

SO YOU DISCOVER YOU HAVE OVERPAID AN EMPLOYEE...WHAT CAN YOU DO?

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Employment

So you discover you have overpaid an employee . . . what can you do? First, with respect to deducting the overpayment from future pay, federal law would allow you to withhold from the employee's paycheck. It will come as no surprise to a California employer that California law is more problematic. Labor Code section 224 does permit deductions agreed to in writing by the employee which are for medical expenses or insurance, or do not amount to a rebate or deduction from the standard wages. But what about an overpayment?

The Labor Commissioner published an Interpretive Bulletin in 1985 that clearly allowed a deduction from the next paycheck if the employee was aware or reasonably should have been aware of the overpayment. However, the Labor Commissioner's Interpretive Bulletins have been invalidated and there is no similar provision in the current Labor Commissioner's Enforcement Policies and Interpretations Manual, which has replaced the Interpretive Bulletins.

If you overpay wages and the error is caught immediately, the Labor Commissioner generally allows you to make a deduction from the next payment. The problem arises when the overpayment continues over a period of time, resulting in the accumulation of a substantial amount. Such a circumstance may cast serious doubt whether there was indeed an error or whether the employer had increased the employee's wages. Payroll deductions made to correct such an overpayment "error" may be seen by the Labor Commissioner as not recoverable and therefore not allowed.

As implied by the language of Labor Code section 224, one of the reasons for the state's diligence on this problem is to prevent kickbacks from employee to employer that would avoid payment of minimum or prevailing wages or other wages due, such as overtime. In any case, involving improper deductions, courts will consider the overriding legislative purpose of preventing kickbacks. Thus, getting the employee to agree to a payback schedule may not always be the answer as the employee may still challenge the scheme as

forced and therefore illegal. Depending on the scope of the problem in terms of both the length of time and the overpayment, other remedies should be considered besides payroll deductions.

For example, sums which might otherwise be paid to the employee in the form of discretionary bonuses might be credited against the debt by the employer and recorded in the form of an agreement that includes a release of any liability on behalf of either party in connection with the bonus or debt. The debt could also be released as part of a severance agreement following termination of