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New York Courts Are Likely To Defer To NYSDOL Opinion Letter Prohibiting Deductions for Wage Overpayments

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In a recently published Opinion Letter (RO-09-0152), the New York State Department of Labor (NYSDOL) stated its position that where an employee is accidentally overpaid, a New York employer is prohibited from recouping the overpayment by making deductions from the employee's paychecks (even if authorized by the employee) or *requiring* the employee to repay the money by separate transaction.

The Opinion Letter, dated January 21, 2010, was issued in response to a Request for Opinion and addressed the permissibility of recovering overpayments through wage deductions:

> If an employee is informed that he received an overpayment of wages over the past 12 months, and specifically authorizes, in writing, the employer to deduct the difference over the next x pay periods (provided the deductions do no total more than 10% of the employee's weekly wages), pursuant to the employee's authorization, can the employer lawfully deduct from the employee's wages?

Section 193 of New York's Labor Law dictates that employers are prohibited from making any deductions from wages except those which "are made in accordance with the provisions of any law or any rule or regulation issued by any government agency"; or "are expressly authorized in writing by the employee and are for the benefit of the employee." The statute limits authorized deductions to payments for "insurance premiums, pension or health and welfare benefit, contributions to charitable organizations, payment for United States bonds, payments for dues or assessments to a labor organization, and *similar payments* for the benefit of the employee" (emphasis added).

The meaning of *similar payments* has long been ambiguous under New York Law although prior NYSDOL authority clearly suggested that, with an employee's permission, an employer *could* recoup wage overpayments through payroll deductions. NYSDOL Opinion Letter (RO-07-0015), October 23, 2008; *see also*, NYSDOL Opinion Letter, May 6, 1997 (Labor Law Section 193 Recoupment of Wage Overpayment), where the NYSDOL stated "[a]s a matter of policy, the Department of Labor will permit an employer to recoup such an erroneous overpayment of wages without limitation of amount, provided such recoupment is made from the employee's next immediately succeeding wage payment. Following that time, such a recoupment would be considered a similar payment for the benefit of the employee within the meaning of the statute (because it would help the employee avoid the inconvenience of being sued to recover the overpayment), and would, therefore, be permissible, provided that it was expressly authorized in writing by the employee, and was limited to ten (10) percent of the gross wages payable to the employee in any one pay period (as provided in NYCRR § 195.1)."

The NYSDOL's position on the legality of wage deductions for overpayments changed only recently from the position articulated in its 1997 Opinion Letter described above. The January 2010 Opinion Letter parallels an August 3, 2009 Opinion Letter (RO-09-0006), where the NYSDOL stated that an employer was prohibited from deducting overpayments from employees who are paid in advance of the day pay is earned. It is also consistent with the NYSDOL's October 23, 2008 Opinion Letter (RO-07-0003), finding a wage deduction for the repayment of tuition assistance to be prohibited because it was outside the list of statutorily-authorized wage deductions under § 193(1)(b) and, accordingly, unlawful.

Attempting to set the record straight, the NYSDOL explains in the January 2010 Opinion Letter that while earlier opinions provided that an employer could make wage deductions for overpayments, the NYSDOL changed its position in light of the New York Court of Appeals' 2006 decision in *Angello v. Labor Ready, Inc.*, 7 N.Y.3d 579, 586 (2006). This explanation is, of course, a little unsatisfying considering that the NYSDOL was espousing inconsistent positions on the subject more than two years after *Labor Ready* was handed down. (*See*, NYSDOL Opinion Letter RO-07-0015, October 23, 2008, referenced above, which permitted voluntary deductions for wage overpayments).

In *Labor Ready*, employees who opted to be paid with a cash voucher (rather than by check) had to redeem the voucher at cash dispensing machines owned by the company, which charged employees a transaction fee of $1 plus any change that would have been a part of the day's wages (thus, for example, an employee whose after-tax wages were $44.85 would receive $43 from the machine). The Court held that this "charge" to wages earned violated § 193 because "subtracting from wages a fee that goes directly to the employer or its subsidiary violates both the letter of the statute and protective policy underlying it."

The NYSDOL now interprets the *Labor Ready* decision as fully applicable to deductions for wage overpayments although, we believe, the facts of *Labor Ready* are fully distinguishable and do not necessarily drive the legal principle now espoused by the NYSDOL in connection with recoupment of inadvertent wage overpayments. Nevertheless, the NYSDOL has broadly interpreted *Labor Ready* to mean that employers may not recoup any amount of overpayment through wage deductions, as such would constitute a "fee that goes directly to the employer." And since §193 prohibits an employer from requiring an employee to make any payment by separate transaction that would not be permitted as a deduction, the NYSDOL has also held that employers cannot require that employees pay back any overpayment by separate transaction. Indeed, in its January 21, 2010 Opinion Letter, the NYSDOL expressly opines "nor may an employee waive the protections of § 193."

So what is an overpaying employer to do? The NYSDOL says that there are two options: 1) the employer can "request" that the employee pay back the overpayment, provided it "clearly communicates that the employee's refusal will not, in any way, result in any form of disciplinary or retaliatory action;" or 2) the employer can sue the employee in civil court.

What Weight Should Be Accorded NYSDOL Opinion Letters?

While the NYSDOL's opinion is now clear, the question remains: What weight, if any, will New York courts give it?

As no New York court has weighed-in on the wage-overpayment deduction issue since *Labor Ready*, we look to litigation regarding New York's "spread of hours" rule (about which the NYSDOL has frequently opined) for insight into what, if any, deference New York courts will afford the recent Opinion Letter.

In this context, in 2005, one federal judge sitting in the Southern District of New York wrote that New York DOL Opinion Letters should be afforded different weight depending on the specific letter's underlying purpose. In *Yang v. ABCL Corp.*, 2005 U.S. Dist. LEXIS 31567, *24-26 (S.D.N.Y. Dec. 5, 2005), defendants argued that the court should defer to a NYSDOL Opinion Letter in rendering its decision interpreting New York's "spread of hours" statute. The court declined, however, explaining that while courts should defer to the governmental agency which administers the statute (the NYSDOL, in this case) when the matter "involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom," deference is *not* required when "the question is one of pure legal interpretation of statutory terms." *See id. citing Kurcsics v. Merchants Mut. Ins. Co.,* 49 N.Y.2d 451, 459, 403 N.E.2d 159, 426 N.Y.S.2d 454 (N.Y. 1980) ("Where [] the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight); *Toys "R" Us v. Silva*, 89 N.Y.2d 411, 419, 676 N.E.2d 862, 654 N.Y.S.2d 100 (N.Y. 1996) (holding that where the question before the court is one of pure legal interpretation of statutory terms, deference to the Board of Standards and Appeals (the agency responsible for revoking building permits) is not required). *See also Suffolk Regional Off-Track Betting Corp. v. New York State Racing and Wagering Board*, 11 N.Y.3d 559, 567 (2008) (holding that deference to administrative agencies charged with enforcing a statute is not required when an issue is one of pure statutory analysis). The *Yang* court concluded that because it was deciding a "question of legal interpretation," deference to the NYSDOL's opinion was not required.[1]

Since the rules regarding deductions for overpayment under § 193 appear to be matters of legal interpretation of statutory terms, under *Yang*, employers would have cause for hope. Unfortunately, subsequent "spread of hours" federal district court decisions have placed the *Yang* holding on this issue in the minority, and while there is an intra-District split on deferral versus non-deferral, the weight of authority seems to be favoring the former. One court noted that "courts in the Southern District of New York are currently divided as to whether a deferential standard should be applied to the opinions of the New York State Department of Labor," but of the five decisions cited, *Yang* was the only one that did not defer to the NYSDOL. *See Jenkins v. Hanac, Inc.*, 493 F. Supp. 2d 556, 558 (EDNY 2007).

And it is not just the federal courts that have deferred to the NYSDOL on "spread of hours." In *Seenaraine v. Securitas Security Services USA, Inc.*, 37 A.D.3d 700 (2d Dept. 2007), the Appellate Division held that the New York Department of Labor's interpretation of the "spread of hours" regulation was entitled to deference since it met the relatively low standard of not being "unreasonable, irrational, or in conflict with the regulation's plain meaning."

Action Steps for Employers

In light of New York courts' apparent deference to NYSDOL opinion letters on "spread of hours," it appears that employers can expect deference to the NYSDOL's recent Opinion Letter prohibiting recoupment of overpayment under §193. While we believe there are credible reasons why courts should *not* defer to the NYSDOL's recent position barring employers from recouping accidental overpayments through wage deductions, what is an employer to do if it wishes to be fully compliant and risk averse?

- *First*, employers should eliminate practices or policies whereby overpayments are deducted from wages, or where employees are *required* to reimburse the employer by separate transaction in order to avoid disciplinary actions;

- *Second*, if an employer finds that it has overpaid an employee, the employee should be informed of the overpayment, and Human Resources should *request* that the employee reimburse the business by making a separate payment to the employer;

    - As this may not achieve the desired result on its own, the employer may want to incentivize the employee by noting that if the employee chooses not to repay the money voluntarily, the employer will have no alternative but to sue the employee to recoup it;

- *Third*, a writing should be prepared whereby the employee acknowledges that s/he has been overpaid, that s/he was *requested* to pay the money back, and that s/he was informed that s/he would *not* be subject to discipline or retaliation for refusing to repay the money via a separate payment;

- *Fourth*, the employer should conduct an investigation into when the employee first knew of the overpayment. The NYSDOL has written that if the employee knew of the overpayment but did *not* inform the employer timely, then the employee can be disciplined;

- *Fifth*, it appears that courts will accord deference to the recently issued Opinion Letter, RO-07-0152, so long as the legal principle enunciated is not "unreasonable, irrational, or in conflict with the regulation's plain meaning." That said, given the prior Opinion Letters (RO-07-0015 and the one issued May 6, 1997), there is a rational basis to challenge the weight to be accorded RO-07-0152; and

Finally, before taking action, the employer should consult with counsel to discuss the specific matter, the employer's alternatives, and the pros and cons of any course of action.

[1] Of course, while *Yang* and similar decisions do not require adherence to agency opinions, they certainly do not forbid it. *See, e.g., Suffolk Regional Off-Track Betting Corp. v. New York State Racing and Wagering Board*, 11 N.Y.3d 559, 567 (2008) (noting that "[e]ven if no deference is owed to an agency's reading of a statute, a court can nevertheless defer to an agency's definition of a term of art contained within a statute").

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