

FAQ: MAKING WAGE DEDUCTIONS TO RECOVER INADVERTENT OVERPAYMENT OF WAGES AND REPAYMENT OF ADVANCES TO EMPLOYEES

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Can I make deductions from employee wages to recover overpayment of wages or repayment of advances given to my employees? When? How?

These are questions that arise often for many employers. Until last year, such wage deductions were prohibited. However, legislation signed into law in September 2012 amended New York's wage deduction law, N.Y. Labor Law §193, and expanded the categories of deductions that employers may take from employees' wages, including for recovery of inadvertent overpayments and advances. The legislation, which took effect in November 2012, also requires such wage deductions to comply with regulations issued by the New York Department of Labor. See our prior L&E Alert, [New York Eases Rules on Deductions from Employee Wages](#) (October 2012).

On May 22, 2013, the New York State Department of Labor published proposed regulations that would govern newly authorized wage deductions. The agency accepted public comment on the proposed regulations through July 6, 2013. Although the regulations are not yet in final form and are subject to potential revision, we believe they offer important guidance on the parameters of permitted wage deductions. To help employers gain a better understanding of these parameters, we provide below several "Frequently Asked Questions" and answers about the amended wage deduction law and the proposed regulations.

Wage Deductions to Recover Inadvertent Overpayment of Wages

What kind of overpayments may be recovered through wage deductions? The new law and proposed regulations provide that an employer may

make deductions from an employee's wages for an overpayment of wages that "is due to a mathematical or other clerical error by the employer."

Must employers obtain employee authorization before making these deductions? Neither the new law nor its proposed regulations require employers to obtain employee authorization prior to making deductions for an inadvertent overpayment of wages. However, the employer must give sufficient notice to the employee before making the deduction(s) and provide a procedure by which the employee may contest the overpayment, described in more detail below.

Must employers provide advance notice to employees before making these deductions? Yes, employers must provide employees with a notice of intent to make a deduction to recover an overpayment of wages. Such notice must be given to an employee at least three weeks before starting to make the deductions, except where the entire amount of overpayment may be recovered in one pay period (see below), in which case notice must be given at least three days prior to making the deduction(s).

What must employers include in their notices of intent to make these deductions? A notice of intent to make deductions for inadvertent overpayment of wages must, at a minimum, include the following information:

- the amount of wages overpaid, both in total and also broken down by pay period;
- the total amount of the overpayment to be deducted; and

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- the date on which each deduction will be made and the amount to be deducted on each date.

The notice of intent must also inform the employee that he or she may challenge the overpayment, provide the date by which the employee must notify the employer of the challenge and also provide the procedure by which the employer will handle the dispute (or a reference to the location of the procedure). The minimum required procedure is described in more detail below.

Is there a time limitation on making these deductions? In order to make deductions to recover an inadvertent overpayment, an employer must send a notice of intent to the overpaid employee within eight weeks of the date the overpayment was made. Deductions may not be made to recover overpayments that occur more than eight weeks before the notice of intent is provided. Thus, employers should regularly review their payroll to timely ascertain whether overpayments have been made and promptly send notices of intent to their employees who were inadvertently overpaid. Once a notice of intent is given, the employer has six years from the date of the original overpayment to make the deduction(s).

How often may employers make deductions to recover overpayments? Employers may make one deduction per pay period to recover for overpayment of wages.

How much may employers deduct from an employee's wages per pay period? This depends on the amount of the overpayment to be recovered. If the entire overpayment is less than or equal to the employee's net wages per pay period (after other permissible deductions), the employer may recover the entire overpayment in one pay period. However, if the overpayment exceeds the employee's net wages in one pay period, the deduction from that period may not exceed 12.5 percent of the employee's gross wages in the period. In such cases, employers will be required to break down the repayment into smaller installments. Further, a deduction cannot reduce the employee's effective hourly wage

below New York State's minimum hourly wage, currently \$7.25 per hour.

How can employees challenge alleged overpayments?

Employers are required to implement a dispute resolution procedure that allows employees to contest alleged overpayments. For non-union employees, this procedure must, at a minimum:

- provide that the employee may, within one week after receipt of the notice of intent, notify the employer that he or she contests the overpayment (employee's notice reduced to two days in cases where the entire overpayment could be recovered in one pay period);
- provide the employer one week to reply to the employee's challenge after receipt of the challenge;
- require the employer to address in its reply the issues raised by the employee (including claims of a new rate of pay) and provide a clear statement of the employer's position regarding the alleged overpayment and the reasons therefore;
- require the employer to provide the employee with written notice of the opportunity to meet within one week after receipt of the employer's reply to discuss any disagreements; and
- require the employer to provide the employee with written notice of the final determination regarding the employee's challenge within one week of their meeting.

If an employee follows this dispute resolution procedure, the employer must wait at least three weeks after issuing its final determination before making the deduction. If the employee does not participate in the procedure, the employer must still, at a minimum, wait three weeks after providing its notice of intent to the employee, except where a shorter period applies.

Wage Deductions for Repayment of Advances

What are considered "advances?" The new law and proposed regulations permit employers to make wage

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deductions for repayment of “advances” to employees. A grant of money is considered an “advance” if “based on the anticipation of [the employee] earning future wages.” However, the employer can only require the employee to repay the principal amount advanced to him or her. If the employer requires the employee to repay any other amount, such as interest or late fees, the provision of money will not be treated as an advance and may not be recovered through wage deductions.

Must employers obtain employee authorization before making deductions for repayment of advances? Yes, employers are required to obtain written authorization from their employees to make deductions before an advance is provided. The authorization must state the total amount to be advanced, the amount to be deducted to repay the advance in total and per pay period, and the date of each deduction. It must also notify the employee or his or her right to revoke the authorization prior to receiving the advance and to contest any deduction not made in accordance with the authorization.

For what period of time may employers make these deductions? The employer and employee must agree in writing, set forth in the written authorization, on the timing and duration of any wage deductions prior to the advance being given. Also, once an advance is given to an employee, the employer may not give or deduct wages for any additional advance until the original advance has been fully repaid. Any excess money given to the employee will not be recoverable through deductions.

How often may employers make these deductions? Employers may make one deduction per pay period to recover for repayment of advances.

How much may employers deduct from an employee’s wages per pay period for repayment of advances? The employer and employee must agree in writing, set forth in the written authorization, on the amounts that may be deducted per pay period to repay the advance. They may also agree to total repayment

through deduction from the employee’s last pay period should his or her employment end before expiration of the written authorization.

How can employees challenge deductions? Employers are required to implement a dispute resolution procedure that allows employees to contest deductions that do not comport with the written authorization after receiving the advance. This procedure must, at a minimum, afford the employee the opportunity to notify the employer, in writing, of his or her objections to the deduction(s) and require the employer to provide a written reply that addresses the issues raised by the employee and include a clear statement of the employer’s position regarding the deduction(s) and the reasons therefore. If the employee follows this procedure, the employer must stop making deductions until it has given its reply to the employee and made any necessary adjustments. However, the time period to make the deductions set forth in the written authorization will be extended to account for any delay.

Failure to Comply with the Regulations

The regulations governing deductions for inadvertent overpayments and for advances are not exclusive; nothing prohibits employers and employees from pursuing their rights under the wage deduction law in another forum. An employer that fails to comply with the new wage deduction law or the regulations may be found liable by a court for wrongfully withholding wages under the Labor Law. In that case, the employer may be required to repay the deductions, plus interest, the employee’s costs and attorneys’ fees and potentially liquidated damages (up to 100 percent of the withheld wages in the absence of a good faith basis for withholding) and penalties and interest. An employer’s failure to provide the required dispute resolution procedure that allows employees to challenge overpayments or deductions for advances will create a presumption that the deduction at issue was impermissible under N.Y. Labor Law §193.

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Steps to Take

Although the Department of Labor has yet to publish its final regulations, there are practical steps that employers can take now to prepare for the new wage deduction obligations that will likely be imposed on them, including:

1. Decide whether to make deductions for overpayments and advances and identify the employees to be affected and the timing, amount and duration of the deductions, in accordance with the regulations.
2. Begin drafting necessary forms, including template notices of intent for deductions to recover overpayments and written authorizations for repayment of advances.
3. Develop dispute resolution procedures for employees to challenge deductions and train all necessary personnel on implementing those procedures;
4. Review all employee handbooks, policies and procedures to ensure that they comply with the new wage deductions requirements; and
5. Review and, if necessary, reconfigure all payroll systems to process permitted wage deductions in accordance with the regulations and/or discuss such processing with your payroll vendor.

We can assist you at each step of your preparation. ◆

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