

Are You Ready for the Final Wage Deduction Rules?

October 14, 2013

The New York State Department of Labor (NYSDOL) issued [final Wage Deduction regulations](#), effective October 9, 2013. The regulations set forth the requirements for making authorized lawful deductions from employee wages under Section 193 of the New York Labor Law (NYLL), plus describe the mandatory requirements for recovering overpayments due to clerical or mathematical errors, or for repayment of wage advances. Employers have been waiting for clear guidance from the NYSDOL on this issue since June 2012, when Section 193 of the NYLL was amended to restore employers' ability to make deductions from employee wages in a number of limited circumstances.

The amended Section 193 of the NYLL prohibits any deduction from employee wages, except deductions that are made in accordance with laws, or "any rule or regulation issued by a government agency," or are "expressly authorized in writing by the employee" *and* "are for the benefit of the employee" so long as the "authorization is voluntary *and* only given following receipt by the employee of written notice of all terms and conditions of payment and/or its details and the details of the manner in which deductions will be made." (Emphasis added.) [Read Proskauer's June 28, 2012 client alert](#). The details were left to the NYSDOL to promulgate, which it has now finalized.

The amended statute authorizes deductions for these limited purposes:

- (i) insurance premiums and prepaid legal plans;
- (ii) pension or health and welfare benefits;
- (iii) contributions to a bona fide charitable organization;
- (iv) purchases made at events sponsored by a bona fide charitable organization affiliated with the employer where at least twenty percent of the profits from such event are being contributed to a bona fide charitable organization;
- (v) United States bonds;

- (vi) dues or assessments to a labor organization;
- (vii) discounted parking or discounted passes, tokens, fare cards, vouchers, or other items that entitle the employee to use mass transit;
- (viii) fitness center, health club, and/or gym membership dues;
- (ix) cafeteria and vending machine purchases made at the employer's place of business and purchases made at gift shops operated by the employer, where the employer is a hospital, college, or university;
- (x) pharmacy purchases made at the employer's place of business;
- (xi) tuition, room, board, and fees for pre-school, nursery, primary, secondary, and/or post-secondary educational institutions;
- (xii) day care, before-school and after-school care expenses;
- (xiii) payments for housing provided at no more than market rates by nonprofit hospitals or affiliates thereof; and
- (xiv) similar payments for the benefit of the employee.

Prohibited Practices

The new regulations prohibit deductions from wages for, among other things:

1. If not done in accordance with law, rule, or regulation;
2. Not authorized for the benefit of the employee;
3. Recoveries of overpayments or advances which do not adhere to the timing, manner, frequency and procedural requirements set forth in the regulations, including a mandated dispute resolution procedure;
4. Recoupment of unauthorized expenses;
5. Fines or penalties for tardiness, excessive leave, misconduct or quitting without notice; and
6. Employee purchases of tools, equipment, and attire required for work.

Deductions Authorized by the Employee

Wage deductions can be authorized by a collective bargaining agreement (CBA) or by a written agreement with the employee that is express, voluntary, and "informed." The regulations then detail the requirements for informed consent, as well as the nature of the written notice. Where the nature of a deduction may fluctuate based upon a purchase, such as meals in the company cafeteria, the notice can list a monetary range of the lowest and highest amount that can be deducted.

Notably, the regulations make clear that mere "convenience" is not a benefit and, accordingly, prohibit check-cashing fees from lawful wage deductions. At the same time, there is some leeway from the prohibition where the convenience results in a financial benefit to the employee (e.g., where the employee benefits monetarily, such as by discounted food purchased at the employer's cafeteria via a wage deduction).

The NYSDOL makes clear that the statutory catch-all phrase "similar payments for the benefit of the employee" must be related to (a) health and welfare benefits, (b) pension and savings benefits, (c) charitable benefits, (d) representative benefits, (e) transportation benefits, and/or (f) food/lodging benefits.

Deductions for Overpayments

Detailed restrictive procedures must be followed in order to make employee wage deductions resulting from a wage overpayment "due to a mathematical or other clerical error by the employer." There are Notice mandates which must be afforded the affected employee prior to taking a wage deduction, and employers must adhere to specific procedures for timing, frequency, and restrictions on the amounts which can be recovered. The regulations require that employers adopt procedures by which the employee can dispute the overpayment and terms of recovery. If an employee triggers the dispute resolution mechanism, the employer cannot commence wage deductions until "at least three weeks after a final determination."

Dispute resolution mechanisms in existing CBAs, which provide the employee as much protection as the regulations, are sufficient, but CBAs executed *after* the issuance of the final regulations (October 9, 2013) are sufficient *only* if they specifically reference §195-5.1 of the regulations.

Importantly, employers must adhere to the limitations on the periodic amount to be recovered. For example, 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 can recover the entire amount of the overpayment in the next wage payment. However, where the recovery of the overpayment exceeds net wages, after other permissible deductions, the wage deduction to be taken cannot exceed 12.5% of the gross wages earned in the wage payment, nor can the deduction reduce the hourly wage below the statutory state minimum (starting in January, 2014, New York's minimum wage rises to \$8.00/hour, increasing gradually to \$9.00/hour by 2016).

Deductions for Wage Advances

An "advance," as defined in the regulations, is the provision of money by the employer to the employee based on the "anticipation of the earning of future wages." While not stated in the regulations, it would appear this definition is sufficiently broad to include advances of vacation and/or sick pay. Note, if the employer charges interest, a fee, or some amount consisting of anything other than the amount provided the employee, this would then *not* constitute an "advance" for which a permitted wage deduction can be made.

There are detailed requirements and procedures governing repayment of an advance. For example, prior to the advance, the parties must agree, in writing, to the timing, duration, frequency, and method of recovery. The agreement also may allow the employer to take a total reclamation of the advance through a deduction made from the last wage payment at the employee's termination. Notably, once an advance is given, "no further advance may be given or deducted until any existing advance has been repaid in full." As with wage overpayments, the employer must adopt a procedure permitting the employee to contest the amount and frequency of deductions if s/he believes they are not in accordance with the parties' written agreement. The employer must set forth its dispute procedure in the parties' agreement to ensure the employee is aware of his/her rights prior to the advance being taken.

Action Steps

Failure to adhere to the authorization, notice, amounts, timing, duration, frequency, method of recovery, and dispute resolution mandates set forth in the regulations will create a presumption that the deduction does not comply with § 193 of the NYLL. In addition, employers must keep the pertinent records for at least six years after the employee's employment ends.

In light of the above, we recommend that Employers take the following action steps:

1. Review and update, as needed, existing wage deduction authorization forms to ensure they meet the new standards memorialized in the final regulations;
2. Prepare Notice of Intent forms which will govern compliance to recoup wage overpayments via payroll deductions (or via a separate transaction in compliance with § 195-5.1(a), and (d)-(i) of the regulations);
3. Prepare compliant written agreements governing advances and deductions therefore;
4. Create dispute resolution procedures that conform to regulatory requirements for employees to contest deductions for wage overpayments and advances;
5. Review policies and practices which may bear on these issues to ensure they are updated; and
6. Ensure open communication between in-house counsel, Human Resources, Payroll, and line management in connection with the new legal requirements.

If you have any questions, please do not hesitate to contact any of the lawyers listed on this client alert, or your Proskauer relationship lawyer.

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