Nos. CA2008-10-036, CA2008-12-042, 2009-Ohio-2629, at ¶24; *Bell v. Turner*, 172 Ohio App.3d 238, 2007-Ohio-3054, 874 N.E.2d 820, at ¶18 (Highland County). Applying “escrow” in the context of paying a county employee’s compensation means that a non-complying employee’s compensation is held by a third party until the employee complies with a condition (*i.e.*, escrowing the compensation in an account at a financial institution until the employee submits a written authorization for direct deposit). If an employee’s compensation is escrowed, the employee’s ability to obtain it is restricted and is conditioned upon the performance of another act.

A similar constraint on an employee’s access to his compensation occurs if his compensation is withheld. The meaning of the term “withhold” is “1 : to hold back from action . . . 3 : to refrain from granting, giving, or allowing . . . 4 : to deduct (withholding tax) from income.” *Merriam-Webster’s Collegiate Dictionary* 1439 (11th ed. 2005). Accordingly, “withhold” in the context of paying a county employee’s compensation means that a non-complying employee’s compensation is not paid to the county employee. In practical terms, this means that a non-complying county employee is denied access to his compensation.

A direct deposit payroll policy is not reasonable if its terms or implementation violates state or federal statutory provisions or administrative regulations or the terms of a collective bargaining agreement. *See* 2006 Op. Att’y Gen. No. 2006-052, at 2-526 (administrative procedures of employer must comply with “relevant statutes, rules, and applicable collective bargaining agreements”); 1994 Op. Att’y Gen. No. 94-097, at 2-481 (“to the extent that a policy . . . falls within the management rights of the court as an employer and is not otherwise limited by the civil service laws or by any substantive law . . . the court has authority to implement such a policy”); *see also* 1998 Op. Att’y Gen. No. 98-035, at 2-208 (administrative rule-making authority may adopt rules “provided that the rules are not unreasonable or in clear conflict with statutory enactments and do not add to statutorily-delegated powers”).

Several state and federal statutes and regulations are relevant to the determination of whether a direct deposit payroll policy by which a county auditor withholds or escrows a non-complying county employee’s compensation is reasonable. First, R.C. 325.17 requires a county auditor to pay county employees on a biweekly basis. *Ohio Council 8, American Federation of State, County & Municipal Employees v. Weber*, 27 Ohio App. 3d 133, 135, 499 N.E.2d 1276 (Marion County 1985) (“[i]t appears that the intention of the legislature was to insure that an employee would receive his full annual compensation on a biweekly basis”); 1996 Op. Att’y Gen. No. 96-055, at 2-211 n.1 (R.C. 325.17 requires county auditor to pay employees on biweekly basis). In addition, a county employer is required to pay a county employee at least a minimum wage for the hours worked by the employee. *See* Ohio

Const. art. II, § 34a (establishes a state minimum wage every employer must pay its employees); R.C. 4111.02 (employers must pay employees minimum wage); R.C. 4111.03 (establishes an overtime wage rate that must be paid to certain employees); R.C. 4111.10(A) (an employer that fails to pay an employee the wages to which he is entitled is liable for the full overtime rate and costs and reasonable attorney's fees); R.C. 4111.13(C) (prohibits an employer from paying an employee a wage less than the applicable rate established by R.C. 4111.01 to R.C. 4111.17); 29 U.S.C.S. § 206 (LexisNexis 2010) (employers are required to pay their employees a minimum wage for work performed in a workweek).

Under the Fair Labor Standards Act (FLSA), 29 U.S.C.S. § 201, *et seq.* (LexisNexis 2010), “‘wages’ cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or ‘free and clear.’” 29 C.F.R. § 531.35 (2012).⁵ Although the FLSA does not specify a time that employees must be paid, “courts have consistently interpreted the statute to include a prompt payment requirement.” *Mathis v. About Your Smile, P.C.*, No. 02-CV-597, 2002 U.S. Dist. LEXIS 15572, *4-8 (E.D. Pa. Aug. 14, 2002) (the fact that the employee eventually received the compensation she earned did not satisfy the requirement that employees must be paid on payday under the FLSA); *see also Marshall v. Quik-Trip Corp.*, 672 F. 2d 801, 807 (10th Cir. 1982) (“[t]he policies of the [FLSA] would be nullified if the employer were permitted to retain sums which were refused or went unclaimed”).

The provisions of R.C. Chapter 124 and the terms of any applicable collective bargaining agreement regarding reductions in wages and suspensions of pay⁶ also must be considered in determining whether a policy of escrowing or withholding a non-complying county employee's compensation is reasonable. R.C. Chapter 124 specifies the circumstances in which a civil service employee's compensation may be reduced or its payment suspended. *See, e.g.*, R.C. 124.06 (a civil service employee cannot be suspended except as provided in R.C. Chapter 124 and the rules adopted by the Director of Administrative Services, or municipal or township civil service commissions); R.C. 124.34 (a classified civil service employee cannot be reduced in pay or suspended except as provided in R.C. 124.32 and for

⁵ The Fair Labor Standards Act (FLSA) applies to public employees. *Worley v. City of Cincinnati*, No. C-990506, 2000 Ohio App. LEXIS 3856 (Hamilton County Aug. 25, 2000); *Marshall v. Owensboro-Daviess County Hospital, et al.*, 581 F. 2d 116, 117-118 (6th Cir. 1978). However, whether a direct deposit payroll policy adopted by a county auditor complies with the FLSA is a matter that must be determined by local officials or the courts. *See* 2011 Op. Att'y Gen. No. 2011-008, at 2-69 (the Attorney General does not have the authority to interpret federal law); 1999 Op. Att'y Gen. No. 99-007, at 2-55; 1983 Op. Att'y Gen. No. 83-057, at 2-232 (the Attorney general does not determine factual issues). For guidance concerning the application of the FLSA to a particular direct deposit payroll policy, a county auditor may contact the United States Department of Labor.

⁶ “‘Suspension’ means the interruption of an employee's employment and compensation for a fixed period of time.” 2 Ohio Admin. Code 124-1-02(EE).

“incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer’s or employee’s appointing authority, violation of [R.C. Chapter 124] or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony”); 2 Ohio Admin. Code 123:1-31-01 (“[a] . . . reduction in pay or . . . suspension . . . shall be made for one or more of the statutory reasons enumerated in [R.C. 124.34]”). Under R.C. 4117.08-.10, matters pertaining to a public employee’s wages and terms and conditions of employment are subjects appropriate for collective bargaining. R.C. 4117.08 (subjects appropriate for collective bargaining); R.C. 4117.10(A) (wages, hours, terms and conditions of public employment may be determined by a collective bargaining agreement). County employees may be subject to a collective bargaining agreement. A collective bargaining agreement may establish certain terms of discipline. R.C. Chapter 4117; 2006 Op. Att’y Gen. No. 2006-052, at 2-524 (“[c]ertain rights and obligations relating to suspensions may be affected by collective bargaining agreements”). If such a collective bargaining agreement applies to employees of an appointing authority, that appointing authority is bound by the terms of that agreement, subject to certain exceptions. *See* 2006 Op. Att’y Gen. No. 2006-052, at 2-517 n.1; 1988 Op. Att’y Gen. No. 88-016, at 2-65. Therefore, a disciplinary policy established by an appointing authority with respect to compliance with a direct deposit payroll policy must be consistent with the terms of discipline set forth in an applicable collective bargaining agreement.

It is our opinion that withholding compensation or placing it in escrow in an account to which a non-complying employee does not have access is not a reasonable exercise of the authority granted a county auditor by R.C. 9.37(G). The statutory provisions cited above give a county employee the right to have immediate and unfettered access to his compensation. Employees are required to be paid compensation for the hours they have worked in a timely manner and free and clear of any restrictions. Therefore, a county auditor may establish a direct deposit payroll policy that provides for the direct deposit of a county employee’s compensation into an account when an employee fails to comply with the terms of a direct deposit payroll policy. An essential element of reasonably providing for the direct deposit of compensation is ensuring that the non-complying employee has access to the compensation, either directly or through a debit card issued by the financial institution, within the same period of time that other employees of the appointing authority have access to their compensation. Withholding or escrowing the compensation in an account to which the employee does not have access, even temporarily, is not a reasonable exercise of the authority granted to a county auditor by R.C. 9.37(G).

In summary, a county auditor’s direct deposit payroll policy may adopt the same measures used in R.C. 124.151 and 2 Ohio Admin. Code 123:1-35-05 regarding the direct deposit of state employees’ compensation, in order to accomplish the direct deposit of a non-complying county employee’s compensation. Alternatively, a county auditor’s direct deposit payroll policy may adopt reasonable measures that are different from those set forth in R.C. 124.151 and rule 123:1-35-05, so long as

the measures do not violate a state or federal law or regulation. Consequently, the measures included in a county auditor's direct deposit payroll policy may not include withholding or escrowing a non-complying employee's compensation such that the employee is denied access to his compensation.

County Auditor's Authority to Implement a Progressive Discipline Policy and Impose Discipline Pursuant to the Terms of that Policy

We will now address your second question, whether a county auditor may implement a policy of progressive discipline to enforce the terms of a direct deposit payroll policy. To ensure that the business of a governmental entity is performed efficiently, a public employer, like any other employer, has the authority to discipline its employees. *Moorer v. Copley Township*, 98 F. Supp. 2d 838, 844 (N.D. Ohio 2000); 2006 Op. Att'y Gen. No. 2006-052, at 2-522; 1994 Op. Att'y Gen. No. 94-097, at 2-481 (“[a] public employer has the right to maintain the efficiency and effectiveness of governmental operations, to discipline and discharge employees for just cause, and to manage the work force effectively”); see R.C. 124.01(D) (“[a]ppointing authority’ means the officer, commission, board, or body having the power of appointment to, or removal from, positions in any office, department, commission, board, or institution”).

Employees in the county service are included within the civil service system established by the General Assembly in R.C. Chapter 124, and are divided into two categories: classified employees and unclassified employees. R.C. 124.01(A) (“[c]ivil service’ includes all offices and positions of trust or employment in the service of the state and in the service of the counties, cities, city health districts, general health districts, and city school districts of the state”); R.C. 124.11 (composition of the classified service and the unclassified service); 1991 Op. Att'y Gen. No. 91-011, at 2-57. Both classified and unclassified employees may be subject to discipline for violating a direct deposit payroll policy that is adopted under R.C. 9.37(G) if compliance with the direct deposit policy is required by the appointing authority's work rules or policies.

The authority of a county employer to discipline a classified employee for violating the employer's policy requiring compliance with a county auditor's direct deposit payroll policy is derived from R.C. Chapter 124. R.C. 124.34 affords classified employees certain procedural safeguards preventing arbitrary termination from employment. 1991 Op. Att'y Gen. No. 91-011, at 2-58. Those safeguards include notice of the allegations against a classified employee and an opportunity to be heard before disciplinary action is taken. *Seltzer v. Cuyahoga Cty. Dept. of Human Serv.*, 38 Ohio App. 3d 121, 122-123, 528 N.E.2d 573 (Cuyahoga County 1987). Classified employees are subject to discipline or removal for the causes set forth in R.C. 124.34. 1994 Op. Att'y Gen. No. 94-097, at 2-483. Specifically, R.C. 124.34(A) limits the reasons to suspend or remove a classified employee to the following:

incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, ne-

glect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of [R.C. Chapter 124] or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony.

Violations of reasonable work rules or administrative policies that are uniformly applied constitute cause for discipline under R.C.124.34. 1994 Op. Att'y Gen. No. 94-097, at 2-484 (“[t]he language of R.C. 124.34 has been construed to encompass discipline for violations of reasonable workrules or administrative policies that are uniformly applied”). Failure to comply with an appointing authority's rule or policy requiring compliance with a county auditor's direct deposit payroll policy is cause for disciplining a classified employee under R.C. 124.34. Such non-compliance may also constitute insubordination under R.C. 124.34.

The authority of a county employer to discipline an unclassified employee is derived, in part, from the status of an unclassified employee as an at-will employee. Unclassified employees serve at the pleasure of the appointing authority and “have no vested property interest in continued employment.” *Garvey v. Montgomery*, 128 Fed. Appx. 453, 465 n.9 (6th Cir. 2005); *accord Bracken v. Collica*, 94 Fed. Appx. 265, 267 (6th Cir. 2004); *Myers v. Dean*, No. 2:04 CV 00654, 2006 U.S. Dist. LEXIS 10770, at *14 (S.D. Ohio March 16, 2006); 1991 Op. Att'y Gen. No. 91-011, at 2-58. As at-will employees, unclassified employees may be terminated without cause. *Myers v. Dean*, 2006 U.S. Dist. LEXIS 10770, at *14. Unclassified employees also may be “suspended or reduced from the position at the pleasure of the appointing authority.” 2 Ohio Admin. Code 123:1-47-01(A)(82). By implication, it follows that an unclassified employee may be subject to other discipline at the discretion of the appointing authority. *See Myers v. Dean*, 2006 U.S. Dist. LEXIS 10770, at *14. The violation of a work rule or policy applicable to an unclassified employee will subject that unclassified employee to discipline at the discretion of the appointing authority. Accordingly, should an appointing authority choose, an unclassified employee who fails to comply with his appointing authority's rule or policy requiring compliance with a direct deposit payroll policy may be subject to discipline, up to and including termination.

Regardless of the classification of a county employee, an appointing authority may not establish a discipline policy for or impose discipline on employees of another appointing authority. 2006 Op. Att'y Gen. No. 2006-052, at 2-522 (“[a] public employer generally has authority to supervise and discipline *its* employees so that the business of the governmental entity may be performed efficiently”) (emphasis added); *see also* 2003 Op. Att'y Gen. No. 2003-029, at 2-248 (“[t]he county auditor has not, however, been given the statutory authority to prescribe the substance of a travel policy for offices other than her own Rather, each county officer, board, or department may establish a travel policy for the agency's officers and employees”). Consequently, a county auditor's direct deposit payroll policy adopted pursuant to R.C. 9.37(G) may only notify county employees that they may be subject to discipline by their appointing authorities for failing to comply with the

requirements of a direct deposit payroll policy. Implementation of the terms of a discipline policy and the imposition of discipline on a non-complying county employee, therefore, fall within the prerogative of the non-complying employee's appointing authority.⁷ A progressive discipline policy of a county auditor would, therefore, be part of the rules and policies provided to employees of the county auditor.

An appointing authority's policy of progressive discipline must be compatible with applicable federal and state laws, regulations, and collective bargaining agreements. 2006 Op. Att'y Gen No. 2006-052, at 2-526 (administrative procedures of employer must comply with "relevant statutes, rules, and applicable collective bargaining agreements"); 1994 Op. Att'y Gen. No. 94-097, at 2-481 (a public employer's authority to discipline employees is "subject only to such limitations as may be imposed by a collective bargaining agreement, civil service laws, or any substantive law governing a particular matter"). An appointing authority's progressive discipline policy may not include escrowing or withholding a non-complying employee's compensation to obtain compliance with the direct deposit payroll policy. As we discussed previously, escrowing or withholding an employee's compensation (*i.e.*, not affording the employee immediate access to his earned compensation) until the employee complies with the direct deposit payroll policy is contrary to federal and state law and regulations and may violate the terms of a collective bargaining agreement. *See* Ohio Const. art. II, § 34a (state minimum wage requirements); R.C. 124.06 (grounds for suspending civil service employee); R.C. 124.34 (grounds for reduction in pay or suspension of classified employees); R.C. 325.17 (requirement that county auditors pay employees on biweekly basis); R.C. 4111.02 (requirement to pay minimum wage); R.C. 4111.03 (overtime wages); R.C. 4111.10(A) (employers that do not pay wages employees are entitled to are liable for attorney's fees); R.C. 4111.13(C) (employers are prohibited from paying a wage less than minimum wage); R.C. 4117.08-.10 (wages and terms and conditions of public employment are subjects appropriate for collective bargaining); 29 U.S.C.S. § 206 (LexisNexis 2010) (at least minimum wage must be paid to employees for hours worked); 29 C.F.R. § 531.35 (under FLSA, wages are not paid unless paid free and clear of restrictions); *Mathis v. About Your Smile, P.C.*, No. 02-CV-597 (FLSA requires payment of wages on payday).

Thus, a direct deposit payroll policy established by a county auditor pursuant to R.C. 9.37(G) may notify county employees that they may be subject to pro-

⁷ That a county auditor has authority to establish a direct deposit payroll policy applicable to all county employees, but does not have the authority to establish a discipline policy applicable to all employees is not inconsistent. R.C. 9.37(G) is an express grant of authority to a county auditor to establish a direct deposit policy for all county employees and is, therefore, within the statutory powers granted to a county auditor for the payment of compensation to county employees. In contrast, imposing disciplinary measures on employees that are *not* appointed and supervised by a county auditor does not fall within the statutory duties or powers of a county auditor.

gressive discipline by their individual appointing authorities for failing to comply with the terms of the direct deposit payroll policy. Each county appointing authority, including a county auditor, may establish a work rule or policy that requires employees of the appointing authority to comply with a direct deposit payroll policy adopted pursuant to R.C. 9.37(G). The failure to comply with an appointing authority's work rule or policy is a ground for disciplining either a classified or unclassified county employee. The discretion to impose discipline for failing to comply with a direct deposit payroll policy rests with each individual appointing authority. The terms of a progressive discipline policy, including the types of discipline imposed, shall be set by each appointing authority. However, the progressive discipline policy established by an appointing authority may not withhold an employee's compensation or deny an employee access to his compensation in order to compel a county employee's compliance with a direct deposit payroll policy. A progressive discipline policy must comply with the applicable provisions of federal and state law, administrative regulations, and the terms of any controlling collective bargaining agreements.

Conclusions

In sum, it is my opinion, and you are hereby advised that:

1. A direct deposit payroll policy established by a county auditor pursuant to R.C. 9.37(G) may specify procedures for the direct deposit of a county employee's compensation into an account to which the employee has access when a county employee fails to comply with a direct deposit payroll policy, or provides incorrect information in an attempt to comply with a direct deposit payroll policy. A direct deposit payroll policy may not include procedures that contravene federal or state law. (1996 Op. Att'y Gen. No. 96-055 (syllabus, paragraph 2), overruled because of statutory change.)
2. A county appointing authority may implement a progressive discipline policy and impose discipline on the employees of his office that do not comply with a county auditor's direct deposit payroll policy established pursuant to R.C. 9.37(G).