

New York Department of Labor Issues New Regulations on Wage Deductions

New York's amended Labor Law Section 193, which went into effect in November 2012, allowed employers to make certain types of wage deductions previously prohibited under the New York Labor Law (e.g., to recover for wage advances and overpayments), subject to regulations adopted by the New York Commissioner of Labor. (Read our alert on the amended law [here](#).) The New York Department of Labor (DOL) has now issued these regulations, 12 NYCRR Part 195, effective Oct. 9, 2013.

Permitted Wage Deductions

The DOL regulations confirm that employers may not make wage deductions unless they fall into one of the following four categories:

- 1) deductions made in accordance with any law, rule or regulation issued by any governmental agency;
- 2) deductions specified by, or similar to those specified by Section 193, authorized by, and for the benefit of, the employee;
- 3) deductions for the recovery of overpayments made in accordance with the DOL regulations; or
- 4) deductions for the repayment of wage advances made in accordance with the DOL regulations.

The regulations specifically provide that deductions for the following are prohibited:

- 1) repayments of loans, advances and overpayments not in accordance with the regulations;
- 2) employee purchases of tools, equipment and attire for work;
- 3) recoupment of unauthorized expenses;

- 4) repayment of losses (including for spoilage or breakage, cash shortages and fines, or penalties imposed due to an employee's conduct);
- 5) fines or penalties for tardiness, excessive leave, misconduct and quitting without notice;
- 6) political contributions; and
- 7) the employer's administrative fees, costs and interest.

Deductions Made in Accordance with Law

The regulations specifically state that employers may make any deductions from employee wages that are in accordance with laws, rules or regulations issued by any governmental agency. These deductions include tax withholdings, wage garnishments and child support levies. No authorization signed by an employee is necessary for these deductions.

Authorized Deductions for the Benefit of the Employee

Section 193 allows for certain deductions from wages that are authorized by, and for the benefit of, the employee. The deductions are limited to the ones specifically listed in the statute and "similar payments for the benefit of the employee." Among the common wage deductions specifically listed in Section 193 are deductions for insurance premiums, pension dues, charitable contributions, parking and transit, union dues, and company cafeteria purchases.

Generally, the regulations provide that deductions are for the "benefit of the employee" when they provide financial or other support for the employee, the employee's family or a charitable organization (although the employer may also receive some generalized, indirect benefit). Mere

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convenience is not considered a benefit to the employee, and therefore check-cashing fees and similar charges are not permissible deductions.

More specifically, the DOL regulations provide that permitted “similar payments for the benefit of the employee” must fall within one of the following six categories: (1) health and welfare benefits; (2) pension and savings benefits; (3) charitable benefits; (4) representational (union) benefits; (5) transportation benefits; or (6) food and lodging benefits. Permitted deductions in these categories include, without limitation, those for insurance premiums, health club memberships, day care expenses, labor union dues, mass transit payments or discounted passes, and purchases of food at an employee cafeteria or vending machines.

In order to be authorized, a deduction for an employee’s benefit must be pursuant to (1) a collective bargaining agreement or (2) a written agreement between the employer and the employee that is express, written, voluntary and informed. A written agreement is “informed” when, prior to entering into the agreement and before any deduction is made, the employer provides the employee with a written notice of all the terms and conditions of the deduction, its benefit and how the deduction is to be made. This written notice must also be provided prior to any substantial change in the amount or manner of the deduction or reduction of the benefit received.

Wage Deductions for Overpayments

Section 193 also permits wage deductions to recoup inadvertent wage overpayments due to mathematical or clerical errors, without obtaining the employee’s authorization, so long as the employer satisfies the following criteria:

- *Timing, duration, frequency and method.* The employer may not deduct wages for overpayments occurring more than eight weeks before the issuance of the below-described “notice of intent” to the employee. These deductions may not be made more frequently than once per wage payment and may be made over a period of six years from the overpayment.
- *Amount.* Where the entire overpayment is less than or equal to the net wages earned after other permissible deductions in the next wage payment, the employer may recover the entire amount of the overpayment in the next wage payment. Where the entire overpayment is greater than the net wages earned after other permissible deductions in the next wage payment, the recovery may not exceed 12.5 percent of the gross wages earned in that wage payment and the deduction may not reduce

the employee’s effective hourly wage below the minimum wage.

- *Notice of intent.* Employers must provide to an employee a “notice of intent” at least three days before the date of the wage deduction if the entire overpayment is being reclaimed in the next wage payment and at least three weeks before the start of wage deductions in all other cases. The notice must contain (1) the amount overpaid in total and per pay period; (2) the total amount to be deducted; (3) the date each deduction shall occur and the amount of each deduction; (4) a notice that the employee may contest the overpayment; (5) the date by which the employee may contest the overpayment; and (6) the procedure by which the employee may contest the overpayment and/or terms of recovery, or provide a reference to where such procedure is otherwise set forth.
- *Dispute resolution procedure.* The employer must implement a procedure by which the employee may dispute the overpayment and terms of recovery and/or seek a delay in the recovery of such overpayment. Dispute resolution provisions of an applicable collective bargaining agreement may suffice if they provide at least as much protection to the employee as required by the DOL regulations. The regulations set forth requirements (including time frames) for the dispute resolution procedure, which includes an employee’s contest of the deduction, an employer’s response, an employee’s reply and a final determination by the employer. If an employee takes advantage of the dispute resolution procedure, the employer may not commence taking the deduction until at least three weeks after issuing a final determination. The failure of an employer to offer the required dispute resolution process will create a presumption that the deduction was impermissible.

Wage Deductions for Wage or Salary Advances

Section 193 also permits wage deductions for repayment of an advance of wages or salary to an employee. The regulations define an “advance” as “the provision of money by the employer to the employee based on the anticipation of the earning of future wages.” Any provision of money that is accompanied by interest, fees or a repayment amount consisting of anything other than the strict amount provided is not an “advance” and may not be reclaimed through wage deductions. Notably, the regulations do not specifically state whether an advance includes advances of paid leave, such as unaccrued sick or vacation time. While the “provision of money” language used in the regulations could be interpreted broadly to include payment for time off in advance of when it is

earned, whether the DOL or courts will do so remains to be seen.

The DOL regulations further provide that an employer must comply with the following requirements prior to making any wage deduction for advances:

- *Written agreement regarding timing and duration of deductions.* The employer and employee must agree, in writing, to the time and duration of the deduction before the advance. The agreement must also contain the amount to be advanced, the amount to be deducted to repay the advance in total and per wage payment, the date(s) when each such deduction will be taken, and notice that the employee can contest any deduction not in accordance with the terms of the agreement. An employee may revoke his/her authorization/agreement for the deductions at any time prior to the actual advance by the employer. Additionally, once an advance is given, no further advance may be given or deducted until any existing advance has been repaid in full.
- *Amount of deductions.* The amount of deductions for advances is not limited, as the deductions are for recovery of overpayments. The amount can be any value that is agreed upon by the employee and employer (even if such amount is greater than 12.5 percent of an employee's gross wages or reduces the employee's wages below the minimum wage). Additionally, the written agreement between the employer and employee may include total reclamation through deduction of the last wage payment should employment end prior to the expiration of the provided-for repayment period.
- *Dispute resolution procedure.* As with deductions for overpayments, employers must implement a procedure by which an employee, after receiving an advance, may dispute that the amount and frequency of the deductions are not in accordance with the written agreement for the advance. Just as with overpayments, dispute resolution provisions of an applicable collective bargaining agreement may suffice if they provide at least as much protection to the employee as required by the DOL regulations. The regulations set forth requirements for the dispute resolution procedure, including the nature and timing of an employer's response to any objection filed by an employee. Upon the filing of any such objection by an employee, the employer must cease making any deductions until it replies to the employee and makes any necessary adjustments. The failure of an employer to offer the required dispute resolution process will create a presumption that the deduction was impermissible.

Wage Deductions by Separate Transaction

The DOL regulations also expressly continue a preexisting rule that an employer may not require an employee to make a separate payment to the employer in lieu of a wage deduction unless the payment also would be permitted as a deduction from wages or would be permitted under a current collective bargaining agreement.

In an opinion letter issued prior to the DOL regulations, the DOL stated that no prohibited "separate transaction" will take place where an employer merely requests that an employee pay the money back and communicates to the employee that the employee's refusal will not result in "disciplinary or retaliatory action," such as suspension or termination of employment. While the DOL has given no indication that this interpretation will not continue, that also remains to be seen. Under this interpretation, an employer may make a loan that includes interest charges to an employee, provided repayments are made by separate payments (not wage deductions) and the employer advises the employee that failure to make the loan payments will not result in any disciplinary or retaliatory action. If an employee fails to make payments in connection with a loan, an employer may sue the employee to recover past-due amounts.

Implications for Employers

The good news for employers is that, so long as they follow the requirements set forth in the DOL regulations, they may now begin making permitted wage deductions, including those for overpayments and salary advances. Employers should develop compliant policies, procedures and forms, including notices of intent, agreements/authorizations for salary advances and written dispute resolution procedures and should train their employees who are in charge of these matters on the new regulations and their requirements.

The bad news is that, while the regulations provide welcome guidance, they are highly technical and may lead to claims by employees that the employer has failed to follow the letter of the regulations and has made unlawful wage deductions. Under the New York Labor Law, an employer that makes an unlawful wage deduction may be held liable not only for the amount of the wage deduction, but also for liquidated damages equal to 100 percent of the unlawful deduction, as well as the employee's attorneys' fees. Employers should consult with counsel before implementing any wage deductions to ensure they are acting consistently with New York's new wage and hour laws.

If you have questions about this or other employment issues, please contact [Mark Goldberg](mailto:mgoldberg@loeb.com) at 212-407-4925 or mgoldberg@loeb.com.

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