

## RECOVERING WAGE OVERPAYMENTS

By Karen Sutherland

This article addresses recovering wage overpayments under Washington State law. How and when overpayments can be recovered depends on whether the employer is in the public or private sector.

### A. Private Sector Employers.

The Washington State regulation covering overpayments, WAC 296-126-030, is fairly self-explanatory. It states as follows:

(1) An overpayment occurs when an employer pays an employee for: (a) More than the agreed-upon wage rate; or (b) More than the hours actually worked.

(2) Recouping the overpayment may reduce the employee's gross wages below the state minimum wage.

(3) An employer cannot recover an overpayment when the disputed amount concerns the quality of work.

(4) An employer can recover an overpayment from an employee's paycheck provided the overpayment was infrequent and inadvertent. Infrequent means rarely, not occurring regularly, or not showing a pattern. Inadvertent means an error that was accidental, unintentional, or not deliberately done. The burden of proving the inadvertent error rests with the employer who made the error. The employer has ninety days from the initial overpayment to detect and implement a plan with the employee to collect the overpayment. If the overpayment is not detected within the ninety-day period, the employer cannot adjust an employee's current or future wages to recoup the overpayment. Recouping of overpayments is limited to the ninety-day detection period.

(5) In the case of employees covered by an unexpired collective bargaining agreement that expires on or after January 1, 2006, in which overpayments are included in the terms of the collective bargaining agreement, the effective date of this rule shall be the later of: (a) The first day following expiration of the collective bargaining agreement; or (b) The effective date of the revised collective bargaining agreement.

Helpful information: The following are examples of when overpayments may or may not be allowed:

Example 1. Allowed. Overpayment of agreed wage rate: An employee was paid an agreed rate of ten dollars per hour but received a paycheck at the rate of eleven dollars per hour. The employer provided documentation of the overpayment to the affected employee and adjusted the employee's next paycheck for the amount overpaid in the previous pay period.

Example 2. Allowed. Overpayment for hours worked: An employee worked seventy-two hours in the pay period, but the employee was paid for eighty hours for that period. The employer

provided documentation of the overpayment to the affected employee and adjusted the employee's next paycheck for the eight hours overpaid in the previous pay period.

Example 3. Not allowed. Overpayment not detected within ninety days of first occurrence: An employer agreed to pay an employee ten dollars per hour, but when the first check was received, the amount paid was paid at eleven dollars per hour. The employee may or may not have brought it to the attention of the employer. Six months later the employer detected the overpayments and adjusted the employee's wages in the next paycheck for the entire amount of the overpayment. This is not an allowable adjustment because it was not detected within ninety days from the first occurrence.

(6) The employer must provide advance written notice to the employee before any adjustment is made. The notice must include the terms under which the overpayment will be recouped. For example: One adjustment or a series of adjustments.

(7) The employer must provide documentation of the overpayment to the affected employee or employees.

(8) The employer must identify and record all wage deductions openly and clearly in employee payroll records.

(9) Regardless of the provisions of this section, if appropriate, employers retain the right of private legal action to recover an overpayment from an employee.

(10) This regulation does not apply to public employers. See chapter 49.48 RCW, Wages--Payment--Collection.

## **B. Public Sector Employers.**

Recouping overpayment was addressed by the Washington State Supreme Court in the public sector in *State v. Adams*, 107 Wn.2d 611, 732 P.2d 149 (1987). In that case, the court held that the State had a right and duty to collect wage overpayments, but that it could not do so through unilateral payroll deductions. Subsequently, the legislature adopted a statutory procedure for collection of wage overpayments from state, county and city employees' paychecks. RCW 49.48.200; RCW 49.48.210; RCW 49.48.220. The Supreme Court has not yet addressed whether the laws are sufficient to address the issues in *State v Adams*. The statutes state as follows:

### **49.48.200. Overpayment of Wages--Government employees**

(1) Debts due the state or a county or city for the overpayment of wages to their respective employees may be recovered by the employer by deductions from subsequent wage payments as provided in RCW 49.48.210, or by civil action. If the overpayment is recovered by deduction from the employee's subsequent wages, each deduction shall not exceed: (a) Five percent of the employee's disposable earnings in a pay period other than the final pay period; or (b) the amount still outstanding from the employee's disposable earnings in the final pay period. The deductions from wages shall continue until the overpayment is fully recouped.

(2) Nothing in this section or RCW 49.48.210 or 49.48.220 prevents: (a) An employee from making payments in excess of the amount specified in subsection (1)(a) of this section to an employer; or (b) an employer and employee from agreeing to a different overpayment amount than that specified in the notice in RCW 49.48.210(1) or to a method other than a deduction from wages for repayment of the overpayment amount.

#### **49.48.210. Overpayment of Wages--Notice--Review--Appeal**

(1) Except as provided in subsection (10) of this section, when an employer determines that an employee was overpaid wages, the employer shall provide written notice to the employee. The notice shall include the amount of the overpayment the basis for the claim, a demand for payment within twenty calendar days of the date on which the employee received the notice, and the rights of the employee under this section.

(2) The notice may be served upon the employee in the manner prescribed for the service of a summons in a civil action, or be mailed by certified mail, return receipt requested, to the employee at his or her last known address.

(3) Within twenty calendar days after receiving the notice from the employer that an overpayment has occurred, the employee may request, in writing, that the employer review its finding that an overpayment has occurred. The employee may choose to have the review conducted through written submission of information challenging the overpayment or through a face-to-face meeting with the employer. If the request is not made within the twenty-day period as provided in this subsection, the employee may not further challenge the overpayment and has no right to further agency review, an adjudicative proceeding, or judicial review.

(4) Upon receipt of an employee's written request for review of the overpayment, the employer shall review the employee's challenge to the overpayment. Upon completion of the review, the employer shall notify the employee in writing of the employer's decision regarding the employee's challenge. The notification must be sent by certified mail, return receipt requested, to the employee at his or her last known address.

(5) If the employee is dissatisfied with the employer's decision regarding the employee's challenge to the overpayment, the employee may request an adjudicative proceeding governed by the administrative procedure act, chapter 34.05 RCW or, in the case of a county or city employee, an adjudicative proceeding provided pursuant to ordinance or resolution of the county or city. The employee's application for an adjudicative proceeding must be in writing, state the basis for contesting the overpayment notice, and include a copy of the employer's notice of overpayment. The application must be served on and received by the employer within twenty-eight calendar days of the employee's receipt of the employer's decision following review of the employee's challenge. Notwithstanding RCW 35.05.413(3), agencies may not vary the requirements of this subsection (5) by rule or otherwise. The employee must serve the employer by certified mail, return receipt requested.

(6) If the employee does not request an adjudicative proceeding within the twenty-eight-day period, the amount of the overpayment provided in the notice shall be deemed final and the

employer may proceed to recoup the overpayment as provided in this section and RCW 49.48.200.

(7) Where an adjudicative proceeding has been requested, the presiding or reviewing officer shall determine the amount, if any, of the overpayment received by the employee.

(8) If the employee fails to attend or participate in the adjudicative proceeding, upon a showing of valid service, the presiding or reviewing officer may enter an administrative order declaring the amount claimed in the notice sent to the employee after the employer's review of the employee's challenge to the overpayment to be assessed against the employee and subject to collection action by the employer as provided in RCW 49.48.200.

(9) Failure to make an application for a review by the employer as provided in subsections (3) and (4) of this section or an adjudicative proceeding within twenty-eight calendar days of the date of receiving notice of the employer's decision after review of the overpayment shall result in the establishment of a final debt against the employee in the amount asserted by the employer, which debt shall be collected as provided in RCW 49.48.200.

(10) When an employer determines that an employee covered by a collective bargaining agreement was overpaid wages, the employer shall provide written notice to the employee. The notice shall include the amount of the overpayment the basis for the claim, and the rights of the employee under the collective bargaining agreement. Any dispute relating to the occurrence or amount of the overpayment shall be resolved using the grievance procedures contained in the collective bargaining agreement.

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*This brief article is a broad summary only. It lacks specificity about the law and about the effects of different fact patterns, and thus shall not be applied without consulting an attorney. It also focuses on Washington State law and federal law, and the laws of other jurisdictions may vary materially. The information set forth in this article is a broad and general overview of complex topics, and is not legal advice. It also does not take into account any changes to the law or in interpretations of the law that may have occurred since it was written. For more information, contact Karen Sutherland at [ksutherland@omwlaw.com](mailto:ksutherland@omwlaw.com)*