Fox Rothschild LLP
ATTORNEYS AT LAW

October 2013

HOSPITALITY

ALERT

New York Department of Labor Issues Final Regulations on Wage Deductions

By Glenn S. Grindlinger

In 2012, New York amended Section 193 of the Labor Law to expand those instances where employers may lawfully make deductions from employee wages. Last week, consistent with the 2012 amendments, the New York Department of Labor (DOL) issued final regulations that clarify the types of permissible wage deductions and established a mechanism that must be followed by those employers seeking to make deductions from employee wages for overpayments to employees and repayment of pay advances given to employees.

The DOL regulations, which became effective on October 9, 2013, confirm that there are four general categories of permitted wage deductions under Section 193:

- Deductions made in accordance with any law, rule or regulation issued by any governmental agency;
- Deductions specified by, or similar to those specified by Section 193, authorized by, and for the benefit of the employee;
- Deductions for the recovery of overpayments provided the deductions are made in accordance with the DOL's regulations; and
- Deductions for the repayment of wage advances provided the deductions are made in accordance with the DOL's regulations.

Deductions Made in Accordance with Law

The regulations specifically state that employers may make any deductions from employee wages that are required by any applicable law, rule or regulation issued by any governmental agency. Employers can make these deductions without first obtaining a signed authorization from the employee. Examples of such deductions include tax withholdings, wage garnishments and child support levies.

Deductions Specified in Section 193

Under Section 193, employers are permitted to make deductions from employee wages provided they first obtain a written authorization from the employee, the deduction is for the employee's benefit and the deduction is for:

- Health and welfare benefits;
- Pension and retirement benefits;
- Insurance premiums and prepaid legal plans;
- Contributions to a bona fide charitable organization;
- Purchase of U.S. bonds;
- Dues or assessments to a labor organization;
- Fitness center, health club and/or gym membership dues;
- Discounted parking or discounted passes, tokens, fare cards, vouchers or other items that entitle the employee to use mass transit;
- Day-care, before-school care and after-school care expense; or
- Similar benefits for the employee.

In order for the deduction to be authorized, it must be set forth in a collective bargaining agreement, or the employer must have obtained written authorization from the employee that is express, voluntary and informed. An authorization is express, voluntary and informed when all of the terms and conditions of the deduction are set forth in writing. The authorization must be obtained "prior to the deduction being made, any [time there is a] change in the amount of a deduction, or a substantial change in the benefits of the deduction." A "substantial change" to the deduction exists, according to the regulations, whenever

there is a change in the amount of the deduction, a reduction in the benefit received or a modification in the details of the manner in which the deduction is made. In those situations where the amount of the deduction may fluctuate from week to week, the regulations permit the employer to set "a range where the lowest and highest amounts that may be deducted are set forth in the notice."

The regulations also detail when a deduction is "for the benefit of the employee." The regulations note 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." They specifically state that "convenience is not a benefit." Further, the regulations state that except in very limited circumstances, the employer may not obtain any financial gain from the deduction and if it does so there is a presumption that the deduction was not for the employee's benefit.

In addition, consistent with recent court rulings, the regulations note that the phrase "similar benefits for the employee" is limited to those deductions that are similar to the deductions specified in Section 193.

Deductions for Overpayments

Under Section 193, in order for an employer to recover an overpayment made to an employee, the overpayment must be the result of a mathematical or clerical error. Assuming the overpayment is the result of such an error, the employer may recoup the overpayment under the following conditions:

- The employer may only recover such overpayments as were made in the eight weeks immediately prior to the issuance of the Notice of Intent, as detailed below.
- If the overpayment is less than or equal to the net wages in the next wage payment, the entire amount may be deducted, otherwise the overpayment deduction is limited to 12.5% of the employee's gross wages, provided the deduction does not reduce the employee's wages below the minimum wage.
- Before making a wage deduction for an overpayment, the employer must provide the employee with a Notice of Intent. If the employer is recouping the entire overpayment in the next wage payment, the Notice of Intent must be given at least three days prior to the deduction; in all other cases the Notice of Intent must be provided at least three weeks before the overpayment deductions may commence.
- The Notice of Intent must set forth the amount of the overpayment and the amount that will be deducted each pay period until the overpayment is recouped.
- The Notice of Intent must inform the employee that he or she can contest the overpayment, provide a date by which the employee must make any such challenge and include the procedure by which the employee may contest the overpayment and/or the terms of its recovery.
- Unless there is an applicable collective bargaining agreement in place, the employer must set up a procedure by which employees can contest the amount of the overpayment and/or how the overpayment is recovered. The procedure must provide the employee at least one week from receipt of the Notice of Intent to challenge the proposed deduction. Should the employee make such a challenge, the employer must respond to the employee within one week. In the response, the employer must clearly state its position and provide a reason as to why the employer agrees or disagrees with the issues raised by the employee. The employee then has at least one week to provide written notice to the employer that he or she wants to discuss the matter further. The employer must then meet with the employee and within one week of such meeting provide written notice to the employee of the employer's final determination.
- The employer is not permitted to make the overpayment deduction until the above procedure permitting employees to challenge the deduction has run its course.

In the event the employer fails to follow the parameters outlined above, the DOL will presume that the deduction was impermissible and in violation of Section 193.

Deductions for Advances

Similar to deductions for overpayments, the regulations set forth an elaborate protocol that must be followed before an employer may make deductions for advances given to employees. Those protocols include:

- The employer and the employee must agree, in writing, to the timing and duration of the repayment deduction before the advance. The writing must set forth the amount of the advance, the amount the employer will deduct each pay period to recoup the advance, when such deductions will commence and that the employee can contest any deduction not in accordance with the terms of the repayment. The employee can revoke the writing at any time prior to the employer advancing the employee his or her wages; thereafter the employee cannot revoke the writing.
- Once an advance is given, the employer may not advance the employee additional wages until the original advance has been repaid in full.
- The employer must set up a procedure by which the employee can challenge any deduction not taken in

accordance with the writing. The challenge procedure must be provided to the employee in writing. Under the procedure, the employee must be able to submit written notice to the employer objecting to the deduction. The employer must respond to the written objection as soon as practicable and in writing provide a reason as to why the employer agrees or disagrees with the issues raised by the employee.

- Should the employee file a written objection concerning the deduction, the employer must suspend the recoupment deduction until it provides its written response to the employee.

As with overpayment deductions, if the employer fails to follow the above protocols, the DOL will assume that the deduction was taken in violation of Section 193. Furthermore, the regulations also specifically note that the employer may not charge interest or a fee associated with the advance.

Prohibited Deductions

Finally, the regulations provide examples of deductions that are not permitted under any circumstances. These deductions include:

- Employee purchases of tools, equipment and attire required for work;
- Recoupment of unauthorized expenses;
- Fines or penalties for tardiness, excessive leave, misconduct or quitting without notice;
- Contributions to political action committees, campaigns and similar payments;
- Repayment of employer losses, such as losses for spoilage, breakage and cash shortages;
- Fees, interest or the employer's administrative costs; and
- Repayments of loans, advances and overpayments that are not made in accordance with the regulations.

Because an employer may not deduct interest from an employee's wages and there is no provision within the regulations specifically addressing loans, as opposed to wage advances, it is clear that employers may not loan employees money and recoup that loan through a wage deduction. Instead, the employer is limited to advancing wages to an employee.

The regulations clarify that before New York employers may make deductions from employee wages that are not legally required, they must obtain a written authorization from the employee detailing the reason for the deduction and its amount. Further, the employer must set up an elaborate protocol if it wants to take deductions caused by overpayments and advances. While these regulations provide welcome guidance for the employer community, they may also embolden plaintiffs' attorneys. For example, plaintiffs' attorneys may now challenge employee wage deductions asserting that because the employer did not follow the letter of the regulations the deductions were not properly authorized and seek to recoup such wage deductions as well as liquidated damages, which after the passage of the Wage Theft Prevention Act are now equal to 100% of the unlawful deduction taken. Accordingly, New York employers should work carefully with counsel to ensure that they remain compliant with New York wage and hour law.

For more information about this Alert, please contact Glenn Grindlinger at ggrindlinger@foxrothschild.com, or another member of the Fox Rothschild New York Labor & Employment Department. Visit us on the web at www.foxrothschild.com.