June 3, 2019

NELA/NY Memorandum in Support of the "No Wage Theft Loophole Act" (S5777/A7841)

NELA/NY, the local affiliate of the National Employment Lawyers Association ("NELA"),[1] promotes the employment rights of individual employees through legislation, a legal referral service, and other activities, with an emphasis on the special challenges presented by New York's employment laws. NELA/NY strongly supports the No Wage Theft Loophole Act (S5777/A7841), legislation which is critical in the fight to protect New York employees from wage theft.

INTRODUCTION

Article 6 of the New York Labor Law was *previously* amended to guarantee that "*All* employees *shall* have the *right to recover* full wages, benefits and wage supplements and liquidated damages[.]" N.Y. Labor Law § 198(3) (1997 and 2011 amendments) (emphasis added). But many courts have overlooked, ignored, or refused to give effect to that unequivocal statutory guarantee, and have left many New York employees with no remedy under the Labor Law for their employers' failure to pay wages. Indeed, NELA/NY members have represented a broad range of employees who could not obtain redress in the face of significant wage theft because of courts' erroneous construction of Article 6.

[1] NELA/NY is the New York affiliate of the National Employment Lawyers Association, a bar association consisting of approximately 4,000 lawyers nationwide who primarily represent individuals and groups of individuals in employment matters.

Many courts have compounded their error in construing section 198 by erroneously concluding that Labor Law section 193 — the law that broadly prohibits "any" unauthorized deductions from wages — shields from liability the law's worst offenders, i.e., those who keep *all* of an employee's earnings. To cite just a few examples:

- The court in *Gold v. Am. Med. Alert Corp.*, 14-Civ-5485, 2015 U.S. Dist. LEXIS 108122, at *5 (S.D.N.Y. Aug. 13, 2015) dismissed a plaintiff's claim under sections 193 and 198 alleging "the complete failure to pay wages or severance benefits" owed under the parties' agreement. The court determined that the plaintiff did not have a claim under section 193 because the plaintiff's claim was for "*merely* the *total* withholding of wages" (emphasis added)—as if keeping someone's *total* pay is somehow *less* harmful than keeping part of it.

- The court in *Strohl v. Brite Adventure Ctr., Inc.*, 8-CV-259, 2009 U.S. Dist. LEXIS 78145, at *28 (E.D.N.Y. Aug. 28, 2009) dismissed a plaintiff's section 193 claim alleging that her employer altered its time-keeping records to deprive her of earned wages. Making a distinction without a difference, the court dismissed her claim on the ground that "defendants did not 'deduct' any amounts from her wages, but simply failed to pay her all the wages she had earned." *Id.*

- Embracing the same distinction without a difference, the court in *Williams v. Epic Sec. Corp.*, 358 F. Supp. 3d 284, 302 (S.D.N.Y. 2019) denied Article 6 relief to plaintiffs who were deprived of the hourly wages they were promised.

Such cases reflect a judge-made loophole that has undermined the will of the Legislature and wrongly deprived many employees of their statutory "right to recover full wages, benefits and wage supplements and liquidated damages[.]" N.Y. Labor Law § 198(3).

The No Wage Theft Loophole Act closes the judge-made loophole by amending Labor Law sections 193 and 198 to make unmistakably clear that "[t]here is no exception to liability

under [sections 193 or 198] for the unauthorized failure to pay wages, benefits or wage supplements."

As detailed below, a review of Article 6's existing protections against wage theft shows that the No Wage Theft Loophole Act merely clarifies that courts are not free to disregard the *existing* right of all employees to recover full wages, benefits and wage supplements and liquidated damages.

BACKGROUND

A. Labor Law Article 6 *Already* Gives All Employees the Right to Recover Full Wages, Benefits and Wage Supplements and Liquidated Damages

Article 6, and section 193 in particular, of the New York Labor Law reflects New York's "longstanding policy against the forfeiture of earned but undistributed wages." *Bader v. Wells Fargo Home Mortg.*, 773 F. Supp. 2d 397, 415 (S.D.N.Y. 2011); *see also Esmilla v. Cosmopolitan Club*, 936 F. Supp. 2d 229, 252 (S.D.N.Y. 2013) (to same effect, citing *Ryan v. Kellogg Partners Institutional Services*, 19 N.Y.3d 1, 16 (2012)); *Kolchins v. Evolution Mkts.*, 31 N.Y.3d 100, 109 (2018) (to same effect).

Labor Law section 193 provides: "No employer shall make any [unauthorized] deduction from the wages of an employee[.]" The inequity the Legislature sought to prevent in enacting section 193 was employers reaping the benefit of employees' earned wages. *See In re Angello v. Labor Ready*, 7 N.Y.3d 579, 586 (2006) ("The history of Labor Law § 193 manifests the legislative intent to assure that the unequal bargaining power between an employer and an

employee does not result in coercive economic arrangements by which the employer can divert a worker's wages for the employer's benefit.").

"Once the compensation is earned or vested, an employer's 'neglect to pay' those 'wages' violates NYLL § 193." *Quinones v. PRC Mgmt. Co. LLC*, 14-CV-9064, 2015 U.S. Dist. LEXIS 88029, at *13-16 (S.D.N.Y. July 7, 2015) (citing *Ryan*, *supra*); *see also Kieper v. The Fusco Grp. Partners Inc.*, 152 A.D.3d 1030, 1033 (3d Dept. 2017).

Moreover, Labor Law section 198 guarantees that "All employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages[.]" N.Y. Labor Law § 198(3).

Nonetheless, many courts deny Article 6 relief to unpaid employees by finding that: (A) a failure to pay earned wages is not a "deduction" from wages, *see, e.g., Gold*, *supra*, and (B) section 198's unequivocal guarantee that "[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages" does *not* mean what it says. *See, e.g.*, *Williams*, *supra*. As detailed below, such cases have misconstrued *both* the letter *and* the spirit of the law.

B. There is No Distinction Between "Deducting" and "Failing to Pay" Wages Under Section 193

Some courts see a distinction between the "deduction" of wages referenced in the language of section 193 and a more general "failure to pay" wages. *See, e.g.*, *Strohl*, *supra*. Presumably that is because the phrase "deduction from…wages" reminds us of a paystub

notation, and a "failure to pay wages" does not. But a paystub notation is not a deduction; it is only a *manifestation* of a deduction.

The purported distinction between "deducting" and "failing to pay" wages misapprehends the concept of a "deduction" and the intangible nature of what is being deducted. Since a "deduction" is "an act of taking away or subtraction" (*Angello*, *supra*, 7 N.Y.3d at 584), and a "taking" is a *deprivation* (*Take*, Black's Law Dictionary [6th ed. 1990]), an employee's earned but unpaid wages are "deducted" (i.e., taken) when the employee is *deprived* of them (i.e., when earned wages become due but unpaid wages that the employer does not intend to pay). *See, e.g.*, *Ryan*, *supra*, 19 N.Y.3d at 16 (employer's neglect to pay nondiscretionary bonus violated Labor Law section 193); *see also Is There a Difference Between "Deducting" and "Failing to Pay" Wages?*, New York Law Journal, Nov. 14, 2018, p. 4.

C. There is no Basis for Courts to Ignore Section 198(3)'s Rights-Affirming Language

The issue of which construction of section 193 is best should be academic because section 198(3) commands that "[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages[.]" However, many courts treat section 198(3)'s rights-affirming language as meaningless.

Refusing to give effect to section 198(3)'s unequivocal rights-creating or rights-affirming language would be improper *even if* total wage thefts did not violate section 193 (which they do). That is because, as Judge Cardozo wrote in *Jacobus v. Colgate*, 217 N.Y. 235 (1916):

> [T]he grant of a remedy where none of any kind was available, is equivalent in substance to the creation of a cause of action.

Id., 217 N.Y. at 242.

"Where the statute is clear and unambiguous on its face, the legislation must be interpreted as it exists." *Doctors Council v. N.Y.C. Employees' Ret. Sys.*, 71 N.Y.2d 669, 674 (1988). Accordingly, section 198(3) either affirms or imposes a liability because it clearly and unequivocally commands that "all employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages[.]"[2]

CONCLUSION

The No Wage Theft Loophole Act (S5777/A7841) will close the judge-made loophole once and for all by amending sections 193 and 198 to make unmistakably clear that "[t]here is no exception to liability under [sections 193 or 198] for the unauthorized failure to pay wages, benefits or wage supplements." This amendment is essential to protect employees throughout the State of New York and to ensure that the Labor Law is an available remedy for wage theft in this state.

[2] There is no conflict between section 198(3)'s rights-affirming language and section 198-c(3)'s limited exception to *criminal* liability because section 198(3) deals exclusively with *civil* liability. *See generally Labor Law Article 6: A Misunderstood Law That Fully Protects All Employees' Wages*, 80 Alb. L. Rev. 1355, 1374-79 (2017).