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LABOR & EMPLOYMENT

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IN THIS NEWSLETTER:

We report on recent developments in the area of paycheck deductions by employers, as well as the strict provisions of a law regarding independent contractor misclassification. We also discuss a new law that requires employers to provide paid leaves of absence for organ and bone marrow donation, and a new law that requires same-sex rights for bereavement leave.

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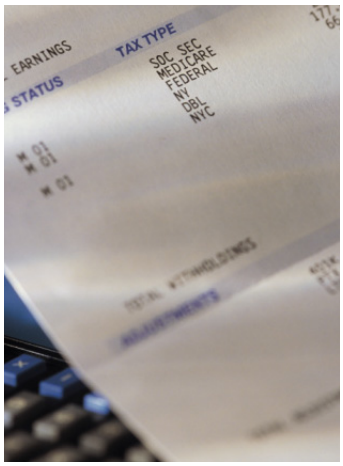
NEW YORK DOL LIMITS EMPLOYERS' RIGHT TO MAKE PAYCHECK DEDUCTIONS



Several recent New York State Department of Labor (DOL) opinion letters have taken the position that New York's Wage Payment Law prohibits employers from making deductions from their employees' wages in the event of an overpayment, even when the employee has authorized the deduction.

In addition, recent opinion letters have addressed, and rejected, deductions from wages for advances and loans, use of unaccrued PTO, rent charges for employer-provided housing, charges made at an employer-sponsored cafeteria, and parking garage fees.

Section 193(1) of the New York Labor Law provides that deductions may only be made from wages that:

> are expressly authorized in writing by the employee and are for the benefit of the employee; provided that such authorization is kept on file on the employer's premises. 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.

Previously, the DOL had taken the position that "similar payments for the benefit of the employee" included deductions for overpayments and advances, when approved in writing by the employee. Therefore, this practice fell into the Section 193(1) exception (so long as an employer did not deduct more that 10% of an employee's wages in any one paycheck). However, the DOL's recent opinion letters, based on a reading of a New York Court of Appeals decision, take the position that these deductions violate Section 193. "Similar payments for the benefit of the employee," according to the DOL, is defined as investments of money for the later benefit of the employee, such as deductions for insurance premiums and payments for bonds, or payments for the benefit of others, such as charitable contributions or union dues. Money that goes to the employer does not fit the definition.

The DOL added, with respect to advances and overpayments, that because Section 193(2) states, "No employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages under the provisions of subdivision one of this section," an employer may ask an employee to repay an advance or an overpayment voluntarily. However, the employer must clearly communicate to the employee that the employee's refusal to write a check will not, in any way, result in any form of disciplinary or retaliatory action. The DOL further stated that when an employee receives an overpayment and chooses not to voluntarily repay the amount, the employer's only remedy is to file a lawsuit.

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NEW YORK DOL LIMITS EMPLOYERS' RIGHT TO MAKE PAYCHECK DEDUCTIONS *>> continued from page 1*

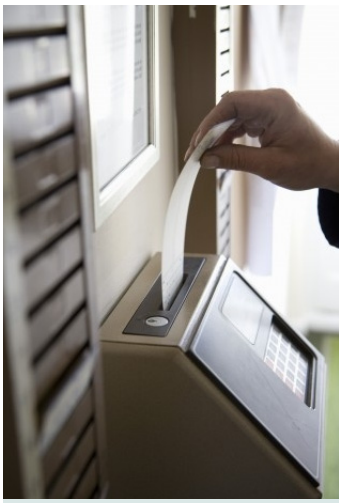
Although not addressed specifically in the opinion letter, if an employer makes an unlawful deduction from an employee's wages, the employee would be entitled to repayment of the deduction, as well as 100% liquidated damages plus attorneys' fees.

>> The Bottom Line

In light of new opinion letters released by the New York State Department of Labor, the safest way to comply with the New York Wage Payment Law regarding deductions is to avoid making deductions from employees' pay for overpayments, advances, unaccrued PTO, or any other charges for which the employee is essentially reimbursing the company for advancing a payment. As a result, employers may want to re-examine their policies and practices with respect to advances of any kind and allowing employees to use PTO before it is accrued.

EMPLOYERS MAY WANT TO RE-EXAMINE THEIR POLICIES AND PRACTICES WITH RESPECT TO ADVANCES OF ANY KIND AND ALLOWING EMPLOYEES TO USE PTO BEFORE IT IS ACCRUED.

MASSACHUSETTS LAW IMPOSES HARSH PENALTIES FOR INDEPENDENT CONTRACTOR MISCLASSIFICATION



EMPLOYERS MUST BE WARY OF CLASSIFYING INDIVIDUALS AS INDEPENDENT CONTRACTORS... WHEN IN DOUBT, THE SAFER APPROACH IS TO CLASSIFY THE PERSON AS AN EMPLOYEE.

A recent increase in the number of lawsuits brought under the Massachusetts Independent Contractor Law serves as a reminder of the strict provisions of this law and its significant penalties.

Under the law, individuals who provide service in Massachusetts for a Massachusetts employer are assumed to be employees unless the employer can establish all three of the following:

1. the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of the service and in fact,
2. the service is performed outside the usual course of the business of the employer, and
3. the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

If a company fails to properly treat an individual as an employee, criminal and/or civil remedies may be imposed. In fact, any officer or agent with managerial responsibilities for the entity may be held personally liable depending on the circumstances. Criminal penalties may include fines and even imprisonment. Civil damages are significant and include treble damages and attorneys' fees. Even if an employer can show that it paid the individual more than it would have paid him or her as an employee, the individual may nevertheless be eligible for any wages (including overtime) and benefits he or she would have received as an employee, including holiday pay, vacation pay, and any other employee benefits.

>> The Bottom Line

In any state, but particularly in Massachusetts, employers must be wary of classifying individuals as independent contractors. Multistate employers should note that different states may consider different factors in determining whether an individual is an employee or an independent contractor. Employers must be sensitive to these differences – two people performing the same tasks in different states may need to be treated differently. When in doubt, the safer approach is to classify the person as an employee.

CALIFORNIA'S NEW ORGAN AND BONE MARROW DONATION LEAVE LAW

As of this year, most private employers in California are required to permit employees to take paid leaves of absence for organ and bone marrow donation.

Under the Michelle Maykin Memorial Donation Protection Act, companies that employ 15 or more employees must provide up to 30 days of paid leave for an organ donation and up to five days of paid leave for a bone marrow donation. However, as a condition of an employee's initial receipt of bone marrow or organ donation leave, employers may require that an employee take earned but unused sick or vacation leave (up to five days for bone marrow donation and up to two weeks for organ donation), unless doing so would violate the provisions of any applicable collective bargaining agreement.

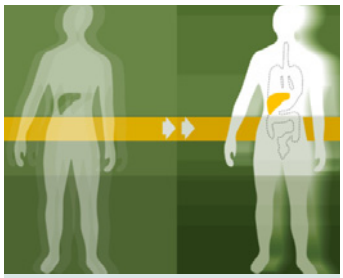
Under the new law, employees returning from organ or bone marrow donation leave must be returned to the same, or an equivalent, position. However, an employer may decline to restore an employee because of conditions unrelated to the employee's donation leave.

The law also prohibits covered employers from interfering with employees who take organ or bone marrow donation leaves. Employers may not retaliate against employees for taking a leave or for opposing an unlawful employment practice related to the leave. The law also creates a private right of action for aggrieved employees to seek enforcement of its provisions.

Organ or bone marrow donation leave is separate from, and does not run concurrently with, leave taken pursuant to the federal Family and Medical Leave Act (FMLA) or the California Family Rights Act (CFRA). Therefore, an employee who suffers medical complications and needs more leave than allotted under this state law may be entitled to additional unpaid leave under the FMLA and/or CFRA.

>> The Bottom Line

Under this new California law, employers must provide paid leaves of absence for organ and bone marrow donations and covered California employers should update their policies to provide for these new leave entitlements.



MOST PRIVATE EMPLOYERS IN CALIFORNIA ARE REQUIRED TO PERMIT EMPLOYEES TO TAKE PAID LEAVES OF ABSENCE FOR ORGAN AND BONE MARROW DONATION.

NEW YORK REQUIRES SAME-SEX RIGHTS FOR BEREAVEMENT LEAVE

EMPLOYERS WHO PROVIDE FUNERAL OR BEREAVEMENT LEAVE FOR THE DEATH OF ANY EMPLOYEE'S SPOUSE OR THE SPOUSE'S RELATIVES SHOULD PROVIDE THE SAME LEAVE FOR SAME-SEX PARTNERS.

New York employers who provide funeral or bereavement leave for the death of an employee's spouse, or the child, parent or other relative of a spouse, must now provide the same leave with respect to the death of an employee's same-sex committed partner, or the death of a same-sex partner's child, parent or other relative.

The statute specifically defines "same-sex committed partners" as "those who are financially and emotionally interdependent in a manner commonly presumed of spouses." This new requirement, which went into effect in fall 2010, is the result of a new statute that amended the New York Civil Rights Law. It is unknown at this time whether new regulations will be developed to further clarify this definition.

Importantly, the new law, and New York law generally, does not require employers to provide any kind of funeral or bereavement leave, whether paid or unpaid. Employers who do not offer bereavement or funeral leave, and those who already deem same-sex partners to have the same status as spouses for leave purposes, will not need to take any action in response to this new law.

>> The Bottom Line

Employers who provide funeral or bereavement leave for the death of any employee's spouse or the spouse's relatives should update their policies and employee handbooks to provide the same leave for same-sex partners, under New York law.

CALENDAR OF EVENTS

American Conference Institute's National Forum on Defending and Managing High Exposure Claims of Retaliation and Discrimination

July 27 – July 28, 2011

Speaker: Gregg Brochin

Topic: Sexual Harassment Claims: Minimizing Conduct or Showing That It Had No Effect on the Discriminatee

Location: Helmsley Park Lane Hotel, New York, NY

Register: www.americanconference.com

American Law Institute – American Bar Association's Annual Employment Law Conference: Current Developments in Employment Law: The Obama Years at Mid-Term

July 28 – 30, 2011

Speaker: Maureen McLoughlin

Topics:
1. Employment and Separation Agreements for Executives: A Balanced Perspective
2. The Battle of the Experts
3. Damages in Employment Cases: How to Maximize/Minimize

Location: La Fonda on the Plaza, Santa Fe, NM

Register: www.ali-aba.org

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