Employment Law Matters

September 2013

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

Hot Topics

Proposed Regs for New York's Wage Deduction Law Create Complex Requirements for Employers

Late last year, Governor Cuomo signed a bill amending New York Labor Law Section 193 to increase the number and types of voluntary deductions that an employer can legally withhold from an employee's paycheck. Under the old law, employers were only permitted to make deductions from an employee's wages for pension/health/welfare insurance premiums, contributions to charitable organizations, payments for United States Bonds, and payments for dues or assessments to labor organizations. The amended version of the law allows employers to make wage deductions (in addition to those described above) for:

- prepaid legal plans;
- purchases made at certain events for charitable organizations "affiliated with" the employer;
- discounted parking/passes, tokens, fair cards, vouchers, etc., related to mass transit;
- fitness center, health club or gym membership;
- cafeteria, vending machine purchases made at the employer's place of business, and purchases made at gift shops operated by the employer, where the employer is a hospital, college, or university;
- pharmacy purchases made at the employer's place of business;
- tuition, room, board and fees for preschool, nursery, primary, secondary, and/or post-secondary educational institutions;
- day care, before-school and after-school expenses, payments for housing provided that no more than market rate by non-profit hospitals or affiliates thereof and "similar payments for the benefit of the employee".

Recently, the New York State Department of Labor (NYSDOL) issued proposed regulations to implement this law and provide specific parameters and procedures for employers seeking to take advantage of its provisions. These regulations are quite complex with specific requirements regarding the contents of written authorizations by employees, limitations on the amount of recovery with respect to wage overpayments, dispute resolution procedure requirements and specific prohibitions not included in the law.

Written Authorizations

Even prior to last year's amendment to Labor Law Section 193, employers were required to obtain written authorization from an employee when that employee voluntarily consented to or requested a deduction from his/her wages. The proposed regulations for the amended law require that these written authorizations include certain specific terms. The regulations provide that a deduction will be considered authorized if it is agreed to "in a collective bargaining agreement between the representative of the employee and the employer or by a written agreement between the employer and the employee that is expressed, written, voluntary, and informed." A written authorization is considered "informed" only when an employee has been provided with a written notice of "all terms and conditions of the deduction, its benefit to the employee and the details of the manner in which deductions will be made." This written notice has to be provided to the employee prior to the employee's initial written authorization and prior to any deductions being made. Moreover, such notice has to be provided if there is any change in the amount of the deduction or a substantial change in the benefits of the deduction to the employee. If the employer does not obtain this type of authorization, the voluntary wage deduction would be against the law.

"For the Benefit of the Employee"

Under both the old and new versions of Labor Law Section 193, a voluntary wage deduction has to be "for the benefit of the employee". In the past, the NYSDOL interpreted this requirement as meaning that if there was any bene-

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fit to the employer then the deduction would **not** be considered "for the benefit of the employee" and therefore impermissible. The new regulations change this requirement stating

> "every deduction may provide some generalized indirect benefit to employers by helping to attract and maintain a stable and productive workforce. However, deductions that result in financial gain to the employer at the expense of the employee call into question whether the deduction provides a benefit to the employee."

In short, employers are not precluded from making deductions in all cases where there is a benefit to the employer.

However, the regulations make it clear that "convenience" of the deductions for employees is not a "benefit" of employees. Let's say, for example, that an employer owns a private parking lot. The monthly charge for patrons of that parking lot is $100. If the employer were to deduct the full $100 from its employees' paychecks to pay for their parking in that facility, it is unlikely that the NYSDOL would consider that a permissible deduction. This is because the deduction is for the full amount of the parking cost and only offered as a convenience to the employee and the employer receives a benefit at the expense of the employee. If, on the other hand, the employer were to offer a discounted parking rate to the employees and take a deduction for that amount, it would likely be considered a permissible deduction under these new regulations.

Prohibited Deductions

The new regulations also provide a list of deductions that the NYSDOL will not consider to be permissible even if there is a benefit to the employee. These include:

- repayments of loans, advances, and overpayments that are not in accordance with the regulations (discussed in further detail below);
- employee purchases of tools, equipment and attire required for work;
- recoupment of unauthorized expenses;
- repayment of employer losses, including spoilage and breakage, cash shortages, and fines or penalties incurred by the employer through the conduct of the employee;
- fines or penalties for tardiness, excessive leave, misconduct, quitting without notice;
- contributions to political action committees, campaigns and similar payments; and
- fees, interest or the employer's administrative costs.

Deductions for Advances

The new regulations make it clear that while an employer can "advance" or "loan" money to an employee, the employer cannot charge any interest or fee for the repayment of that amount. Specifically, the regulations provide that an advance:

> "is the provision of money by the employer to the employee based on the anticipation of the earning of future wages. Any provision of money which is accompanied by interest, fee(s) or repayment amount consisting of anything other than the strict amount provided, is not an advance, and may not be reclaimed through the deduction of wages".

The authorization requirements for deductions for advances are also different from other types of deductions. Moreover the regulations provide specifics for the timing and duration of the repayment schedule, the frequency within which employers may recover advances, the method by which they can recover the advances, etc. In addition, an employer must implement a dispute resolution procedure whereby an employee can contest whether the amount and frequency of deductions are in accordance with the terms of the written advance authorization.

Deductions for Wage Overpayments

The new regulations permit an employer to make deductions from an employee's paycheck for an overpayment of wages where the overpayment was due to a mathematical or clerical error by the employer. However, the deductions are only permitted if the employer follows very specific and detailed procedures and protocols in order to do so. For example, the employer may only recover such overpayments as were made within eight weeks prior to the issuance of a notice of the employer's intent to recover those overpayments. In addition, an employer can only recover the entire overpayment if it is less than or equal to the net wages earned (after other permissible deductions). Where the overpayment exceeds the net wages, the recovery may not exceed 12.5% of the gross wages earned in that wage payment. Such deduction cannot reduce the employee's effective hourly wage below the state minimum wage. There is also a requirement for a dispute resolution procedure similar to the one required for recovery of wage advances. The regulations note that "The failure of an employer to follow [the regulatory requirements] … will create the presumption that the contested deduction was impermissible."

If you have any questions (or if you need assistance in complying with this new law and its regulations), please feel free to contact us.

OFCCP Enforcement

Federal Contractors Alert:

OFCCP has Issued New Federal Contract Compliance Manual for Affirmative Action Plans

The Office of Federal Contract Compliance Programs (OFCCP) recently released its new "Federal Contract Compliance Manual". This manual provides procedural guidelines for the OFCCP's compliance officers in conducting iaudits of employers' mandatory affirmative action plans.

Affirmative action plans are mandatory for employers who contract (or subcontract) with the federal government, which employ 50 or more workers, if they:

- have a federal contract or subcontract of $50,000 or more;
- have government bills of lading which in any twelve-month period total, or can be reasonably expected to total, $50,000 or more;
- serve as a depository of federal funds in any amount; or
- are financial institutions that serve as issuing and paying agents for U.S. Savings bonds and saving notes in any amount.

The OFCCP's staff was trained on this manual earlier this year. The Agency considers the manual to be a procedural framework for executing "quality and timely compliance evaluations and complaint investigations". Copies of the manual can be found at: http://www.dol.gov/ofccp/regs/compliance/fccm/FCCM_FINAL_508c.pdf.

It should be noted that these guidelines are not regulations or law. Accordingly, if there is any conflict between the content of the manual and the governing regulations, the regulations will control.

This new procedural manual is the latest in the OFCCP's efforts to take a more aggressive approach to performing audits of affirmative action plans. Accordingly, employers should review their existing plans and make sure they are up to date. Remember, these plans **must** be updated annually.

If you need any assistance in drafting or updating your affirmative action plan, please feel free to contact our office.

Employment Discrimination

Recent U.S. Supreme Court Decisions Reduce Liability Exposure for Employers in Discrimination Cases

Definition of Supervisor Narrowed

The U.S. Supreme Court recently issued a decision which reversed the Equal Employment Opportunity Commission's long-standing definition of "supervisor" for the purposes of imposing liability on an employer for employment discrimination claims. Under Title VII of the Civil Rights Act of 1964, an employer can be held automatically liable for the discriminatory actions (including sexual and other forms of harassment) if the prohibited conduct is performed by a "supervisor". Since the late 1990's the EEOC has defined the term "supervisor" as: 1) an individual who has the authority to undertake or recommend tangible employment decisions affecting other employees; or 2) an individual who has the authority to direct other employees' daily work activities. This definition has led to a number of lower court cases which have held that individuals who were not considered supervisors by their employer (e.g., working foremen, etc.) were nevertheless supervisors for purposes of Title VII because they directed the daily work activities of other employees. Some of these cases even found union members to be "supervisors" for Title VII purposes, in direct contradiction to other labor laws, like the National Labor Relations Act.

In Vance v. Ball State University, the U.S. Supreme Court defined supervisory authority as having the power to make "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." If an employer has not vested an individual with such power, the Court said, the employer cannot be held automatically liable for his or her discriminatory actions.

Employers should bear in mind that while an employer may not be automatically liable for the actions of these

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Employment Discrimination

Recent U.S. Supreme Court Decisions Reduce Liability Exposure for Employers in Discrimination Cases (cont'd)

employees, the employer may still face liability based on co-worker discrimination (including all type of workplace harassment, such as, sexual, racial, religious, etc.). However, in these instances, a court will only impose liability if the employer knew or should have known about the conduct and failed to take appropriate steps to stop it and provide an appropriate remedy to the victimized employee.

Supreme Court Limits Grounds for Retaliation Claims.

As most employers are aware, Title VII of the Civil Rights Act provides protection to employees for complaining about or otherwise opposing discrimination in the workplace. If an employer were to take adverse action against such an employee (e.g., firing the employee, demoting the employee, etc.) for engaging in such protected activity, the employer could be held liable for discriminatory retaliation.

However, over the years, the EEOC has applied a lenient standard for employees claiming retaliation. Specifically, if an employee could show that retaliation was a "motivating factor" of an employer's adverse action against him/her, the employee could establish a viable claim for discriminatory retaliation. The U.S. Supreme Court in University of Texas Southwestern Medical Center v. Nassar recently held that an employee must show that "but for" the employer's retaliatory motive, the adverse action would not have taken place. In other words, employees seeking to assert claims of retaliation under Title VII for opposing discrimination or complaining about it, will now have to demonstrate that the adverse action against them would not have been taken at all had the employee not made the complaint or opposed discrimination.

This is significant for employers in that this is the first time that the Supreme Court has distinguished between the protections under Title VII against discriminatory activity and discriminatory retaliation. An employee has long been able to successfully sue his/her employer for discriminatory activity under Title VII if the employee can show that an employer's discriminatory attitude is even a "motivating factor" in an adverse action taken against the employee. Now, based on the Nassar case, if an employer has independent, sufficient grounds to take adverse action against an employee apart from any unlawful retaliatory motivation, the employer could not be held liable under Title VII. For example, if an employee were to oppose discrimination in the workplace and the employer discovered that this same employee was stealing from the company, the employer's action in terminating the employee (even if partially motivated by an employer's desire to retaliate against the employee) would not be a viable claim.

This being said, employers must still be cautious in their employment decisions affecting employees who have recently brought discrimination claims or otherwise opposed discrimination in the workplace. Moreover, they should carefully document all reasons for any adverse actions that are unrelated to those types of complaints or other protected actions.

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

Family and Medical Leave Act

FMLA Now Applies to Same-Sex Spouses

Recently, the U.S. Supreme Court overturned the federal Defense of Marriage Act (DOMA) as unconstitutional. DOMA had prohibited federal agencies from recognizing and therefore providing protections to same-sex couples who were legally married in a state that lawfully permits such marriages. Specifically, the Court held that "[t]he federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."

As a direct result of this ruling, the federal protections provided to married employees under the Family and Medical Leave Act (FMLA) now apply to same-sex married couples (again, in those states in which same-sex couples can be lawfully married). In response, the U.S. Department of Labor (DOL) has revised some of its guidance documents with regard to the FMLA. Specifically, the DOL has revised its definition of "spouse" under the FMLA, as follows: "a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including 'common law' marriage and same-sex marriage."

This change is important for employers to consider given that the FMLA permits eligible employees to take up to 12 weeks of time off per year to care for a spouse with a serious health condition and up to 26 weeks for a spouse's military-related leaves. These benefits must now be provided to spouses of same-sex marriages in qualifying states. If, on the other hand, your company operates in states that do not legally sanction same-sex marriages, you may or may not have to provide these benefits depending on a variety of factors, such as, whether the employee was legally married in another state, whether the state recognizes same-sex marriages which are valid in other states, etc.

In light of the Supreme Court's decision and the DOL's revised guidance, employers should review and revise their FMLA policies and procedures accordingly. If you have any questions or need assistance in determining whether your company must revise its practices, please contact us.