# *Act Now* Advisory: New York State Releases Proposed Wage Deduction Regulations

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The New York State Department of Labor ("DOL") recently published its long-awaited proposed regulations ("Proposed Regulations") pertaining to the newly expanded categories of permissible wage deductions pursuant to the New York State Labor Law ("Labor Law"). As we previously reported (see the *Act Now* Advisory entitled "New York Labor Law Significantly Expands the Scope of Permissible Wage Deductions"), the amendments to Section 193 of the Labor Law ("Section 193"), which govern permissible wage deductions, became effective on November 6, 2012. However, Section 193 required the Commissioner of Labor to issue regulations implementing the amendments. With the release of the Proposed Regulations, New York employers should plan to implement new processes and procedures relating to wage deductions once the Proposed Regulations become final.[1]

Among other things, the Proposed Regulations (i) set forth information concerning the subset of permissible wage deductions referred to as "similar payments for the benefit of the employee," (ii) provide information regarding prohibited deductions and requirements relating to an employee's authorization, and (iii) specify procedures and notice requirements concerning the recovery of overpayments and wage advances to employees.

The Proposed Regulations will be codified at 12 New York Codes, Rules, and Regulations Section 195 ("12 NYCRR 195") and will replace the current 12 NYCRR 195, which includes the "10 percent rule," which caps deductions relating to "similar payments for the benefit of the employee" at 10 percent of the employee's gross pay for the particular pay period. As such, the 10 percent rule will no longer be effective.

**Deductions for the Benefit of the Employee**

Subsection (b) of Section 193 enumerates categories with respect to which employers may lawfully deduct from an employee's wages, so long as the employer receives a voluntary, written authorization from the employee. Employers are limited to deducting from wages for purposes specifically enumerated in Section 193, including "similar payments for the benefit of the employee." The Proposed Regulations define "deductions for the benefit of the employee" as those that "provide financial or other support for the employee, the employee's family, or a charitable organization." Specifically, the Proposed Regulations state that such deductions are limited to the following categories:

- health and welfare benefits;
- pensions and retirement benefits;
- child care and educational benefits;
- charitable benefits;
- dues or assessments for labor organization representation;

- transportation, including parking passes, and mass transit vouchers and passes; and
- food and lodging.

The Proposed Regulations make clear that "mere convenience" is not a recognized benefit. The Proposed Regulations also expressly permit employers to make deductions for the sale of their own goods and services to employees at a discounted rate, so long as the deduction complies with Section 193 and the Proposed Regulations.

**Authorized Deductions[2]**

The Proposed Regulations set forth rules for compliant written authorizations under Section 193. A deduction is considered authorized if it is agreed to in a collective bargaining agreement or in a written agreement between the employer and the employee that is "express, written, voluntary and informed." Further, an authorization is "informed" when the employee is given written notice of all terms and conditions of the deduction, its benefit, and the details of the manner in which deductions will be made. The written notice must be provided *prior* to the employee executing the initial authorization to make deductions, prior to the deduction being made, and prior to any change in the amount of a deduction (or a substantial change in the benefits of a deduction).[3]

**Prohibited Deductions**

The Proposed Regulations state that employers may not deduct the following from employees' wages: (i) employee purchases of tools, equipment, and attire required for work; (ii) recoupment of unauthorized expenses; (iii) repayment of losses such as spoilage, breakage, cash shortages, or penalties incurred as a result of employee conduct; (iv) fines or penalties for tardiness, excessive leave, misconduct, and quitting without notice; (v) contributions to political action committees, campaigns, and similar payments; (vi) fees, interest, or administrative costs; and (vii) repayment of loans, advances, and overpayments not made in accordance with the Proposed Regulations.

**Recoupment of Overpayments**

Subsection (c) of Section 193 permits employers to make deductions for overpayments due to the employer's mathematical or other clerical error. The Proposed Regulations set forth these rules that employers must follow prior to making such deductions:

- Prior to recovering an overpayment through a wage deduction, an employer must provide the employee with a notice of intent to commence deductions ("Notice of Intent"). Significantly, an employee's written authorization is not required for recovery of an overpayment.
- The Notice of Intent must include: (i) the amount overpaid in total and per pay period, (ii) the total amount to be deducted, (iii) the date each deduction will occur followed by the amount of such deduction, and (iv) information concerning an employee's ability to contest the overpayment, including the procedure to contest.
- Specifically, employers must implement a procedure by which the employee may dispute the overpayment, terms of recovery, and/or seek a delay in the recovery of such overpayment. Failure to follow the procedures set forth in the Proposed Regulations will create a presumption that the deduction is impermissible.[4]

- Deductions can be effectuated by wage deductions or separate transactions. However, employers may not deduct more than once per pay period via either wage deduction or separate transaction.
- Finally, employers are limited to recover such overpayments made in the eight weeks prior to issuance of the Notice of Intent but may make deductions to recover such overpayments for a period of six years from the original overpayment.

With respect to the size of the overpayment, the Proposed Regulations set forth two categories, which impact the amount that can be deducted from an employee's wages:

1. If the entire overpayment is *less than or equal to* the employee's *net* wages to be paid in the next wage payment (paycheck), the employer may recover *the entire amount* of the overpayment in that next wage payment (an "Entire Recovery"). In the case of an Entire Recovery, the employer must provide the Notice of Intent to the employee at least *three days* prior to the deduction.

2. If the overpayment *exceeds* the *net* wages to be paid in the next wage payment, the deduction may not exceed 12.5 percent of the employee's *gross* wages earned in the applicable wage payment(s), and the deduction must not reduce the effective hourly wage below the statutory state minimum hourly wage (each, a "Partial Recovery"). In the case of a Partial Recovery, the employer must give the Notice of Intent to the employee at least *three weeks* before deductions commence.

**Overpayment Dispute Procedure**

Employers must implement a dispute procedure, permitting employees to challenge the proposed overpayment deduction after the employee's receipt of the Notice of Intent, which conforms to the following rules:

1. *Employee's Response*
    a. In connection with an Entire Recovery, an employee who seeks to dispute the overpayment must notify the employer within *two days* following his or her receipt of the Notice of Intent; or

    b. In connection with a Partial Recovery, the employee must notify the employer of his or her challenge to the overpayment within *one week* of receiving the Notice of Intent.
2. *Employer's Reply*

    In all cases (i.e., for both an Entire Recovery and a Partial Recovery), the employer then must respond within *one week* of receipt of the employee's response. The employer's reply must address the employee's objections and contain a clear statement containing the employer's position and whether the employer agrees or disagrees with the objections.

3. *Written Notice – Opportunity to Meet*

    In all cases, within *one week* of receiving the employer's reply, the employee should be given written notice of an opportunity to meet with the employer to discuss any disagreement that may remain regarding the deductions.

4. *Final Determination*

    In all cases, the employer must provide a written notice of its final determination regarding the deductions within *one week* of the meeting

referenced above. In making a final determination regarding the overpayment, the employer must consider the agreed-upon wage rate paid to the employee and whether the alleged overpayment may have appeared to the employee to be a new agreed-upon rate of pay.

If an employee initiates this dispute procedure, the employer may not commence the deductions until at least *three weeks* after the employer issues its final determination.

**Deductions for Advances**

The Proposed Regulations also provide a procedure for making deductions following a wage advance by the employer. *Prior to* advancing wages, both the employer and the employee must agree, in writing, to the timing and duration of the repayment(s). The written authorization ("Advance Authorization") must contain: (i) the amount to be advanced, (ii) the repayment schedule (including the dates deductions will occur and the amounts to be deducted), and (iii) notice of the employer's procedure for disputing the amount and frequency of the deductions. The Proposed Regulations make it permissible to include a provision in the Advance Authorization whereby the employer may reclaim up to the employee's entire final wage payment if employment terminates prior to the expiration of the other terms of the Advance Authorization. Importantly, this means an employer may recoup (from the final paycheck) the value of vacation days it advanced to an employee, where the employee returns to work after the vacation but his or her employment terminates prior to the date that he or she would have accrued the vacation days that had been advanced.

Employees may only revoke the Advance Authorization prior to the first deduction.

**Dispute Procedure Concerning Advances**

The dispute procedure required by the Proposed Regulations must allow the employee to provide a written notice of his or her objection to a deduction that the employee believes is not in accordance with the terms of the Advance Authorization. The employer must reply, in writing, to the employee's objection as soon as practical. The employer's reply must address the issues raised by the employee's objection and contain a clear statement explaining the employer's position regarding the deduction and whether the employer agrees or disagrees with the employee's position, including a reason for agreement or disagreement. Failure to allow for an adequate procedure will create a presumption that the deduction was impermissible. Finally, if an employee initiates the dispute procedure, the employer must cease deductions until a reply has been provided to the employee and any appropriate adjustments have been made.

**Additional Information Pertaining to the Proposed Regulations**

Any authorization or notice to be furnished in accordance with the Proposed Regulations must be provided in writing or via e-mail. Statements must be provided in readily understood language and in at least a 12-point font. Further, employers must keep authorizations on file for at least six years after an employee's employment terminates.

**What Employers Should Do Now**

While the Proposed Regulations are subject to public comment through July 6, 2013, and will not be effective until officially published at 12 NYCRR 195, in anticipation of the effective date, employers should begin to do the following:

- Develop procedures that allow employees to contest deductions for overpayments and wage advances in compliance with the procedures set

forth in the Proposed Regulations.

- Inform payroll, human resources, and any other applicable departments responsible for implementing wage deductions of the specific deadlines and dispute procedures set forth in the Proposed Regulations.
- Update wage deduction authorization forms so that such forms comply with the rules set forth in the Proposed Regulations.
- Prepare the Notice of Intent forms in connection with deductions relating to overpayments.
- Review employee handbooks and other policies and procedures to reflect the rules set forth in the Proposed Regulations (including updating lists of permissible deductions).
- Ensure that payroll systems (including any third-party vendors used for this purpose) have the capability to make any newly implemented deductions.
- Await the effective date of the Proposed Regulations, and note that changes may be made as a result of the public comment period, which lasts through July 6, 2013.
- Consider commenting to the DOL with respect to any aspect of the Proposed Regulations.

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For more information about this Advisory, please contact:


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**ENDNOTES**

[1] The DOL has invited the public to comment on the Proposed Regulations by sending submissions to regulations@labor.ny.gov through July 6, 2013, before the regulations become final.

[2] As explained in the *Act Now* Advisory previously referenced, Section 193 now imposes limitations for several permissible wage deductions relating to employee purchases, including: (i) purchases made at events sponsored by a bona fide charitable organization affiliated with an employer where at least 20 percent of the profits from such event are being contributed to the charitable organization; (ii) purchases made in the employer's cafeteria or vending machines; (iii) gift shop purchases if the employer is a college, university, or hospital; (iv) pharmacy purchases made at the employer's place of business; and (v) similar payments for the benefit of the employee. The amended Section 193 also provides that such

deductions may not exceed a "maximum aggregate limit" set by an employer and a maximum aggregate amount set by the employee, in increments of $10 up to the maximum established by the employer. Further, in the event that an employee does not set a maximum aggregate limit, the deduction must not exceed the limit set by the employer. The Proposed Regulations do not, however, include any additional or clarifying information relating to the maximum aggregate limit, and we understand that such guidance will not be forthcoming. The Proposed Regulations do, however, provide that where the nature of the deduction may fluctuate based upon a purchase, the employee's written notice may include a range setting forth the lowest and highest amount that may be deducted.

[3] Per the Proposed Regulations, "[a] substantial change in the benefits includes, but is not limited to, any reduction in the benefit received for the deduction, or the details in the manner in which deductions shall be made."

[4] The details of the dispute procedure are set forth later in this Advisory.

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