

Kane Kessler, P.C.
1350 Avenue of the Americas
New York, N.Y. 10019
(212) 541-6222
Fax (212) 541-9799

DATE: May 17, 2010

FROM: Kane Kessler, P.C.
[Labor and Employment Practice Group](#)

RE: Deductions from Wages: NYS Labor Law Section 193

As the result of a recent reversal of opinion by the New York State Department of Labor (“NYS DOL”), employers may no longer arrange for the repayment of an inadvertent overpayment or an advance or loan to an employee by deducting such repayment from the employee’s wages – even if the employee authorizes or specifically requests such deductions. Furthermore, employers may not require employees to repay overpayments or advances by a separate transaction. The only way employers can guarantee that they will be repaid for overpayments or loans to an employee is by commencing an independent legal action against the employee.

Section 193 of the New York Labor Law prohibits deductions from the wages of an employee except those that are made in accordance with law, rule or regulation issued by a governmental agency (i.e., tax withholding, FICA, garnishments, etc.) and those that “are expressly authorized in writing and are for the benefit of the employee....Such authorized 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”. (emphasis added). Section 193 also prohibits an employer from requiring any payment by a separate transaction unless such payment is a permitted deduction under this section.

Until recently, it was the opinion of NYS DOL that deductions authorized by the employee in writing to repay overpayments of wages and/or salary or benefit advances or loans through payroll deductions were “for the benefit of the employee” and therefore permissible under Section 193. However, earlier this year, the New York Court of Appeals decided two (2) cases in which it held that the provisions of Section 193 must be read very narrowly and that permissible deductions were strictly limited to the specific types of payments enumerated in that section. In one case, the Court ruled that deductions of the employer’s cash dispensing machine fee were not permissible because the fee was not “similar” to the specific deductions enumerated in Section 193. In the other case, the Court ruled that deductions for voluntary contributions to a deferred investment plan was permissible because the plan was “similar” to the permissible deductions enumerated in Section 193.

As a result of these cases, NYS DOL has changed its previously issued opinions on repayments. NYS DOL now takes the position that deductions for overpayments and for salary/benefit advances are not permitted, even with the employee's written authorization (and even if the employee specifically requests repayment through payroll deductions).

Not only can an employer not deduct from wages to repay overpayments, advances and/or personal loans but in addition an employer cannot require an employee to make such repayments by a separate payment. In other words, an employer cannot discipline or threaten to discipline an employee for refusing to repay overpayments or advances. An employer may, however, request that an employee voluntarily repay the amount due as long as it also informs the employee that he/she will not be disciplined if he/she fails to make such repayment.

DOL has made clear that an employer may seek repayment through legal proceedings against the employee and that such legal proceedings are not considered "disciplinary or retaliatory action." Thus, an employer can require an employee to sign a promissory note to repay the loan and such promissory note could be enforced in a court proceeding. However, the time, expense and effort of engaging in a legal proceeding to enforce the promissory note and recover the amount owed makes this option unsatisfactory.

NYS DOL has also made clear that nothing in Section 193 prohibits an employer from disciplining an employee for theft, but it does prohibit an employer from conditioning discipline for theft on whether or not the employee agrees to repay the money stolen.

Based on the revised opinion of NYS DOL, we must now strongly advise employers against granting any advances or loans to any employee for any reason, unless the employer is prepared to forego repayment in the event of default. If you currently have an agreement with an employee to repay an advance or overpayment by payroll deduction, please contact us to discuss how to proceed. We also recommend that employers review their payroll very carefully for accuracy before wages and benefits are paid, since there is a strong likelihood that any overpayments will never be repaid.

If you have any questions, please do not hesitate to contact [David R. Rothfeld](#), [Judith A. Stoll](#), [Robert L. Sacks](#), [Lois M. Traub](#), [Alexander Soric](#), [Michael C. Lydakis](#) or [Jaclyn Ruocco](#).

*This memo is provided for informational purposes only.
It is not intended as legal advice and readers should consult counsel to discuss how these matters relate to their individual circumstances*