



New York State Department of Labor  
David A. Paterson, Governor  
M. Patricia Smith, Commissioner

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January 21, 2010

Joel L. Finger, Esq.  
Little Mendelson, P.C.  
900 Third Avenue  
New York, NY 10033-3298

Re: Request for Opinion  
Wage Deductions—Overpayments  
RO-09-0152

Dear Mr. Finger:

This letter is written in response to your letter of November 5, 2009, to Senior Attorney Benjamin A. Shaw, in which you request an opinion as to the permissibility of the recovery of overpayments of salary made to employees of a hospital in the New York City area. Your letter poses three inquiries with several questions relating to each individual inquiry. Your inquiries, and the individual questions, are addressed below:

*Inquiry 1: If an employee is informed that he received [an] overpayment of wages over the past 12 months, and specifically authorizes, in writing, the employer to deduct the difference over the next  $x$  pay periods (provided the deductions do not total more than 10% of the employee's weekly wages), pursuant to the employee's authorization, can the employer lawfully deduct from the employee's wages?*

Section 193 of the Labor Law, which is titled "Deductions from wages" provides, in full, as follows:

1. No employer shall make any deduction from the wages of an employee, except deductions which:
  - a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or
  - b. 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

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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.

As you can see, Labor Law Section 193 explicitly prohibits deductions from wages except those that are required by law or *that are similar to* one of the specific purposes set forth in Section 193(b)(1). Emphasis supplied. (See, *Angello v. Labor Ready*, 7 NY3d 579 [2006]; *Marsh v. Prudential Securities, Inc.*, 1 NY3d 146 [2003].) Please also note that the New York State Court of Appeals in *Labor Ready* found payments that go “directly to the employer or its subsidiary violate[s] both the letter of the statute and the protective policy underlying it.” (7 NY3d *supra* at 586.)

The Court in *Labor Ready* provided guidance for the interpretation of the term “similar payment” by noting that the deductions authorized by Labor Law §193(1)(b) are all “monetary or supportive.” (*Id.* at 584.) Although the Court did not provide an explicit definition as to the meaning of “monetary or supportive,” a simple review of the authorized deductions in light of the Court’s guidance reveals their meaning. All the authorized deductions are either “monetary,” meaning that they are investments of money for the later benefit of the employee, such as deductions for insurance premiums, pension or health and welfare benefits and payments for United States bonds, or they are “supportive,” meaning that the deducted wages are used by someone other than the employee or employer to support some purpose of the employee, such as contributions for charitable organizations or payments for dues or assessments to a labor organization.

While previous opinions of this Department may have provided that an employer may make a wage deduction for overpayments so long as the deduction does not exceed ten percent of the employee’s total gross wages, in light of the decision of the Court of Appeals in *Labor Ready*, such deductions are no longer permissible under Labor Law §193. Such payments are neither required nor authorized by law, nor do they fit within the meaning of the term “similar payment” applied by the Court and discussed in the previous paragraph. Furthermore, as noted by the Court of Appeals, since such payments go directly to the employer, they violate “both the letter of the statute and the protective policy underlying it.” (7 NY3d *supra* at 586.)

Therefore, the recoupment of overpayments through wage deductions as described in your inquiry would constitute a violation of Labor Law §193.

- a. *If it is lawful, can the employer deduct more than 10% of the weekly wages if the employee insists on it and does not want the liability over any extended period of time?*

See the response to the question immediately above. Such deductions are not permissible nor may an employee waive the protections of §193.

- b. *If it is unlawful, can the employer at least recoup the repayment [sic] made from the previous pay period? In such a situation, is the employer still limited to deducting no more than 10% of the employee's weekly wages?*

With regard to the question above, we presume you are asking about the *overpayment* made during the previous pay period, not the *repayment*. The timing of the deduction does not, in any way, affect the legality of the deduction to recoup wage overpayments. While 12 NYCRR §195.1 provides that deductions for items not enumerated in Section 193 of the Labor Law are limited to ten percent of the gross wages due to the employee in the payroll period, this language is not intended to imply that the only restriction on deductions made during that time period is the percentage restriction found in the rule. On the contrary, this section imposes an *additional* restriction as to the amount of any allowable "similar" deductions that can be made during any one pay period. With regard to the deduction of wages for repayment of an outstanding loan balance, since such a deduction does not meet the statutory "similar" test set forth in §193, the language found in 12 NYCRR §195.1 is irrelevant. An employer may not recoup any amount of the overpayment through wage deduction regardless of when the overpayment was made.

*Inquiry 2: If the employer is not permitted to recoup the overpayments in Inquiry 1, what are the employer's options in recovering the difference?*

In responding to this question, it is initially worth noting that Section 193(2) prohibits employers from making any charge against wages, or from requiring an employee to make any payment by separate transaction. In interpreting that provision, the Department views any employer induced or requested action which, if refused, could result in disciplinary or retaliatory action to be a prohibited separate transaction. However, where the employer merely requests that the employee separately pay such money overpaid, such an action will not be considered to be a prohibited separate transaction so long as the employer clearly communicates that the employee's refusal will not, in any way, result in any form of disciplinary or retaliatory action.

Additionally, the United States District Court in *Huntington Hospital v. Huntington Nurses Association*, 302 F.Supp.2d 34, 42-43 (E.D.N.Y. 2004), held that while "a garnishment of an employee's salary to recover overpayments would violate Section 193, such overpayments could be sought in a separate proceeding." Therefore, while the employer may not avail itself of self-help by utilizing wage deductions to recover overpayments, employers may seek relief in a separate proceeding against the employee, i.e. an action in civil court.

- a. *Would initiating a lawsuit or asking the employee to write a check in an attempt to recoup the difference constitute a "separate transaction" prohibited under Section 193(2), which states "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?"*

See the response to the question immediately above.

- b. *Does it make a difference whether the employee absolutely insists that the overpayments be deducted from his wages and for an amount more than 10% because he does not want the liability?*

Since nothing in Section 193 states that an employee's insistence upon a wage deduction renders such a deduction permissible, such an action by the employee has no effect. Written authorization of an employee may only permit deductions from wages that are expressly enumerated by Section 193(1)(b) or are "similar payments for the benefit of the employee."

*Inquiry 3: Can an employer take disciplinary action against an employee for failing to inform the employer about the overpayments in a situation where the overpayment was obvious to the employee and the employee was deceitful in not informing his or her employer?*

Nothing in the New York State Labor Law prohibits an employer from taking disciplinary action against an employee for failing to inform the employer that he or she has been overpaid. However, either applicable collective bargaining agreements, employer policies, or other factors outside of the Department's jurisdiction could impact an employer's flexibility in taking such action.

This opinion is based on the information provided in your letter of November 5, 2009. A different opinion might result if the circumstances outlined in your letter change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By:



Jeffrey G. Shapiro  
Associate Attorney

JGS:mp

cc: Carmine Ruberto