

In This Issue:

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Recent opinion letters from the New York State Department of Labor (NYDOL) reverse its prior position regarding permissible deductions from wages for overpayments to employees. Employers need to be aware of the NYDOL's current position regarding lawful deductions from wages when attempting to collect overpayments or other monies owed by an employee.

New York Department of Labor Reverses Itself on Permissible Paycheck Deductions Under the Labor Law

By **Stephen A. Fuchs and Elias J. Kahn**

Section 193 of the New York Labor Law ("Section 193") prohibits, with certain enumerated exceptions, deductions from an employee's wages. In a major shift of its position, the New York Department of Labor (NYDOL) has recently determined that, under Section 193, certain deductions from an employee's paycheck, including but not limited to previously permitted deductions for overpayments, salary/benefit advances and tuition, are now impermissible – even with the employee's written consent and even if the deduction does not exceed 10% of the employee's pay.¹ In addition, the NYDOL, in a change of position, now states that an employer may not discipline its employee if the employee refuses to pay back an overpayment or other amounts owed to the employer. This ASAP summarizes which deductions are no longer permitted and what actions an employer may take when it needs to recover money from an employee.

New York Labor Law Section 193

Section 193 provides as follows:

1. No employer shall make any deduction from the wages of an employee, except deductions which:
 - are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or
 - are expressly authorized in writing by the employee and are for the benefit of the employee; provided that such authorization is kept on file on the employer's premises. Such authorized deductions shall be limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee.
2. No employer shall make any charge against wages, or require an employee to

make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages under the provisions of subdivision one of this section.

3. Nothing in this section shall justify noncompliance with article three-A of the personal property law relating to assignment of earnings, nor with any other law applicable to deductions from wages.

The NYDOL's Prior Interpretation of Section 193

The NYDOL previously held that certain deductions from pay could be considered “for the benefit of the employee” within the meaning of Section 193 if they were repayments of a debt to the employer incurred by the employee’s receipt of an overpayment, loan, or other advance which the employee did not earn. For example, in October 2008, the NYDOL advised that, with an employee’s written consent, the employer may deduct the full amount of any overpayment of wages to an employee from an employee’s paycheck if the deduction is made within the pay period immediately following the overpayment.² If the employer made the wage deduction after the pay period immediately following the overpayment, then the deduction was permissible if it was limited to 10% of the employee’s wages for the pay period and if the employer received the employee’s written authorization.³ This position by the NYDOL, while helpful to employers, was contrary to the plain language of Section 193 and at least one published appellate decision.⁴ The NYDOL also previously advised employers that other deductions from paychecks for the employee’s benefit, such as deductions for salary/benefit advances⁵ and tuition payments,⁶ could be made with the employee’s written consent.

The New York State Court of Appeals’ Narrow Interpretation of Section 193(1)(b)

In two cases, the New York Court of Appeals, the state’s highest court, relied on the narrow language of Section 193 to strictly limit deductions to the specific types of payments enumerated in Section 193(b), regardless of whether or not such deductions were optional or had been authorized by the employee. In one case, *Angello v. Labor Ready, Inc.*,⁷ deduction of an employment firm’s cash dispensing machine fees from employee pay was not a payment of the type contemplated by the statute, and such deductions therefore violated Section 193.⁸ The court held that deduction payments that go “directly to the employer or its subsidiary violate[s] both the letter of the statute and the protective policy underlying it.”⁹ In the second case, *Marsh v. Prudential Securities*,¹⁰ the court emphasized that Section 193 authorizes only deductions that are “expressly authorized by” and “for the benefit of the employee,” and are “similar” to the types of payments enumerated in the statute.¹¹ However, the court held that voluntary, authorized deductions for an employer’s deferred investment plan met these criteria, and were not a violation of the statute.¹²

The NYDOL's Recent Interpretation of Section 193

Prior Deductions No Longer Permitted

Relying heavily on the two Court of Appeals decisions referenced above, in January 2010, the NYDOL explicitly reversed its position in the October 2008 opinion letter that had permitted deductions for overpayments from an employee’s wages.¹³ The NYDOL now takes the position that deductions for overpayments from an employee’s wages are not permitted, even with the employee’s written consent.¹⁴ The NYDOL determined that overpayments are not similar to the types of enumerated payments for which deductions from wages are authorized, and therefore may not be deducted from an employee’s wages.¹⁵

In August 2009, the NYDOL also applied this same logic to deductions for salary/benefit advances to employees, and opined that deductions for salary/benefit advances from an employee’s wages are impermissible, even with the employee’s written consent.¹⁶ Curiously, on the same day that it issued its October 2008 letter permitting deductions for overpayments, the NYDOL issued another letter stating that deductions for tuition payments are not permitted.¹⁷ The NYDOL’s recent opinions also do not directly address whether deductions for personal loans to an employee are permitted. A July 15, 1998 letter from Robert Ambaras, NYDOL Senior Attorney, to Steven J. Younes (NYDOL Letter #RO-98-0079) permitted deductions for personal loans. Given the NYDOL’s current reading of Section

193, however, it is unlikely that the NYDOL will now permit deductions for personal loans, because personal loans are not similar benefits to the benefits enumerated in Section 193.

New Restrictions on Separate Transactions

The NYDOL has also changed its interpretation of New York Labor Law Section 193(2), which provides: “No employer shall make any charge against wages, or require an employee to make any payment by *separate transaction* unless such charge or payment is permitted as a deduction from wages under the provisions of subdivision one of this section.”¹⁸ The NYDOL now states that if the employer asks the employee to pay back money owed to the employer, and states that the employee could be disciplined if he or she refuses to pay it back, the NYDOL will consider this conduct by the employer to be a prohibited “separate transaction” under Section 193(2).¹⁹ The NYDOL does state, however, that no prohibited “separate transaction” takes place where the employer merely requests that the employee pay back the money as long as it communicates to the employee that the employee’s refusal will not result in “disciplinary or retaliatory action” such as termination or suspension.²⁰ While the reasons for this distinction may not be readily apparent, a payback under threat of discipline would be one that is “required,” and therefore prohibited by the wording of Section 193(2), whereas a voluntary payback is performed not “required.” Nothing in the NYDOL’s opinion, however, prohibits an employer from disciplining an employee for theft itself.

In addition, the NYDOL makes it clear that “disciplinary or retaliatory action” does not include bringing legal proceedings against the employee to recover the money owed to the employer. Thus, the employer may still “seek relief in a separate proceeding against the employee, i.e., an action in civil court.”²¹ Moreover, the NYDOL’s recent opinion letter does not address whether or not it is permissible to enter into a written agreement with the employee to repay money the employee owes the company.

Implications and Recommendations for Employers

- Employers may only make deductions not required by law from an employee’s paycheck – even with the employee’s written consent – for very limited purposes, including payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization and any payments that are nearly identical to these types of payments. All other payments including, but not limited to, overpayments, loans, salary/benefit advances and tuition, may not be deducted from an employee’s paycheck. This is true even with the employee’s written permission and even if the employee requests that such deductions be made because doing so would be either more convenient or less costly for the employee.
- Money that is owed to the employer may not be deducted from the employee’s paycheck. To recover such money owed by the employee, the employer should request the money from the employee without threatening disciplinary or retaliatory action. If the employee refuses to pay back the money, then the employer’s recourse is to initiate a legal action against the employee to recover the money. An employer may request that an employee repay an overpayment, as long as the employer communicates that the employee’s refusal will not result in any disciplinary action.
- The NYDOL now takes the position that an employer may not discipline an employee for refusing to repay money owed to the employer, regardless of the accompanying circumstances. However, the NYDOL’s recent opinions do not specifically address discipline for failure to repay monies owed in cases of theft by the employee. Moreover, nothing in the New York Labor Law prohibits the discipline of an employee for theft of money or property. Employers clearly may discipline employees for misconduct such as theft, and then bring a court claim against the employee for the amount stolen.
- In every case, employers should consult experienced labor and employment counsel regarding the lawful alternative actions to recover overpayments and similar types of payments to employees.

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¹ Pursuant to a regulation promulgated by the NYDOL, 12 N.Y.C.R.R. § 195.1, permissible deductions from wages may not exceed 10% of the employee's gross pay.

² See October 23, 2008 letter from Benjamin T. Garry, NYDOL Senior Attorney, to Sally Jo-Waterfall (NYDOL Letter #RO-07-0015).

³ *Id.*

⁴ *Hennessey v. Board of Educ.*, 227 A.D.2d 559, 560 (N.Y. 1996).

⁵ See Aug. 3, 2009 letter from Maria L. Colavito, NYDOL Counsel, and Jeffrey G. Shapiro, NYDOL Associate Attorney (NYDOL Letter #RO-09-0006) (stating that the NYDOL used to permit deductions for advances of salary/benefits and overpayments).

⁶ See Apr. 11, 1997 letter from Brian S. Reichenbach, NYDOL Deputy Counsel, to Patrick K. Greene (No NYDOL #) (permitting deductions for tuition payments).

⁷ *Angello v. Labor Ready, Inc.*, 7 N.Y.3d 579 (2006).

⁸ *Id.* at 585.

⁹ *Id.* at 586.

¹⁰ *Marsh v. Prudential Securities, Inc.*, 1 N.Y.3d 146 (2003).

¹¹ *Id.* at 152.

¹² *Id.* at 156-57.

¹³ See Jan. 21, 2010 letter from Jeffrey G. Shapiro, NYDOL Associate Attorney, to Joel L. Finger (NYDOL Letter #RO-09-0152).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Aug. 3, 2009 letter from Maria L. Colavito, NYDOL Counsel, and Jeffrey G. Shapiro, NYDOL Associate Attorney, to Joseph A. DeTraglia (NYDOL Letter #RO-09-0006).

¹⁷ See Oct. 23, 2008 letter from Benjamin T. Garry, NYDOL Senior Attorney, to Michael G. Weisberg (NYDOL Letter #RO-07-0003) (prohibiting deductions for tuition).

¹⁸ N.Y. LAB. LAW § 193(2) (emphasis added).

¹⁹ See Jan. 21, 2010 letter from Jeffrey G. Shapiro, NYDOL Associate Attorney, to Joel L. Finger (NYDOL Letter #RO-09-0152).

²⁰ *Id.*

²¹ *Id.*