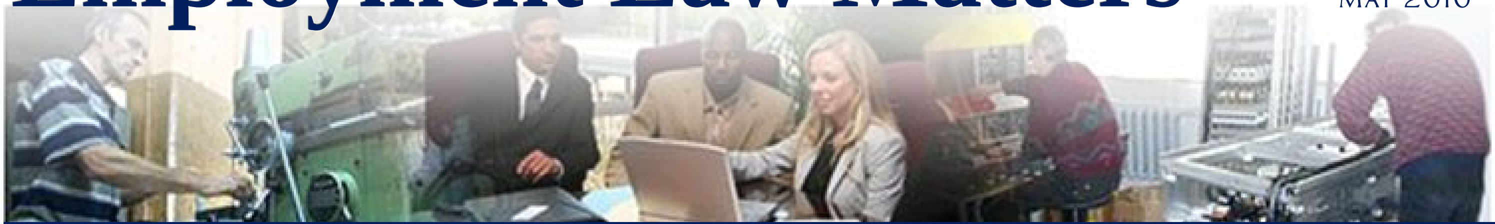
Employment Law Matters

May 2010



A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Wage Deductions for Overpayments, Salary Advances and Tuition Assistance No Longer Allowed in New York

The New York State Department of Labor (NYSDOL) has announced a major reversal in its position with respect to deductions from an employee's wages. In a recently-issued opinion letter, the NYSDOL has ruled that employers in New York can no longer withhold money from an employee's paycheck in order to repay the employer for: salary advances, wage overpayments, or employer-paid tuition assistance.

Section 193 of the New York Labor Law ("Section 193") states that:

> No employer shall make any deduction from the wages of an employee, except deductions which... are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or ... are expressly authorized in writing by the employee 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.

This law, of course, permits an employer to withhold money from an employee's paycheck for taxes and social security either with or without the employee's authorization. However, what constituted authorized deductions "for the benefit" of employees (beyond those listed above) has been open to interpretation.

Prior to 2010, the NYSDOL interpreted this Section as allowing deductions not expressly listed in the law, if the deductions were "for the benefit of the employee" AND the employee provided written consent. As noted above, these exceptions included repayments of salary advances, wage overpayments, and employer-paid tuition assistance.

For example, under this prior interpretation, wage overpayments could be deducted by an employer for the full amount of any such overpayment (in the pay period immediately following the overpayment) so long as the employer had the written consent of the employee. Deductions withheld thereafter or over a period of time could not exceed ten percent (10%) of the employee's pay in any pay period, and also required the employee's written consent.

In January 2010, the NYSDOL issued an opinion letter overruling its prior interpretation, stating that deductions for wage overpayments are not permitted, even with the employee's written consent. Specifically, the NYSDOL ruled that recouping such overpayments are not "similar payments for the benefit of the employee", and therefore may not be deducted from an employee's wages. Other such opinions have held that deduction for the repayment of salary advances and employer-paid tuition are likewise impermissible.

While Section 193 technically still states that "similar payments for the benefit of the employee" may be deducted from an employee's paycheck, as a result of the NYSDOL's reversal it is unclear what, if any, other deductions are permissible beyond those expressly authorized by the law. Again, those deductions include: 1) payments for insurance premiums, 2) contributions/premiums for pension/health and welfare benefits (including deferred investment plans), 3) contributions to charitable organizations, 4) payments for United States bonds, and 5) payments for dues or assessments to a labor organization. Any other deductions from an employee's pay that go directly to the employer are considered violations of the statute; even if the employee requests the deduction and consents to it in writing.

Should the NYSDOL discover that an employer has deducted money from an employee's paycheck on an impermissible basis, the Department will order that the money be returned to the employee and could impose fines on the employer. The intent behind Section 193 was to protect employees from becoming so indebted to their employers (through purchases at

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Wage Deductions for Overpayments, Salary Advances and Tuition Assistance No Longer Allowed in New York (continued)

"company stores", for example) that they would be working for - in essence - no compensation from the employer. Given the NYSDOL's now expansive interpretation of this law, employers must be extremely cautious when collecting money from their employees.

In the event an employee owes its employer money, the NYSDOL states that the employer may "request" the employee to pay back such monies (outside of payroll deductions). However, the employer may not impose discipline if the employee refuses to pay. Moreover, the employer must communicate to the employee that such refusal will not result in any discipline or retaliation. Failure to follow these rules will be viewed by the NYSDOL as a violation of Section 193.

While it will be much more difficult for employers to recover what they are owed, if an employee fails to pay, the employer's only recourse will be to seek legal redress through the court system. In other words, while an employer cannot discipline an employee for failing to repay a debt, it can sue the employee (in small claims court, for example) to recover the money owed.

If you have any questions about this major change in New York's employment law, or need assistance with respect to an employee-owed debt, please feel free to contact us.

FREE Clients and Friends Webinar on Health Care Reform Laws

Wednesday, June 23, 2010 12:00 noon -1:30 pm

The debate is over but many questions still remain. Health care reform is now law. Now, every employer must be prepared to deal with the sweeping changes created by the Patient Protection and Affordable Care Act (PPACA) and the Health Care and Education Reconciliation Act of 2010 (HCERA).

These two laws, which combined are more than 950 pages in length, will have a dramatic impact on employers, employees and their group health plans. Failure to comply with the new requirements can lead to substantial penalties. But you cannot comply until you understand the essential elements of the new laws. We have put together this "clients and friends" program to help with your compliance efforts.

Join us for this 90-minute FREE web-based conference designed to make these extraordinarily complex laws easy to understand.

There is **no registration fee** for this program. Please register as soon as possible. For more information and/or to register for the program most convenient for you, please visit our website at www.ferrarafirm.com or, email njgross@ferrarafirm.com or call 315-437-7600.

New DOL Enforcement Strategy Means More Compliance Headaches for Employers

In recent months, we reported on the fact that the U.S. Department of Labor ("DOL") has hired more than 200 investigators to increase enforcement of various labor laws. Now, the DOL has announced that employers will also be responsible for investigating and ensuring their own compliance. Specifically, the DOL recently announced a far-reaching change in its regulatory and enforcement strategy entitled: "Plan/Prevent/Protect: The Beginning of a Broader Regulatory and Enforcement Strategy". This new DOL strategy would require employers to create plans to address employment law compliance with wage and hour laws, Occupational Safety and Health laws, as well as other laws enforced by the DOL.

According to the DOL announcement, this new strategy comes as a result of the DOL's perception that employers in the U.S.:

> ...make a calculated decision whether to comply with employment laws. They assess the benefits of refusing to comply with the law and compare them to the costs of complying with the law. Then they weigh these costs and benefits against the likelihood they will be caught and the penalty they might suffer if they are caught. This is the "catch me if you can" system in action. And for far too many employers ... subject to the laws enforced by the Labor Department, this cold economic calculus leads them to violate the law.

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New DOL Enforcement Strategy Means More Compliance Headaches for Employers (continued)

To address this perceived "catch me if you can" system, the DOL proposes that employers affirmatively find and fix employment law problems rather than waiting for the DOL to discover the problems, and enforce the law. While the specifics of this new strategy are months away, and employers will have an opportunity to comment on the DOL's new approach before it is implemented, this "Plan/Prevent/Protect" strategy will require employers to take three steps to ensure compliance with the law:

1) "Plan": The DOL will propose a requirement that employers and other regulated entities create a plan for identifying and remediating risks of legal violations and other risks to workers - for example, a plan to search their workplaces for safety hazards that might injure or kill workers. The employer would provide their employees with opportunities to participate in the creation of the plans. In addition, the plans would be made available to workers so they can fully understand them and help to monitor their implementation.

2) "Prevent": The DOL will propose a requirement that employers thoroughly and completely implement the plan in a manner that prevents legal violations. The plan cannot be a mere paper process. The employer or other regulated entity cannot draft a plan and then put it on a shelf. The plan must be fully implemented for the employer to comply with the "Plan/Prevent/Protect" compliance strategy.

3) "Protect": The DOL will propose a requirement that the employer ensures that the plan's objectives are met on a regular basis. Just any plan will not do. The plan must actually protect workers from violations of their workplace rights.

As a result of this new strategy, employers should analyze their practices, policies and procedures in order to assess their employment law compliance. Assuming that the strategy is implemented as described by the DOL, employers will have to establish and enforce policies designed to eliminate, not just reduce, any employment law

Legal Risks Associated with Hiring an Individual with Non-Compete Agreement with Prior Employer

You have just interviewed what seems to be an ideal candidate for a job opening in your sales department. However, the candidate tells you that her former employer (one of your main competitors) required that she sign a non-competition agreement. What are the legal risks you face if you choose to hire her?

In New York, the risks depend on whether the non-compete agreement is enforceable. As most of you are aware, an employer will seek a non-compete agreement from an employee in order to prevent the employee from subsequently working for a competitor after the employment relationship ends.

The general rule in New York is that such agreements are enforceable if they are: (1) reasonable in time and geographic scope, (2) necessary to protect the employer's legitimate interests, (3) not harmful to the general public, and (4) not unreasonably burdensome to the employee. Most cases, however, turn on the first issue listed above; i.e., whether the restrictions are reasonable in time and geographic scope.

Based on existing case law, time restrictions of two years or less are generally considered reasonable. In other words, a non-compete agreement that prevents an employee from working for a competitor for five years or more may not be enforceable.

A reasonable geographic scope depends on the market in which the employer seeking to enforce the non-compete agreement operates. For example, if the employer's market is within a 75-mile radius of a certain city, restricting an employee from working for a competitor outside that market would likely be unreasonable and, therefore, unenforceable. Conversely, if an employer has a nationwide market, a nationwide restriction may be appropriate under the law.

Assuming that the agreement is enforceable, the job candidate subject to its restrictions could be legally prevented from working for a competitor. So the first, and most obvious, risk associated with hiring an individual subject to a valid non-compete agreement is that the former employer may obtain a court order to force you to either not hire the individual or immediately terminate his/her employment.

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Legal Risks Associated with Hiring an Individual with Non-Compete Agreement with Prior Employer (continued)

There is also potential liability exposure for employing such an individual, knowing of the existence of the non-compete agreement. New York and many other state courts recognize a cause of action for "tortious interference with contract." The elements of such a claim are as follows: 1) existence of a valid contract; 2) defendant's knowledge of the contract; 3) defendant's intentional procuring of the breach; and 4) damages.

In other words, an employer seeking to enforce its non-compete agreement with a former employee can obtain monetary damages (if any exist) from the prospective/new employer if: 1) the non-compete agreement is enforceable, 2) the prospective/current employer is aware of the existence of the agreement, 3) the prospective/current employer either offers employment or continues to employ the individual subject to the agreement. Should the former employer be able to prove these elements, it would be entitled not only to an award which compensates it for any loss resulting from the employment of the former employee (e.g., lost customers, accounts, reputation, etc), it could also be entitled to punitive damages.

In sum, there are serious legal risks associated with hiring an individual subject to a pre-existing non-competition agreement. Work closely with your employment law attorney when you learn of the existence of such an agreement to minimize those risks.

If you have any questions, or need assistance in this regard, please feel free to contact our office at 315-437-7600 or 716-875-1406.

COBRA Premium Subsidy Extended Again

President Obama recently signed a new law (called the Continuing Extension Act of 2010) extending the COBRA subsidy to individuals who are involuntarily terminated through May 31, 2010. As you may recall, the eligibility period was extended earlier this year but that extension expired as of March 31, 2010.

If you have any questions, please feel free to contact us.

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