Client Alert

Latham & Watkins Litigation Department

Amendment to New York's Wage Law Gives Employers More Flexibility to Deduct From Employees' Wages

On June 21, 2012, the New York State Senate and Assembly passed Bill No. S7790-2011/A10785-2011, which amends New York Labor Law Section 193 by expanding the categories of permissible wage deductions that employers may take with the consent of employees. The amendment also permits employers to use wage deductions in order to recapture inadvertent overpayments of wages and for the repayment of advancements of wages. On September 7, 2012, Governor Andrew Cuomo signed the amendment into law, and it will take effect on November 6, 2012.

New York Labor Law Section 193 (Pre-Amendment)

New York Labor Law Section 193 prohibits deductions by a private employer from an employee's wages unless such deductions are either (1) expressly authorized by law, a court or a government agency or (2) are for the employee's benefit and authorized in writing by the employee. Prior to the amendment, permissible categories of deductions for the employee's benefit were limited to:

- Payments for insurance premiums
- · Payments for pension or health and welfare benefits
- Contributions to charitable organizations
- Payments for United States bonds
- Payments for dues or assessments to a labor organization
- Payments for the benefit of the employee that are "similar" to the enumerated
 categories above and which, in the aggregate do not exceed 10 percent of the
 gross wages due to the employee in a payroll period.

Significantly, prior to the amendment, the New York State Department of Labor (the NYSDOL) narrowly interpreted items deemed "similar" to the enumerated categories, excluding repayment of salary advancements or loans and even the repayment of inadvertent overpayments of wages.

"The amendment to New York
Labor Law Section
193 permits an employer to make deductions to recover inadvertent wage overpayments due to mathematical or other clerical errors and for the repayment of advancements of wages."

New York Labor Law Section 193 (Post-Amendment)

Expanded Enumerated Categories

The amendment to New York Labor Law Section 193 expands the categories of wage deductions that are permissible with the prior written consent of the employee to include:

- Purchases made at certain charitable events
- Discounted parking or discounted passes, tokens, fare cards, vouchers or other mass transit items
- Fitness center, health club and/or gym membership dues
- Cafeteria, vending machines and pharmacy purchases made at the employer's place of business
- Tuition, room, board and fees for certain educational institutions
- Certain child-care expenses
- Payments for housing provided at no more than market rates by non-profit hospitals or affiliates thereof.

With respect to deductions for payments at certain charitable events and purchases at a cafeteria, vending machines or pharmacy at the employer's place of business (as well as other payments for the benefit of the employee that are "similar" to the enumerated categories) employers cannot permit such purchases to exceed a limit established by the employee, or if no such limit is set, then a limit set by the employer. Employers must give the employee access, free of charge, to account information regarding such purchases.

Deductions to Recover Wage Overpayments and Repayment of Advancements

Most important, the amendment to New York Labor Law Section 193 permits an employer to make deductions to recover inadvertent wage overpayments due to mathematical or other clerical errors and for the repayment of advancements of wages. However, any such deductions will be subject to compliance with NYSDOL regulations. NYSDOL has not yet promulgated the regulations, but they will include the following:

- The size of the overpayments that may be recovered
- The timing, frequency, duration and method of any recovery or repayment
- · Limitations on the periodic amount of any recovery or repayment
- A requirement that the employer provide notice to the employee prior to commencing any recovery or repayment
- A requirement that the employer implement a procedure to dispute the amount of any recovery or repayment or to delay commencing any recovery or repayment
- A requirement that the employer provide notice of the terms and content of its procedure to the employee prior to commencing such recovery, or in the case of repaying a loan or advance, at the time the loan or advance is made.

Employee Notification and Consent

Prior to making any deductions, other than those expressly authorized by law, a court or a government agency, the employer must provide the employee with written notice of all terms and conditions of the payments and/or benefits and the details of the manner in which such deductions will be made. Additionally, the employer must, as soon as practicable and prior to making any increased deduction, provide notice to the employee whenever there is a substantial change in the terms or conditions of the payments, the benefit of the deduction or the manner in which the deductions will be made.

After providing notification to the employee, the employer must obtain the employee's voluntary written consent prior to making any deductions, other than those expressly authorized by law, a court or a government agency or the terms of a collective bargaining agreement. The employee's written consent must be retained by the employer throughout the period of employment and for six years thereafter.

With the exception of deductions required or authorized pursuant to a collective bargaining agreement, the employee may revoke his or her consent to deductions in writing at any time. After receiving such written notification from the employee, the employer must cease the deduction by no later than the earlier of four pay periods or eight weeks after it receives the notice.

Looking Forward

Private employers with operations in New York should start to assess how these new changes may affect their current payroll practices. However, until the NYSDOL regulations are available, such employers should avoid deductions intended to recover wage overpayments or repayments on advances. Employers should note that the amendment is set to expire three years after the effective date, and it is therefore possible that the law will change in the future.

If you have any questions about this *Client Alert*, please contact one of the authors listed below or the Latham attorney with whom you normally consult:

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