

October 16, 2013

New York Employers Are Now Safe to Make Wage Deductions: NYDOL Issues Final Wage Deduction Regulations

By Bruce Millman and Adam Colón

The New York Department of Labor (NYDOL) issued final regulations, effective October 9, 2013, which explain how and when employers may make deductions for wage overpayments due to mathematical or clerical errors and for repayments of salary or wage advances.¹ The final regulations include minor changes from the proposed regulations Littler previously discussed in detail.² Below, we summarize the key provisions of the final regulations.

Deductions for the Benefit of Employees

New York Labor Law Section 193(b) lists specific permissible deductions “for the benefit of the employee,” and also provides for “similar payments for the benefit of the employee.” “Similar payments” are expressly limited to benefits for health and welfare, pension and savings, charity, representation, transportation, and food and lodging. Permitted deductions in this category include health club memberships, pharmacy purchases made at the employer’s business, day care expenses, payments for discounted passes or other items that allow employees to use mass transit, and purchases of food at employee cafeterias or vending machines.

The regulations explain that simply because a deduction offers a convenience to the employee, this does not mean the deduction offers a benefit to the employee. For example, 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 the employer at the expense of the employee will be questionable. Specifically prohibited deductions include deductions for employee purchases of tools, or fines or penalties for employee misconduct or quitting without notice. However, the regulations do allow deductions for discount purchases of the employer’s own products or services as long as the deduction falls within the types of permissible deductions under the law and the regulations.

1 The full text of the regulations can be found at <http://labor.ny.gov/legal/wage-deduction-regulation.shtm>.

2 See Bruce Millman and Jennie Woltz, [Proposed Regulations Clarify New York Employers’ Wage Deduction Rights](#), Littler ASAP (Jun. 3, 2013).

Required Authorization for Deductions

A deduction for the benefit of an employee is “authorized” only if it is agreed to in a collective bargaining agreement or an agreement between the employer and employee that is express, written, voluntary, and informed. To be “informed,” the employee must receive advance written notice of all of the terms and conditions of the deduction, its benefit, and the details of the manner in which the deduction shall be made. Further, employees must receive a new notice whenever the amount of the deduction changes or there is a substantial change in the benefits of a deduction. However, if the amount of the deduction may fluctuate based upon the purchase, for example for cafeteria meals, the notice can provide a range of the lowest and highest amounts that may be deducted. Deductions within the range will not require additional notice or authorization. A written authorization may cover more than one deduction as long as the authorization contains all of the required information for each deduction.³

Deductions for Overpayments

A written authorization is not required to make deductions for unintended overpayments. However, 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 are all subject to the regulations.

Timing, Duration, Frequency, and Method: An employer may recover by deduction only those overpayments made in the last eight weeks prior to issuing a required “notice of intent” for overpayment deductions. The employer may make the 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.

Amount: The amount an employer may recover for overpayments through wage deductions is 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 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.

Notice of Intent: Employers must 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.⁴ The notice must contain (1) the amount overpaid in total and per pay period, (2) the total amount to be repaid in wage deductions, and (3) the date each deduction shall occur, followed by the amount of each deduction. The notice 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 the employee to published procedures governing such disputes.

Dispute Resolution: Employers are required to adopt 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 for employees as provided for in the regulations are sufficient. Dispute resolution provisions in collective bargaining agreements executed after the issuance of the regulations, which provide at least as much protection to the employee and which specifically reference the regulations, are also sufficient.⁵ The regulations explain how an employee may contest the deduction, and the steps an employer must take to respond properly to the employee and issue a final determination concerning the deduction, including time limits for the employee’s initial protest and the employer’s response. If an employee takes advantage 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 offer a compliant dispute resolution process.

³ Section 195-4.2(a). This language was not included in the proposed regulations.

⁴ The final regulations explain that “days” are to be counted as calendar days and not business days, and a “week” is seven consecutive days. Section 195-4.2(a).

⁵ Section 195-5.2(f). This language was not included in the proposed regulations.

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

Advances are defined as “the provision of *money* by the employer to the employee based on the anticipation of the earning of future wages” (emphasis added). Any 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 “advances” include advances of paid leave time, such as sick or vacation days. Nonetheless, use of the broad phrase “provision of money,” rather than the narrower “advance of wages,” suggests that the regulation can be read to include payment for time off in advance of when it is earned.⁶

Timing, Duration, Frequency, and Amount: 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. Employers may recover advances by wage deduction no more than each wage payment.⁷ Employers should note 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 two important ways:

1. 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.
2. 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. These specificity requirements effectively preclude an employer from having a generalized policy providing for advancement of time and recoupment by deduction. 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. The employee may not revoke the authorization after the employer has provided the advance.

Dispute Resolution: As with deductions for overpayments, employers must 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. 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

All authorizations, notice responses, replies, or determinations required to be given in writing 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.

⁶ Littler filed a comment asking the Department of Labor to clarify this issue in the final regulations, but the regulations remain unchanged in this respect.

⁷ The final regulations correct the language in the proposed regulations which stated that “[t]he employer shall recover advances by wage deduction no less than each wage payment.”

Next Steps for Employers

Employers are now free to begin making wage deductions pursuant to the issued regulations. To the extent employers have not already done so, they should develop policies, procedures, and notices that conform to the requirements of the regulations. Notices should include notices of intent, authorization forms, and written dispute resolution procedures that apply to overpayments or advances.

Employers should also prepare training materials for managers and human resources staff so that they can address complaints about improper deductions and ensure that their records comply with the regulations.

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