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MEMORANDUM

CONFIDENTIAL

DATE: October 23, 2013

TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Managers, Human Resources Directors and Controllers

FROM: Kane Kessler, P.C.
Labor & Employment Dept.

RE: New York State Labor Law § 193: Deductions from Wages

Section 193 of the New York Labor Law prohibits deductions from wages (or payment by the employee in a separate transaction) except for deductions made in accordance with law (such as taxes and wage garnishments) or those expressly authorized in writing and for the benefit of the employee. The statute listed as permissible deductions such items as insurance premiums, pension or welfare benefits, contributions to charitable organizations, union dues and “similar payments for the benefit of the Employee.”

New regulations, promulgated by the Commissioner of Labor and effective October 9, 2013, clarify the types of deductions that are considered “similar payments for the benefit of the employee.” Most significantly, the regulations now expressly permit deductions to recoup overpayments of wages and repayment of wage advances.

Deductions for the benefit of the employee

The regulations clarify that the following deductions, if properly authorized by the employee, are considered to be for the benefit of the employee¹ and are permissible under Section 193:

- (a) *Health and Welfare Benefits.* Payments made for health and welfare benefits; insurance premiums and prepaid legal plans; fitness center, health club, and/or gym membership dues; pharmacy purchases made at the employer's place of business; day care, before-

¹ Employers should note that convenience by itself is *not* considered a benefit.

school and after-school care expenses; and tuition, room, board, and fees for pre-school, nursery, primary, secondary, and/or post-secondary educational institutions

- (b) *Pension and Savings Benefits*. Payments made for pension benefits and United States bonds.
- (c) *Charitable Benefits*. Payments made for contributions to a bona fide charitable organization; and purchases made at events sponsored by a bona fide charitable organization affiliated with the employer where at least twenty percent of the profits from such event are being contributed to a bona fide charitable organization.
- (d) *Representational Benefits*. Payments made for dues or assessments to a labor organization.
- (e) *Transportation Benefits*. Payments made for discounted parking or discounted passes, tokens, fare cards, vouchers, or other items that entitle the employee to use mass transit.
- (f) *Food and Lodging Benefits*. Payments made for cafeteria and vending machine purchases made at the employer's place of business; housing provided at no more than market rates by non-profit hospitals or affiliates thereof; and purchases made at gift shops operated by the employer, only where the employer is a hospital, college, or university.

The above deductions must be authorized by the employee. Authorization for such deductions must be express, written, voluntary, and informed. To obtain such authorization, employers must provide a written notice explaining the terms and conditions of the deduction, its benefit and the details of the manner in which deductions shall be made. If the deduction is one that may fluctuate (e.g. meals in a cafeteria), the notice may provide a range setting forth the lowest and highest deductions that can be made. Deductions are considered authorized if they are agreed to in a collective bargaining agreement between the employer and an employee representative. Though the regulations do not address whether any action needs to be taken for existing authorizations, a representative at the New York State Department of Labor confirmed that employers do not need to re-authorize existing wage deductions that are for the benefit of the employee; the regulations only apply to new authorizations going forward.

Deductions for the recovery of overpayments

Employers are now allowed to recover for overpayments that are due to a “mathematical or other clerical error by the employer,” either by making wage deductions or separate transactions. In such an event, employers must follow several steps to recover the overpayment.

Employers may only recover any overpayments that were made in the eight (8) weeks prior to providing an employee with notice of intent to recover overpayment (thus, if an employer was mistakenly overpaying an employee for one year, the employer may only recover the overpayments made in the last eight (8) weeks). If the overpayment is less than or equal to the net wages of the next wage payment after other permissible deductions, the employer may recover the full amount from the following wage payment. If the overpayment exceeds the net wages after other permissible deductions, the recovery may be spread out over multiple wage payments made no more than once per wage payment for a maximum of six years after the original date of overpayment. These deductions must be less than 12.5% of the gross wages earned in the payment from which they will be deducted, and they must not reduce the employee’s effective hourly wage below the state minimum wage rate.

Prior to commencing deductions or separate transactions for repayment, the employer must provide the employee with a written notice of intent which sets forth the amount overpaid in total and per pay period, the total amount to be deducted, and the date each deduction shall occur followed by the amount of the deduction. The notice must also inform the employee of his/her right to contest the overpayment, provide the date by which the employee must contest if he/she intends to do so, and set forth the procedure the employee must follow to contest repayment (or provide a reference to where such a procedure is located). If the entire amount will be recovered in the next wage payment, notice must be provided at least three days before the deduction. Otherwise, notice shall be given at least three weeks before deductions are to commence.

Lastly, employers must establish a procedure by which an employee may dispute the overpayment and terms of recovery. Such a procedure must: 1) allow the employee one week to respond to the notice of intent (two days if the whole overpayment is to be collected in the next wage payment); 2) provide that the employer will reply within one week of receipt of the employee's response; 3) establish that the employee will be given written notice of the opportunity to meet within one week of receiving the employer's reply; 4) provide that the employee will receive a written notice of the final determination. Deductions may not commence until three weeks after the final determination is made; if the overpayment is to be collected entirely in one wage payment, the deduction may be made immediately following the determination. Dispute resolution provisions in collective bargaining agreements may be utilized as long as they provide at least as much protection as the previously described procedure.

Deductions for the repayment of wage advances

Employers may also recover for an advance of wages or salary either through wage deductions or separate transactions. Such recovery cannot include any interest, fees, or other amount additional to the amount of the initial money provided. Additionally, an advance must be repaid in full before another advance can be given. Once repayment commences, employers may only make one deduction per wage payment.

Prior to giving an advance, the employer must receive written authorization from the employee for the deduction(s) that will be made to repay the advance which sets forth the amount to be advanced, the amount to be deducted to repay the advance in total and per wage payment, the date(s) when each deduction will be taken, and notice that the employee may contest any deduction that is not in accordance with the terms of the authorization. The authorization may be revoked at any point prior to the payment of the advance.

Lastly, employers must establish a procedure by which an employee can dispute the amount and frequency of deductions that are not in accordance with the written authorization. Under the procedure, employees must be able to provide written notice of their objection to the deduction, and the employer must reply to the objection in writing as soon as practical. An employer must not make any deductions until a reply to the employee's objection is given and any necessary adjustments have been made. Dispute resolution procedures under already established collective bargaining agreements may be used as long as they provide at least as much protection to the employee as the procedure described above.

Prohibited Deductions

The regulations also specify certain deductions which are expressly prohibited. Such deductions include:

1. Repayments of loans, advances, and overpayments, that are not in accordance with the regulations;
2. Employee purchases of tools, equipment and attire required for work;
3. Recoupment of unauthorized expenses;
4. Repayment of employer losses, including for spoilage and breakage, cash shortages, and fines or penalties incurred by the employer through the conduct of the employee;
5. Fines or penalties for tardiness, excessive leave, misconduct, quitting without notice;
6. Contributions to political action committees, campaigns and similar payments;
7. Fees, interest or the employer's administrative costs.

Additionally, any deductions that are not similar to those listed in the statute (i.e. those discussed previously in this memorandum) are also prohibited.

We suggest that employers review their written wage deduction policies and paperwork to conform to the new regulations. Specifically, employers should have deduction authorization forms, and a written "notice of intent" to recover the overpayment, and establish, or modify, a dispute resolution procedure for employees to challenge the overpayment and advances. Finally, employee handbooks and similar written policies should be updated to conform to these new regulations.

If you have any questions about your obligations under Labor Law Section 193, please do not hesitate to contact David R. Rothfeld, Judith A. Stoll, Robert L. Sacks, Lois M. Traub, Niki J. Franzitta, or Alexander Soric in our Labor & Employment Department.

cc: Joseph E. Spinnato, Esq.
Geoffrey Mills, Chairman