

Deducting wages from an employee's paycheque for a past overpayment: What you should know as an employer

If you are an employer and you have made an overpayment to your employee, whether or not that overpayment was “wages” or benefits, can you unilaterally deduct that overpayment from the employee's wages?

Section 21 of the *Employment Standards Act* (“ESA”) provides that “an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose”, unless it is permitted or required by any enactment of British Columbia or Canada. “Any purpose” in section 21 includes the scenario where the employer wants to deduct an employee's wages to recoup overpayments made to an employee.

However, where the deduction is for something that is permitted by an enactment of British Columbia or Canada such as income tax; Employment Insurance premiums or Canada Pension Plan contributions then the employer is allowed to make a deduction without the employee's consent.

Also, section 22 of the *ESA* identifies several instances in which the employer may, as a result of the written assignment by the employee, deduct wages from the employee's wages. Section 22 states:

Assignments

- 22** (1) An employer must honour an employee's written assignment of wages
- (a) to a trade union in accordance with the *Labour Relations Code*,
 - (b) to a charitable or other organization, or a pension or superannuation or other plan, if the amounts assigned are deductible for income tax purposes under the *Income Tax Act* (Canada),
 - (c) to a person to whom the employee is required under a maintenance order, as defined in the *Family Maintenance Enforcement Act*, to pay maintenance, and
 - (d) to an insurance company for insurance or medical or dental coverage.
- ...
- (3) An employer must honour an assignment of wages authorized by a collective agreement.
 - (4) An employer may honour an employee's written assignment of wages to meet a credit obligation.

How is the employer then to recoup overpayment of wages to an employee? In *HEABC V. B.C. Nurses' Union*¹, the Court of Appeal, in upholding an arbitrator's award declaring that the employer in that case was prohibited from unilaterally recovering overpayment of wages from the wages of its members, stated that the employer:

“ is still able to recover overpayments from employees where that employee agrees to the deductions, or where a statute or collective agreement expressly authorizes the employer's unilateral action. Where no such agreement or statutory authorization exists, the employer has the option of recovering overpayments in other ways such as pursuing a grievance, or bringing a claim against the employee.”

Therefore, it is advisable that an employer tries to obtain an employee's express written authorization or consent to deduct the latter's wages to recoup any overpayment. If the employer is unsuccessful in obtaining the employee's written authorization, the employer may proceed with a debt claim against the employee in the provincial (small claims) court assuming the overpayment is under \$25,000. If the employer is unionized, the employer may be able to pursue the claim by lodging a grievance application.



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