

### **Eagerly Anticipated Proposed Wage Deduction Regulations Announced by New York State DOL**

Last week, the New York Department of Labor ("DOL") published proposed regulations governing the new categories of permissible wage deductions in Section 193 of the New York Labor Law that took effect in November 2012. The law was amended to allow: (1) new types of deductions made for the benefit of the employee, (2) deductions made to recapture overpayments of wages due to employer error, and (3) deductions made to repay wage advances given to employees. We detailed the revisions to the law in a September 2012 Alert available [here](#). When finalized, the regulations governing these deductions will be codified at 12 N.Y.C.R.R. 195.

#### **Deductions for the Benefit of the Employee**

The amended Section 193 created a number of new permissible wage deductions for the benefit of employees, including those made for discounted parking passes or fare cards, gym membership dues, cafeteria purchases, and day care expenses, among others. It also permitted "similar payments for the benefit of the employee," but did not describe those payments.

The proposed regulations make clear that deductions for the benefit of the employee include only (1) items explicitly listed in Section 193 or (2) items in one of six categories that correspond to those listed deductions:

- Health and Welfare Benefits (e.g., insurance premiums, gym memberships, and day care)
- Pension and Savings Benefits (e.g., pension benefits and U.S. bonds)
- Charitable Benefits (e.g., charitable contributions)
- Representational Benefits (e.g., labor dues)
- Transportation Benefits (e.g., parking passes and fare cards)
- Food and Lodging Benefits (e.g., cafeteria and vending machine purchases)

Deductions made for fines for misconduct or tardiness, political contributions, or for recoupment of unauthorized employee expenses, among other things, remain impermissible.

All deductions made for the benefit of the employee must be authorized in advance by the employee in a written agreement (electronic or hard copy) that is express, voluntary, and informed. Oral notice or authorization is insufficient for all deductions permitted by Section 193. For an authorization to be informed, before it is executed, the employee must be provided with written notice of the deduction's terms and conditions, the benefit to which it is related, and the manner in which deductions will be made. That written notice must be provided any time the amount of the deduction changes or there is a "substantial change" in the benefits provided (including any reduction of benefits). For deductions made for cafeteria or similar purchases that may fluctuate from one pay period to the next, the notice should list a deduction range that includes a ceiling for a single pay period.

## **Deductions for Overpayments**

Employers will also be able to make deductions to recover overpayments made due to the employer's mathematical or clerical error. The proposed regulations require the employer to first provide notice to the employee of its intent to make the deduction(s). This notice must be given within eight weeks of the employer's overpayment. Deductions can be made no more frequently than once per wage payment, and recovery can come in the form of a wage deduction or a separate transaction.

For overpayments that are equal to or less than "the net wages earned after other permissible deductions in the next wage period," the employer may recover the entire overpayment amount in the next wage payment. Before doing so, it must give at least three days' notice to the employee.

For overpayments that exceed a single payment of net wages, deductions (1) may not exceed 12.5% of the gross wages earned in that pay period, and (2) may not reduce the effective hourly wage below the minimum wage (which will increase from \$7.25 to \$8.00 on December 31, 2013). Before beginning these deductions, the employer must provide at least three weeks' notice to the employee.

Employers must also implement a procedure under which the employee may dispute the overpayment and terms of recovery (the proposed regulations include a number of specific process requirements). An employee has two days to respond to the employer's notice in the case of overpayments equal to or less than a single payment of net wages; he or she has one week to respond to a notice of an overpayment exceeding this amount. If the employee does protest, the employer must not make the deduction until at least three weeks after the process concludes. The failure to afford this process to the employee creates the presumption that the contested deduction was impermissible.

## **Deductions for Wage Advances**

Finally, the draft regulations allow employers to make deductions for wage advances given to employees. The employer and employee must agree in writing to the amount to be advanced, the deduction amount (in total and per wage payment), and the date(s) on which each deduction will be made. The authorization must also include notice to the employee that he or she may contest deductions that are not taken in accordance with the authorization's terms. If the wage advance is accompanied by interest or a fee or fees, it is not an advance under the Labor Law and cannot be recovered via wage deductions.

Employers may recover advances by making deductions no less frequently than each wage payment. Advances may be recovered through wage deductions or a separate transaction. If an employee is terminated or leaves the organization prior to the advance being repaid, and the written authorization allows for it, the remaining advance can be recovered through a larger deduction from the last wage payment.

Once the employee has taken the advance, he or she may not revoke his or her deduction authorization. And an employee cannot be given a second wage advance until the first has been repaid in full.

As with deductions for overpayments, employers must implement a dispute procedure that allows the employee to dispute the amount and frequency of deductions that are not permitted by the authorization. The employee must be able to provide written notice of his or her objection, and the employer must reply in writing "as soon as practical." If an employee protests the deductions under this procedure, the employer must cease its deductions until it has replied to the employee. The failure to afford this process to the employee creates the presumption that the contested deduction is impermissible.

The full text of the proposed regulations is available [here](#). Public comments on the proposed regulations can be sent to [regulations@labor.ny.gov](mailto:regulations@labor.ny.gov) through July 6, 2013.

**This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.**

**Lisa E. Cleary**

**212.336.2159**

**lecleary@pbwt.com**

**Catherine A. Williams**

**212.336.2207**

**cawilliams@pbwt.com**

**Adam Pinto**

**212.336.2156**

**apinto@pbwt.com**

**IRS Circular 230 disclosure: Any tax advice contained in this communication (including any attachments or enclosures) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication. (The foregoing disclaimer has been affixed pursuant to U.S. Treasury regulations governing tax practitioners.)**

**To subscribe to any of our publications, call us at 212.336.2186, email [info@pbwt.com](mailto:info@pbwt.com), or sign up on our website, [www.pbwt.com/resources/publications](http://www.pbwt.com/resources/publications).**

**This publication may constitute attorney advertising in some jurisdictions.**

**© 2013 Patterson Belknap Webb & Tyler LLP**