

# Employment Law

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## PAYROLL DEDUCTIONS IN NEW YORK: EMPLOYER BEWARE

By Thomas O. Johnston and Suzanne E. Peters

Last year, the New York legislature amended New York Labor Law Section 193, permitting employers to make certain types of wage deductions that were previously prohibited in New York. Recently, the New York State Department of Labor adopted regulations in response to this change in law. The promulgation of the regulations signals that although an employer may now make certain deductions, it must strictly follow the procedures set forth in the regulations prior to making any deduction or attempting to recover any overpayment of wages. Failure to do so creates the presumption that the deductions were illegal and results in significant penalties for the employer. Increasing attention is being paid to employer wage and hour liability, particularly in collective or class actions. New York employers should be vigilant in complying with rules on payroll deductions.

### I. Wage Deductions Under Prior New York Law

Prior to the amendment of the law, New York employers were not permitted to make deductions from an employee's pay for any wage overpayments that were a result of mathematical or clerical errors. In the event such error occurred, the employer only could request that the employee pay back the overpayment after informing the employee that his or her refusal to do so would not result in disciplinary or retaliatory action. The employer also could sue the employee to recover the overpayment.

In November 2012, the law was amended to permit employers to make payroll deductions in the event of inadvertent overpayment of wages. The law also provides that employers may make deductions for wage advances and certain items that are "for the benefit of the employee," including gym memberships, parking or mass transit passes and day care. Notably, the law requires the employer to make the deductions in compliance with regulations promulgated by the Labor Commissioner.

Recently, the Labor Commissioner promulgated the final regulations, which took effect on October 9, 2013. Other than the deductions permitted in the law and the regulations, an employer cannot deduct monies from an employee's payroll, even with the employee's consent.

## **II. The Regulations**

The regulations provide that an employer can only make wage deductions if they fall into one of the following 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 of the Labor Law, authorized by, and for the benefit of, the employee;" (3) deductions for the recovery of overpayments made in accordance with the regulations; and (4) deductions for the repayment of wage advances made in accordance with the regulations. 12 NYCRR § 195-2.1(a).

The first permissible category for wage deductions are those deductions made in accordance with any law, rule or regulation issued by any governmental agency. These deductions include, but are not limited to, tax withholdings, child support, and wage garnishments.

The second category are those deductions "specified by, or those similar to those specified by, section 193 of the Labor Law, authorized by, and for the benefit of the employee." NYCRR § 195-2.1(a). The regulations provide six categories for which every permissible deduction in this category must fall: (a) health and welfare benefits, including insurance premiums, gym memberships, and day care; (b) pension and savings benefits; (c) charitable benefits, including payments made for contributions to a bona fide charitable organization or purchases made at events sponsored by a bona fide charitable organization affiliated with the employer; (d) representational benefits, such as payments that are made for dues or assessments to a labor organization; (e) transportation benefits, including payments that are made for discounted parking, tokens, vouchers, or other items that entitle the employee to use mass transit; or (f) food and lodging benefits, including payments for cafeteria and vending machine purchases made at the employer's place of business. 12 NYCRR § 195-4.4.

The deductions in this second category must be authorized by the employee. Notably, a deduction is authorized if it is agreed to in a collective bargaining agreement or in a written agreement that is express, written, voluntary, and informed. An authorization is "informed" when the employee is provided with written notice of all terms and conditions of the deduction, its benefit, and the details of the manner in which the deductions will be made. This written notice must be provided prior to the execution of the initial authorization, any deduction, any change in the amount of a deduction, or a substantial change in the benefits of a deduction.

An employer can also make deductions to recover wage overpayments. However, the regulations provide certain criteria that an employer must satisfy prior to being permitted to make any such deduction. First, the employer can only recover those overpayments made eight weeks prior to its issuing a required "notice of intent" for overpayment deductions. This notice of intent must be provided to the employee 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 content of the notice must contain the amount overpaid, the total amount to be deducted, the date of the deduction, and specific information regarding the employee's right to contest the payment and the applicable dispute resolution procedure. Second, the employer can make the deductions over a period not exceeding six years from the date of the original overpayment. Third, the employer is prohibited from making an overpayment wage deduction more than once per wage payment. Finally, when 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 such overpayment in that next wage payment. If, however, the recovery of the overpayment exceeds the net wages, the recovery may not exceed 12.5% of the gross wages earned in that wage payment nor shall such deduction reduce the hourly wage below the statutory state minimum.

Notably, an employer must implement a procedure in the event the employee either disputes the overpayment or the terms of recovery or desires a delay in the recovery of the overpayment. The specifics of what constitutes an adequate procedure are set forth at length in the regulations. See 12 NYCRR § 195-5.1 (f). Notably, the dispute resolution provisions of any applicable collective bargaining agreement are sufficient if they provide at least as much protection to the employee as the procedure set forth in the regulations.

The final category of permissible wage deductions are those deductions for wage or salary advances. The regulations define "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 other costs is not an advance and accordingly cannot be reclaimed through wage deductions. Prior to making any such deduction, the employer and employee must agree in writing to the time and duration of the deduction. The agreement must also contain the amount to be advanced, the amount to be deducted to repay the advance, the date of each such deduction, and notice that the employee can contest the deduction. Unlike deductions for overpayment, the amount of deductions for advances is not limited. Indeed, the amount can be any value that is agreed upon by the employee and the employer. As with deductions for overpayments, employers must implement a procedure by which an employee can dispute any deductions that are not in accordance with the written agreement for the advance.

### **III. Next Steps For Employers**

Any employer that fails to follow the New York Labor Law and makes an unlawful wage deduction will 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 and attorneys' fees. In light of this, employers should take all necessary steps to ensure their practices are compliant with the law and the regulations. Accordingly, employers should review and update their employee handbooks and any other policy that discusses or lists any permissible deductions. Employers should also work with their counsel to develop forms that will aid the employer in being compliant with the regulations, including notices of intent and agreements/authorizations for salary advances and/or

deductions. Employers would be wise to not only ensure that their payroll systems have the capability to make deductions but also be active in closely monitoring their payroll practices to ensure compliance with the regulations.

The Porzio Employment Law Monthly is a summary of recent developments in employment law. It provides employers with an overview of the various legal issues confronting them as well as practical tips for ensuring compliance with the law and sound business practices. This newsletter, however, should not be relied upon for legal advice in any particular matter.