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Proposed Regulations Clarify New York Employers' Wage Deduction Rights

By Bruce Millman and Jennie Woltz

Last year, Governor Cuomo signed into law new legislation, effective November 2012, which amended New York Labor Law section 193 to permit employers to make deductions for wage overpayments due to mathematical or clerical errors and for repayments of salary or wage advances.¹ However, under the new law, such deductions can be made only as provided in regulations that have yet to be promulgated by the New York Department of Labor (NYDOL). The lack of regulations has stifled employers' ability to take advantage of the new law.

Now, however, proposed wage deduction regulations interpreting Labor Law section 193 have been filed with the Department of State and published in the May 22, 2013 issue of the State Register.² In addition to deductions for overpayments and advances, the proposed regulations also address the law's expanded list of wage deductions considered permissible because they are "for the benefit of the employee."³ Public comment on the regulations will be received at regulations@labor.ny.gov through and including July 6, 2013.

Deductions for the Benefit of Employees

What Deductions May be Made "for the Benefit of the Employee"?

New York Labor Law section 193(b) lists several allowable deductions "for the benefit of the employee," and also provides for "similar payments for the benefit of the employee." The proposed regulations clarify that such "similar payments" are expressly limited to benefits for health and welfare, pension and savings, charity, representation, transportation, and food and lodging. The proposed regulations provide a list of non-exclusive examples of benefits that fall into each of the above categories.

- 1 See Bruce Millman and Adam Colón, [Wage Deductions Almost Legal in NY? Legislation Allowing Employers to Make Wage Deductions Awaits Governor's Signature](#), Littler ASAP (July 19, 2012). The new law addressed recent interpretations of the previous deduction law by New York's Court of Appeals and Department of Labor, which had narrowed the scope of permissible deductions.
- 2 The full text of the proposed regulations can be found at <http://labor.ny.gov/legal/wage-deduction-regulation.shtml>. If passed, the proposed wage deduction regulations would repeal existing 12 NYCRR 195 and adopt a new 12 NYCRR 195.
- 3 In addition to payments for insurance premiums, pension, health and welfare deductions, prepaid legal plans, union dues, and savings plans, the law adds purchases at charitable events, discounted parking or passes, fare cards or vouchers related to mass transit, fitness, health club or gym memberships, cafeteria, vending machines and pharmacy purchases at the employer's premises, tuition, room, board and fees related to certain education institutions, and certain child care expenses. N.Y. Lab. Law § 193(b).

The proposed regulations also warn against certain deductions that may not be taken because they do not confer a proper “benefit” for employees. For instance, deducting a fee for providing an employee’s paycheck in cash for the “convenience” of the employee is improper. Similarly, any deduction that provides a financial benefit to an employer at the expense of the employee will call that deduction into question. Included in the proposed regulations is a list of specifically prohibited deductions, such as deductions for employee purchases of tools, or fines or penalties for employee misconduct or quitting without notice.

What Are the New Requirements for a Deduction To Be Considered “Authorized”?

Under the proposed regulations, a deduction for the benefit of an employee is “authorized” only if it is agreed to in a collective bargaining agreement or by an agreement between the employer and employee that is express, written, voluntary and informed. To be “informed,” the employee must receive advance written notice that conforms to the proposed regulation, and a new notice must be provided whenever the amount of the deduction changes or there is a substantial change in the benefits of a deduction.

Deductions for Advances and Overpayments

Likely the most anticipated guidance in the proposed regulations provides clarity on how to make deductions for advances and overpayments.

Deductions for Overpayments:

The new regulations do not require written authorization from the employee for the employer to make deductions for unintended overpayments. However, they specify in detail the timing, frequency, method, permitted amount of recovery, how to provide the employee proper advance notice of the deductions, dispute resolution procedures to resolve employee contentions on overpayments, and how to repay improperly taken deductions.

Timing, Duration, Frequency, and Method: The proposed regulations provide that an employer may only recover overpayments made in the last eight weeks prior to issuing a required “notice of intent” for overpayment deductions. The employer may make deductions to recover overpayments over a period not exceeding six years from the date of the original overpayment. Further, an employer may recover overpayments by wage deductions no more frequently than once per wage payment. Employers may recover overpayments through wage deduction or by separate transaction so long as they follow timing and duration requirements and limitations on the amount of recovery set forth in the regulations and summarized below.

Amount: The proposed regulations allow an employer to recover overpayments by deducting the amount of the overpayment from the employee’s wages, limited to the following:

1. 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 such overpayment in that next wage payment;
2. Where the recovery of an overpayment exceeds the net wages after other permissible deductions in the immediately subsequent wage payment, the recovery may not exceed 12.5% of the gross wages earned in that wage payment nor may such deduction reduce the effective hourly wage below the statutory state minimum hourly wage.

Any recovery of overpayments must also comply with any final determination made under the dispute procedure outlined below.

Notice of Intent: The proposed regulations require that employers give employees a “notice of intent” at least three days prior to the date of a deduction for an overpayment if the entire deduction will be taken in a single wage payment, or three weeks prior to the commencement of deductions that will be taken periodically. The notice must state the amount overpaid in total and per pay period, the total amount to be deducted and the date each deduction shall occur, followed by the amount of each deduction. It must also inform the employee that he or she may contest the overpayment, state the date by which the employee must contest, and either include the procedure by which the employee may contest the overpayment or terms of recovery, or refer to where such procedure can be located.

Dispute Resolution: The proposed regulations require employers to adopt or implement a procedure whereby employees may dispute the overpayment and terms of recovery, or seek a delay in the recovery of the overpayment. Existing dispute resolution procedures in collective bargaining agreements that contain at least as much protection to employees as provided for in the proposed regulations are sufficient for purposes of compliance with the proposed regulations. The proposed regulations detail the way an employee may contest the deduction and receive a response, and what steps an employer must take to properly respond to the employee and issue a final determination concerning the deduction.⁴ The proposed regulations note that if an employee avails him or herself of the dispute resolution procedure, the employer may not start taking deductions until at least three weeks after issuing the final determination. A contested deduction is presumed impermissible if an employer fails to afford an employee a compliant dispute resolution process.

Repayments by the Employer: The employer is required to repay the employee for any deduction found to be improper under the dispute resolution procedure no later than the time period provided for payment of wages earned on the day of the final determination, and may make the repayment immediately.

Deductions for Advances:

The proposed 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.” The proposed regulations warn that the provision of money by an employer 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 wages. Notably, the regulations are unclear as to whether this definition includes wage supplements, such as sick or vacation days. While there is an argument that an advance of leave is the same as an advancement of wages, or should be treated in the same manner, the language of the regulations does not seem to contemplate advances of leave rather than wages or money. Littler expects to file a comment with the NYDOL on this issue.

Timing, Duration, Frequency, and Amount: The proposed regulations provide that the employer and employee must agree in writing to the timing and duration of the repayment deduction before the advance is given. Deductions may then be taken, so long as they are in accordance with those written terms.⁵ The proposed regulations also specify that once an advance is given, no further advance may be given or deducted until any existing advance has been repaid in full—and any money given by the employer to the employee in excess of the amounts and durations permitted to be deducted by their agreement are not recoverable through wage deductions.

Deductions made for advances differ from those made for unintended overpayments in at least three important ways under the proposed regulations:

1. Employers must recover advances by wage deduction no less than each wage payment.⁶
2. Employers are not limited in the amount of each deduction they may take in each wage period by concerns that the amount of the deduction will exceed 12.5% of the employee’s gross wages or will reduce his or her earnings below the state minimum wage.
3. Finally, the written authorization between the employer and employee may provide for total recoupment through deduction of the last wage payment, should employment end prior to the expiration of the terms of the written advance authorization.

Authorization: The employee must authorize the repayment deductions in writing before the employer gives the advance. The authorization must contain the amount to be advanced, the amount to be deducted to repay the advance in total and per wage payment, and the date(s) when each such deduction shall be taken. The employee may not revoke the authorization after the employer has provided the advance. The authorization must include notice to the employee that he or she may contest any deduction not in accordance with the terms of the advance written authorization, and must include a written notice describing the procedure.

4 Specifically, the proposed regulations provide that: (1) an employee may respond within one week (or in the case where an overpayment is to be reclaimed in the next wage payment, two days) of receiving a notice of intent contesting the proposed deduction; (2) the employer shall respond to the employee’s response within one week of receipt, addressing the employee’s concerns and providing a reason why the employer agrees or disagrees; (3) the employer must provide the employee with written notice of the opportunity to meet with the employer within one week to discuss any disagreements that remain; and (4) the employer must provide the employee with a written notice of the employer’s “final determination” regarding the deductions within one week of this meeting.

5 Section 195-5.2(c) uses the word “overpayments,” but this appears to be a typo and likely should refer to “advancements.”

6 Section 195-5.2(b) uses this language; presumably this clause should read “once” each wage payment.

Dispute Resolution: As with deductions for overpayments, the proposed regulations require that employers implement a dispute resolution procedure whereby the employee, after receiving the advance, may dispute the amount and frequency of deductions not made in accordance with the terms of the written advance authorization. According to the proposed regulations, under this procedure, the employee shall provide written notice of the employee's objection to the deduction, and the employer must respond in writing to the employee's objection as soon as practical, addressing the issues raised in the employee's objection and containing a clear statement indicating the employee's position regarding the deduction and a reason why the employer disagrees or agrees with the employee's position. If an employee disputes a deduction made to recoup an advance according to the employer-established procedure, the employer must cease taking deductions until it has responded to the employee's objection to the deduction and any appropriate adjustments have been made. Any delay in repayment caused by this procedure extends the time within which the employer may recover the advance through deductions. Like overpayments, the failure of an employer to offer a dispute resolution procedure to its employees will create the presumption that the contested deduction was impermissible.

Authorization, Notification, and Record-Keeping Requirements Relating to Overpayments and Advances:

The proposed regulations state that any authorizations, notice responses, replies or determinations required to be given in writing relating to overpayments or advances may be made through email or electronic means. Statements given to employees must use ordinary language readily understood, and must appear in size 12-point font or larger. Employers must keep records of any authorizations for at least six years after such employee's employment ends.

Employers' Next Steps

While employers might consider implementing deductions at this point in reliance on the proposed regulations, doing so is not without risk. The NYDOL has previously taken the position that deductions should not proceed until regulations are issued. Thus, employers considering implementing deductions before final regulations are issued are advised to contact counsel who can help assess the risk involved in a particular course of action.

Although the regulations are not yet in effect and may be modified from their proposed form, employers should anticipate that the final regulations may be substantially similar. Employers should therefore consider developing policies, procedures, and notices that conform to the requirements of the proposed regulations, in order to permit them to make deductions for overpayments and for advances once the final regulations are passed. These would include notices of intent, authorization forms, and written dispute resolution procedures in the event of overpayments or advances. Of course, employers that begin to develop their materials in anticipation of the final regulations may have to revise those materials once the final regulations are implemented.

Employers should also consider preparing training materials for managers and human resources staff so they will be prepared to respond promptly and appropriately to an employee's complaint about an improper deduction, and ensure the appropriate records will be kept in conformity with the proposed regulations' requirements.

Finally, employers should also contact their payroll coordinators about possible deductions they plan on taking from employee wages to ensure a smooth transition once the regulations are passed.

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