

NYSDOL Issues Final Regulations on Employee Wage Deductions

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Deductions from Wages (Pre-2012 Amendment)

- New York Labor Law Section 193 generally prohibited deductions from employee wages...
- ...except:
 - those made in accordance with law (taxes, Social Security, etc.); or
 - those authorized by the employee, in writing, which are for the benefit of the employee and fall under an enumerated list of payments.



Deductions from Wages (Pre-2012 Amendment)

- Formerly 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.



2012 Amendment to Section 193

- Effective November 6, 2012
- Expands list of permissible deductions
- Imposes other deduction-related requirements
- Permits deductions for “advances” and for “overpayments” due to “a mathematical or other clerical error by the employer”
 - Subject to NYSDOL Regulations

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NYSDOL Final Regulations

- Published on NYSDOL's website
- Effective October 9, 2013
- Repeals previous 12 NYCRR 195 and adopts a new 12 NYCRR 195
 - 10% “cap” on “similar payments” no longer in effect

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NYSDOL Final Regulations

- Key Provisions*
 - Employee Authorization
 - Interpretation of “Similar Payments For the Benefit of the Employee”
 - Prohibited Deductions
 - Requirements for Permissible Advance and Overpayment Deductions
 - Other Authorization & Notification Requirements



*There are more provisions!

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Employee Authorization

- May be provided by collective bargaining agreement or agreement between employer and employee that is “express, written, voluntary and informed”
- “Informed” = Employee given written notice of:
 - All terms and conditions of deduction;
 - Benefit(s) of deduction; and
 - Details in which deductions made.

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Employee Authorization (Cont.)

- Written notice must precede execution of authorization and deduction
- Must also precede any change in amount of deduction or “substantial change” in benefits
 - Any reduction in benefit received for deduction
 - Any change in details or manner of deduction
- Can use high/low range for fluctuating deductions
 - Variation within “range” not a “change” or “increase” in deduction

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Employee Authorization (Cont.)

- Employees/Representatives must be granted access to materials
 - Employers not required to pay or provide means for review
- Can use single written authorization for multiple deductions, so long as all required information is provided to employees

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2012 Amendment to Section 193 & Final Regulations

- **Good News:** Amended statute and Final Regulations still permit deductions for “similar payments for the benefit of the employee”
- **Bad News:** Final Regulations make clear that NYSDOL is still narrowly construing this “catch-all” provision

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“For the Benefit of the Employee”

- Means: Financial or other support for employee, employee’s family, or charitable organization
 - Limited to: Health and welfare benefits, pensions and retirement benefits, child care and educational benefits, charitable benefits, dues and assessments, transportation, and food and lodging
- Convenience itself is not a recognized “benefit” for purposes of determining if a deduction is for the benefit of employee
 - E.g., No deductions for check-cashing fees

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“For the Benefit of the Employee” (Cont.)

- Okay if deduction provides “generalized indirect benefit” to employer by attracting/maintaining a stable, productive work force
- If financial gain to employer at employee’s expense → calls “benefit” into question
- Employer may deduct for discounted sale of own goods and services as otherwise permitted by Section 193 and Final Regulations

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Permissible “Similar Payments”

- Must “fall within” one of the enumerated permissible categories (non-exclusive examples included)
 - Health & Welfare Benefits
 - Pension & Savings Benefits
 - Charitable Benefits
 - Representational Benefits
 - Transportation Benefits
 - Food & Lodging Benefits

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Prohibited Deductions

- Repayment of loans, advances, and overpayments not in accordance with Final Regulations
- Purchases of tools, equipment and attire required for work
- Recoupment of unauthorized expenses
- Repayment of employer losses (spoilage, breakage, cash shortages, *etc.*)
- Contributions to PACs, campaigns and similar payments
- Fees, interest or employer’s administrative costs

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Deductions for Advances

- “Advance” = Provision of money based on anticipation of earning future wages
 - No interest, fee(s), or other amounts can be included
- Prior agreement as to timing and duration of repayment required
- No further advances given or deducted until initial advance repaid in full
 - If employer advances more than is permitted, the overage is not recoverable through wage deduction

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Deduction for Advances (Cont.)

- Deductions no more frequently than each wage payment
- Amount recovered through deduction determined by written terms of advanced authorization
 - May include reclamation through deduction of last wage payment if employment ends before expiration of terms of advance authorization

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Deductions for Advances (Cont.)

- Prior to advance, employers must obtain written authorization from employees, containing:
 - Amount to be advanced
 - Amount to be deducted (total and per wage payment)
 - Dates of the deduction(s)
 - Notice that employee can contest any deduction not in accordance with authorization
- Employee can only revoke authorization prior to advance of money

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Deductions for Advances (Cont.)

- Employers must implement dispute-resolution procedure and provide advanced notice of procedure to employees
- Dispute-resolution provisions in existing/future collective bargaining agreement may (but not necessarily will) be sufficient
 - Must provide "at least as much protection" as Final Regulations
 - Future collective bargaining agreements must specifically reference Final Regulations

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Deduction for Advances (Cont.)

- Advance Dispute-Resolution Process
 - **Employee** must be able to provide **written notice** of objection
 - **Employer** must **reply** in writing "as soon as practicable"
 - Must address issues raised by employee's objection
 - Must contain a clear statement of the employer's position (including whether it agrees/disagrees with employee's position(s) and reason(s) why)
 - Employer must cease deductions until reply given and any adjustment(s) made
 - Any delay caused by procedure extends authorized time frame within which employer may recover advance through deductions

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Deductions for Advances (Cont.)

- Failure to afford dispute procedures creates presumption that deduction was illegal
- "Separate payments" must also follow Final Regulations
- If provision of money by employer does not follow Final Regulations, it is not considered an "advance" and cannot be recovered by wage deduction

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Deductions for Overpayments

- Amended Section 193 and Final Regulations permit employers to deduct from employee wages for overpayments "due a mathematical or other clerical error by the employer"

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Deductions for Overpayments (Cont.)

- May only recover overpayments made within 8 weeks of "Notice of Intent" to employee
- 6-year maximum repayment term
- No more frequently than once per wage payment

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Deductions for Overpayments (Cont.)

- Limitations on amount of deduction, depending on size of overpayment
 - An employer can recover the entire overpayment in employee's next wage payment if amount is less than employee's net wages after permissible deductions
 - If overpayment exceeds net wage's after permissible deductions, recovery cannot exceed 12.5% of the gross wages earned for that wage payment (also cannot reduce employee's effective hourly rate below state minimum)

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Deductions for Overpayments (Cont.)

- Employers must implement **dispute-resolution procedure** for employees to contest overpayment and/or terms of recovery, and/or to seek delay of recovery

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Deductions for Overpayments (Cont.)

- Overpayment Dispute-Resolution Process
 1. Notice of Intent
 2. Employee Response
 3. Employer Reply & Meeting
 4. Final Determination
- Dispute resolution provisions in existing/future collective bargaining agreement may (but not necessarily will) be sufficient
 - Must provide “at least as much protection” as Final Regulations
 - Future collective bargaining agreements must specifically reference Final Regulations

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Deductions for Overpayments (Cont.)

- **Notice of Intent**
 - Must contain amount overpaid in total and broken-down per pay period
 - Must contain total amount to be deducted, and date when each deduction will occur along with amount of each deduction
 - Must contain notice to employee that he or she may contest overpayment, along with date by which employee must do so
 - Must contain procedure by which employee may contest overpayment and/or terms of recovery (or reference to where procedure can be located)

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Deductions for Overpayments (Cont.)

- **Notice of Intent -- Timing**
 - 3 calendar day's advance notice if total overpayment may be lawfully recouped in employee's next wage payment
 - Otherwise, 21 calendar day's advance notice (i.e., if 12.5% “cap” or minimum wage restriction applies)

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Deduction for Overpayments (Cont.)

• Employee Response

- If entire overpayment can lawfully be taken out of next wage payment after overpayment, employee must notify employer within two calendar days after receiving Notice of Intent to postpone deduction while dispute-resolution procedure is followed
- Otherwise, employee has 7 calendar days to respond to Notice of Intent and contest recoupment

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Deductions for Overpayment (Cont.)

• Employer Reply & Meeting

- Must reply within 7 calendar days of receiving employee's response
- Must address issues raised by employee
- Must contain a clear statement indicating employer's position with regard to overpayment(s)
 - Including agreement/disagreement with employee's position and reason(s) why
- Must provide written notice of opportunity for employee to meet with employer to discuss any remaining disagreements
 - 7 calendar day window for meeting from date employee receives employer's reply

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Deductions for Overpayment (Cont.)

• Final Determination

- Must be issued within 7 calendar days of final employee-employer meeting
- Must take into consideration:
 - Agreed-upon wage rate paid to employee and whether alleged overpayment appeared to be new agreed-upon rate of pay
 - Issues raised in employee's response regarding amount(s) of each deduction (when determining amount(s) to be deducted each pay period and date when such deduction(s) will commence)
- Employer must wait at least 21 calendar days after issuing Final Determination to commence taking deduction(s)

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Deductions for Overpayments (Cont.)

- Employers must repay employees for improper deduction(s) no later than pay period during which determination is made
- “Separate payments” must also follow Final Regulations
- Failure to afford dispute procedures creates presumption that deduction was illegal

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Other Authorization and Notification Requirements

- May be given in writing or through e-mail or other electronic means
- Statements given to employees must use “ordinary language readily understood”
- No smaller than 12-point font
- Must keep record of authorizations for at least 6 years after employee’s separation

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Take-Aways

- Evaluate deduction practices for compliance with amended Section 193 and Final Regulations
- Ensure employee authorizations, employee notifications, and dispute procedures for permissible “advance” and “overpayment” deductions are in-place and compliant
- Have overpayment and advance forms “at-the-ready” (will need to act quickly)
- Bargaining obligation?
- Stay tuned for more from NYSDOL...

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