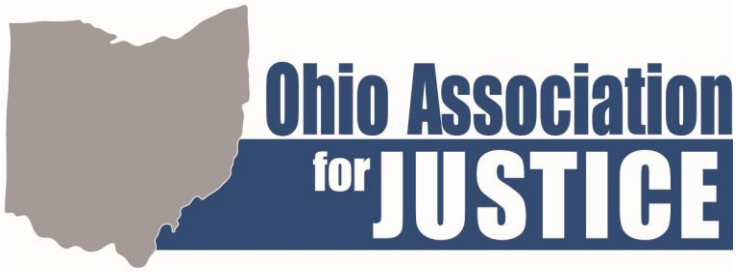

OAJ Destination CLE: Wage & Hour Seminar

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Potential Claims for Unlawful Deductions from Compentation

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POTENTIAL STATE CLAIMS FOR UNLAWFUL DEDUCTIONS FROM COMPENSATION

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I. WHY BRING A CAUSE OF ACTION UNDER STATE LAW FOR UNLAWFUL DEDUCTIONS?

A. Benefit from Opt-Out Nature of Rule 23 Class Action Versus Opt-In Nature of FLSA Collective Action.

B. Obtaining Class Certification Where There is a Uniform Deduction Policy Should be Easily Attainable (comparatively speaking).

- Courts have often noted that class actions dealing with unpaid wages lend themselves particularly well to class actions. *See Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346, 359 (E.D.N.Y. 2011) ("numerous courts have found that wage claims are especially suited to class litigation - perhaps the most perfect questions for class treatment - despite differences in hours worked, wages paid, and wages due") (internal quotations omitted); *Guan Ming Lin v. Benihana N.Y. Corp.*, 2012 U.S. Dist. LEXIS 186526 (S.D.N.Y. Oct 23, 2012) ("the Second Circuit has held that when the plaintiffs are allegedly aggrieved by a single policy of defendants, such as the inadequate wage statements allegedly provided to all employees here, the case presents precisely the type of situations for which the class action device is suited since many nearly identical litigations can be adjudicated in unison.") (internal quotations omitted).
- However, wage claims dealing with deductions are arguably even better suited for class-wide treatment. Instead of dealing with fact-intensive issues sometimes present in misclassification cases (according to defendants), a case concerning an employer's uniform deduction policy lends itself to class-wide resolution. *See Slack v. Swift Transp. Co. of Arizona, LLC*, 2013 U.S. Dist. LEXIS 165998, *12-13 (W.D. Wa. Nov. 20, 2013) (certifying class of Washington truck drivers for *inter alia* violation of Washington pay act); *Knight v. Mill-Tel, Inc.*, 2013 U.S. Dist. LEXIS 105622, *18-19 (D. Kan. July 29, 2013) (certifying class of installation technicians where court found that

all class members shared common legal theory that deductions violate pay act); *Gessele v. Jack in the Box, Inc.*, 2013 U.S. Dist. LEXIS 46758, *11 (D. Or. Apr. 1, 2013) ("the possibility of individualized issues regarding whether the employees signed authorization forms for the payroll deductions for the cost of shoes does not overwhelm the common factual and legal questions of the proposed class."); *Pinkston v. Wheatland Enters.*, 2013 U.S. Dist. LEXIS 43247, *12-13 (D. Kan. Mar. 27, 2013) (certifying class of drivers concerning *inter alia* deductions for credit card fees and property damage); *Thomas v. Matrix Corp. Servs.*, 2012 U.S. Dist. LEXIS 116379, *8 (N.D. Ill. Aug. 17, 2012) (certifying class of technicians involving *inter alia* deductions from compensation); *Scovil v. FedEx Ground Package Sys.*, 886 F. Supp. 2d 45, 47 (D. Me. 2012) (certifying class of drivers regarding *inter alia* improper deductions); *Sherman v. Am. Eagle Express, Inc.*, 2012 U.S. Dist. LEXIS 30728, 32-34 (E.D. Pa. Mar. 8, 2012) (certifying class of drivers regarding *inter alia* claim for unauthorized deductions); *Ruffin v. Entertainment of the Eastern Panhandle*, 2012 U.S. Dist. LEXIS 161420 (N.D.W.Va. Nov. 9, 2012) (certifying Rule 23 class of exotic dancers seeking to recover for *inter alia* improper charges); *Shahriar v. Smith & Wollensky Rest. Group, Inc.*, 659 F.3d 234, 250-253 (2d Cir. N.Y. 2011) (certifying class of servers regarding *inter alia* improper tip-pooling under state law); *Morangelli v. Chemed Corp.*, 275 F.R.D. 99, 115-116 (E.D.N.Y. 2011) (certifying class involving illegal deductions under wage payment laws of 12 different states finding that employee handbook provides common policy); *Karl v. Uptown Drink, LLC*, 2010 Minn. Dist. LEXIS 13, *5-7 (Minn. Dist. Ct. 2010) (certifying class of servers and bartenders alleging *inter alia* uniform illegal deduction policy).

C. <u>The Amount of Damages Are Easily Ascertainable.</u>

- *See Sherman*, 2012 U.S. Dist. LEXIS 30728 at *32-33 ("damages such as deduction reimbursement and backpay are capable of simple calculation.")

D. <u>In Most States This Area of Law is Still Relatively Unchartered.</u>

- Many potential claims exist that have not yet been litigated.
- A careful reading of a state's wage payment statute may reveal a common violation by employers that not yet been itigated.

E. <u>The Ability to Litigate the Wage Claim in State Court.</u>

- If there is no corresponding FLSA claim, and there is no other reason for defendant to seek removal, then this may present a good opportunity to litigate in a more favorable pro-employee forum.

II. CRITERION NEEDED FOR WRONGFUL DEDUCTION CASE

A. Plaintiff Must Be an Employee.

- States' wage payment laws protect employees, not independent contractors, from wrongful deductions.

B. There Must Be Deductions.

- Deductions differ from a cut in pay or salary reductions. *See Ressler v. Jones Motor Co., Inc.*, 387 A.2d 424 (Pa. Super. 1985) ("There appears to be no fixed or easily ascertainable sum which would be withheld or paid out, and we find such indefinite, unpredictable amounts to more closely resemble deductions than reductions as held by the trial court.")

C. The Deductions Must Be From "Wages" and Must Constitute an Impermissible Deduction According to State Law.

1) States differ regarding which deductions from wages are permissible. *See* attached Chart listing each state's statutory law pertaining to deductions.
2) Many states provide limited categories of permissible deductions. Numerous states only allow deductions not expressly allowed by the legislature where they are authorized by the employee in writing. Nearly a dozen states require that deductions not expressly allowed by the legislature must be for the benefit of the employee.
3) Importantly, states' wage payment laws are generally only triggered when deductions are taken from ***earned*** wages/commissions as opposed to deductions taken from advances or ***unearned*** wages/commissions. Thus, deductions made ***after*** wages/commissions are earned might be prohibited, but deductions made ***before*** wages/commissions are earned (i.e., an advance) would generally not be prohibited.
4) Courts will usually look to an employment contract in determining whether wages/commissions were earned. *See Sendi v. NCR Comten, Inc.*, 619 F. Supp. 1577, 1579 (E.D. Pa. 1985) ("The contract between the parties governs whether specific wages or commissions are 'earned.'"); *see also Binder v. Windmiller Management, LLC*, 2013 Conn. Super. LEXIS 160, *45-46 (Conn. Sup. Ct. Jan. 17, 2013) (finding that $660,000 payment was arguably considered wages as operating agreement provided that it was a guaranteed payment); *DeLeon v. Verizon Wireless, LLC*, 207 Cal. App. 4th 800, 808 (2012); *Steinhebel v. Los Angeles Times Communications, LLC* 126 Cal. App. 4th 696, 705 (Cal. App. 2d Dist. 2005); *Stebok v. American General Life and Accident Ins. Co.*, 715 F. Supp. 711, 713 (W.D. Pa. 1989). It is important to note that an employee need not have a formal employment contract in order to show that an employer wrongfully

withheld deductions from wages. *See Euceda v. Millwood, Inc.*, 2013 U.S. Dist. LEXIS 120515, *12-14 (M.D. Pa. Aug. 26, 2013) ("plaintiff need not plead the existence of any formal employment contract. Rather the plaintiff need only plead the existence of some contractual agreement to pay wages that defendant now owes to the plaintiff [which may be either express or implied].").

5) Gratuities are considered wages. *See Karl v. Uptown Drink, LLC*, 835 N.W.2d 14, 17-18 (Minn. 2013).
6) Where an employer argues that the deductions came from unearned wages/commissions, courts generally require a contractual agreement demonstrating what portion of the employee's pay constitutes an advance versus earned wages/commissions.
   a. "Under California law, employers and employees may agree that an employee must satisfy certain conditions before earning a sales commission and an employer may recoup an advance if these conditions are not satisfied. However, to rely on those conditions as a basis for recouping an advance paid for a commission, ***the condition must be clearly expressed and generally must be set forth in writing***." *Sciborski v. Pacific Bell Dir.*, 2012 Cal. App. LEXIS 541 (May 8, 2012) (emphasis supplied); *see also Chenensky v. New York Life Ins. Co.*, 2009 U.S. Dist. LEXIS 119549, *22 (S.D.N.Y. 22, 2009) (denying motion for summary judgment regarding whether commissions were earned "[b]ecause none of the documents address the earning of credits and the timing of deductions in a comprehensive way.")
   b. Court found that deductions were made *after* commissions were earned based on the absence of employee's express written authorization to the contrary. *See Perez v. Westchester Foreign Autos, Inc.*, 2013 U.S. Dist. LEXIS 35808, *33-34 (S.D.N.Y. Feb. 28, 2013).
   c. Financial advisors plead viable claim regarding improper deductions from their commissions attributable to trading losses occurring in 2009 as employer's contract did not address trading losses prior to 2009. *See In re Morgan Stanley Smith Barney LLC Wage and Hour Litigation*, Civ. No. 2:11-03121 (Dec. 4, 2013).
   d. Court found that the plaintiff's commissions were considered earned according to the wage act where employer was unable to point to a written contract indicating otherwise. *See Wiedman v. The Bradford Group*, 2003 Mass. Super. LEXIS 483, *14-18 (Mass. Sup. Ct. 2003).
   e. However, in the absence of a written contract, courts will sometimes look to the parties' past conduct and the common law in determining whether commissions were "earned." For example, in *Pachter v. Bernard Hodes Group, Inc.*, deductions from vice-president's commissions did not violate state law, because, although there was no written agreement, there was an

implied contract based on the parties' courser of dealings for over 11 years demonstrating that commissions were not earned until deductions were made. *See* 10 N.Y.3d 609, 618 (N.Y. 2008). Moreover, the commissions were considered earned under the common law. *See id.* (observing that under common-law, commission is earned where it is tied to "employee's production of a ready, willing and able purchaser of the services.").

7) The following are a sampling of cases where Courts have held certain types of deductions violated, or may have violated, state law. *See Karl*, 835 N.W.2d at 19 (deductions for register shortages, walkouts, and unsigned credit-card receipts violated Minnesota law); *Helde v. Knight Transp., Inc.*, 2013 U.S. Dist. LEXIS 147008, *14-16 (W.D. Wash. Oct. 9, 2013) (finding plaintiff had a valid claim concerning $1.00 payroll service charge associated with using debit card provided by employer); *Camara v. AG*, 941 N.E.2d 1118, 1123-24 (Mass. 2011) (employer's written policy permitting setoffs where an employee damaged a company truck not valid); *Driscoll v. Worcester Telegram & Gazette Corp.*, 2009 Mass. Super. LEXIS 276, *5-7 (Mass. Super. Ct. 2009) (deductions from newspaper carriers for unsatisfactory performance could violate the wage act); *Marroquin v. Canales*, 505 F. Supp. 2d 283, 292-93 (D. Md. 2007); *Robertson v. Opequon Motors, Inc.*, 205 W. Va. 560, 567 (W. Va. 1999) (finding that deductions associated with *inter alia* credit card processing fees were impermissible); *Kilton v. Richard G. Nadler & Associates*, 447 N.W.2d 468 (Minn. Ct. App. 1989) (deductions for overpayment of benefits from unused vacation time impermissible); *Excel Corp. v. Kansas Dep't of Human Resources*, 747 P.2d 179 (Kan. Ct. App. 1987) (deductions from wages for burglary of equipment not permissible under statute); *Yuille v. Pester Marketing Co.*, 682 P.2d 676 (Kan. Ct. App. 1984) (deductions from bonus for cash and inventory shortages, bad checks, and theft losses impermissible); *Weinzirl v. The Wells Group, Inc.*, 234 Kan. 1016, 1019-21 (Kan. 1984) (employer not entitled to forfeit employee's earned commissions upon voluntary termination even though contract provided as such); *Ury v. Fruit Belt Service Co.*, 440 N.E.2d 165, 167 (Ill. App. Ct. 5th Dist. 1982) (holding that deductions to set aside funds in a reserve account for potential uncollectible debts was impermissible as it only benefited the employer); *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1 (Cal. App. 1st Dist. 1981) (employee not entitled to set off an employee's debt); *Male v. Acme Markets, Inc.* 264 A.2d 245 (N.J. Sup. Ct. 1970) (reimbursement for cash register shortages impermissible); *Zarnott v. Timken-Detroit Axle Co.*, 13 N.W.2d 53 (Wisc. 1944) (deductions from machine operator's wages for faulty workmanship violated Wisconsin law).

D. <u>Deductions From "Advances" Generally Do Not Trigger a State's Wage Payment Law.</u>

1) "The essence of an advance is that at the time of payment, the employer cannot determine whether the commission will eventually be earned because a condition to the employee's right to the commission has yet to occur or its occurrence as yet is otherwise unascertainable. An *advance*, therefore, by definition is not a *wage* because all conditions for performance have not been satisfied." *Steinhebel v. Los Angeles Times Communications, LLC*, 126 Cal. App. 4th 696, 705 (Cal. App. 2d Dist. 2005) (emphasis original). In *Steinhebel*, the court found that chargebacks from telesales employees' advances to recoup overpayments was permissible. *See id.*
2) A court found there was no violation of New York's wage payment law where recoupment of overpayment was taken from commissions which were only advanced to employees and not earned pursuant to incentive compensation plan. *See Levy v. Verizon Information Servs. Inc.*, 498 F. Supp. 2d 586, 602 (E.D.N.Y. 2007) ("it is only after Verizon reconciles the incentive compensation it has *advanced* to an employee with the incentive compensation that the employee has actually *earned*, that it can determine the net figure to which that employee is entitled.") (internal quotations omitted) (emphasis original).
3) Loan transaction costs taken from employees' gross commissions were permissible because pursuant to compensation agreements "[o]nly after such subtractions were made did plaintiffs *earn* a wage in the form of incentive compensation." *Macey v. Wells Fargo Bank*, Case No. JCCP 4654 (Sup. Ct. Cal. May 22, 2013) (emphasis original); *see also In re Morgan Stanley Smith Barney LLC Wage and Hour Litigation*, Civ. No. 2:11-03121 (Dec. 4, 2013) (finding that deductions from financial advisors' monthly advances at the end of the year attributable to assistants' compensation were proper pursuant to an implied contract that set forth the commission structure); *Koehl v. Verio, Inc.*, 142 Cal. App. 4th 1313, 1334 (Cal. App. 1st Dist. 2006) (employer entitled to chargebacks from advances as policy expressly stated that commissions were not earned at the time of sale); *Prachasaisoradej v. Ralphs Grocery Co.*, 42 Cal. 4th 217, 237 (Ca. 2007). (produce manager's supplementary compensation subject to reductions for various business expenses of the store was permissible because employee "attained no interest or entitlement in any supplementary compensation other than that finally calculated under the Plan.")
4) Employer's recovery against previously paid commissions did not violate Minnesota law where employee received a monthly draw against commission. *Meyer v. Mason Publishing Co.*, 372 N.W.2d 403 (Minn. Ct. App. 1985); *see also Herr v. McCormick Grain*, 841 F. Supp. 1500, 1511 (D. Kan. 1993) ("A note for

repayment of a commission advance is not a withholding, deduction, or diversion of the employee's wages.")

E. <u>Even Where an Employer Characterizes the Deductions as Coming From an Advance, Some Courts Nonetheless Have Held that the Deductions Were Improper.</u>

1) Court found that policy of deducting a pro rata share of commissions attributed to "unidentified returns" impermissible as these deductions made employees the insurers of the employer's business losses and also rejected defendant's argument that the deductions were from unearned commissions. *Hudgins v. Neiman Marcus Group, Inc.*, 34 Cal. App. 4th 1109 (Cal. App. 1st Dist. 1995)
2) Chargebacks for cancelled newspaper subscriptions were not necessarily taken from an advance because the employees never expressly agreed to the policy in writing and employer's policies suggest that employee's commissions were earned at the time of the sale. *See Harris v. Investor's Business Daily, Inc.*, 138 Cal. App. 4th 28 (Cal. App. 2d Dist. 2006).
3) An employer's characterization of the withholdings as coming from an advance was immaterial where withholdings did not fall under one of three permissible scenarios set forth in Texas Labor Code. *See Sprint/United Management Co. v. Texas Empl. Comm'n*, 2001 Tex. App. LEXIS 4196 (Tex. Appl. Dallas June 26, 2001) ("The characterization of the $354.50 advance to [plaintiff] in January 1991 is irrelevant to the question of whether Sprint had authority under the code to withhold funds from [plaintiff's] wages.")
4) A court rejected an employer's argument that deductions were from insurance agents' *unearned* commissions where the commissions were subject to deductions up until the death of a policy holder. *See Gold v. New York Life Ins. Co.*, 2011 U.S. Dist. LEXIS 62095, *20 (S.D.N.Y. May 29, 2011) ("New York Life's position gives rise to unreasonable results.")

F. <u>There Is a Limit to an Employer's Argument that Deductions Are Always Just a Preliminary Calculation Made Prior to the Employee Receiving His/Her Final Wages.</u>

1) In *Quillian v. Lion Oil Co.*, the court rejected the argument that reductions from an employee's bonus attributable to losses beyond the employee's control did not constitute deductions from final pay: "Appellant herein describes the subject bonus as a calculated amount consisting of the computed sales component less the computed shortage component and argues that no deductions are made from the final computation. It appears to this court that this is merely a clever method of circumventing the statutory definition of wages. [. . .] Rather than call this incentive payment a commission and then deduct for shortages in contravention to

Kerr, appellant deducts shortages from the payment and calls the final results a bonus. Appellant then self-righteously proclaims that no deductions were made from the bonus." 96 Cal. App. 3d 156, 163 (Cal. App. 1st Dist. 1979).

2) Likewise, in *Mytych v. May Department Stores, Co.*, the court rejected defendant's argument that deductions from unearned commissions, attributable to unidentified returns, were not subject to the wage act, finding instead that plaintiffs stated a valid cause of action as these deductions caused the plaintiffs to improperly absorb the defendant's business risks. *See* 34 F. Supp. 2d 130, 131-32 (D. Conn. 1999) ("Regardless of whether [defendant] makes a net sales calculation prior to the final determination of commissions, the amount of a sales person's compensation is connected to the sales person's gross sales. Therefore, a deduction from gross sales that is not otherwise allowed by law reduces the sales person's wages and is prohibited by the statute."); *see also Yuille v. Pester Marketing Co.*, 682 P.2d 676, 681 (Kan. Ct. App. 1984) (stating that even if a clever contractual agreement was created to try and circumvent when bonus was earned, this should be rejected as violative of the wage law).

3) Some courts have found that retroactive modification of commissions is impermissible. *See Lipson v. Jackson National Life Ins. Co.*, 2004 U.S. Dist. LEXIS 1169, *18-20 (E.D. Pa. Jan. 8, 2004); *Holland v. Earl G. Graves Publishing Co.*, 46 F. Supp. 2d 681, 688-89 (E.D. Mich. 1998).

III. TIPS IN BRINGING A LAWSUIT FOR WRONGFUL DEDUCTIONS UNDER STATE LAW

A. Carefully Read Statutory Text (both the statute and any regulations).

1) Make sure that defendant has strictly complied with each and every requirement set forth under the state's wage payment law's statute and/or regulations. Determine whether the employer has complied with every requirement, no matter how seemingly insignificant.
   - For example, where statutes require employee authorization of a deduction, courts have not lightly disregarded this requirement. For example, one court held that even though deductions for fringe health and insurance benefits were probably for the benefit of the employee, without an employee's authorization as required by the statute, the deductions were invalid. *See Division 85 of Amalgamated Transit Union v. Port Authority of Allegheny County*, 9 Pa. D. & C.3d 350, 353-54 (Alleg. Cty. 1978) ("Conceivably, defendant may have wished to protect employees against loss of insurance coverage, but proper motive is not sufficient to change long standing policy against unauthorized deductions."); *E & L Rental Equip., Inc.*, 782 N.E.2d 1068, 1071 (Ind. Ct. App. 2003) (deductions for property damage improper as there was no written

authorization and "[a]ll deductions from wages constitute an assignment, which must meet specified statutory requirements."); *Donovan v. Schlesner*, 240 N.W.2d 135, 139 (Wisc. 1976) ("The consent of the employee may only serve as a basis for a deduction where it is given in writing after the loss and before the deduction."); *Marroquin*, 505 F. Supp. 2d at 293 (offsets for food and lodging not permissible under Maryland law without written authorization).

2) If your state law specifically delineates specific categories of permissible deductions, pay close attention to any general catchall provisions. You can make an argument that these broadly-worded catchall provisions must possess some limitation or else the previous categories of permissible deductions would be superfluous.
   - For example, the Pennsylvania Superior Court recognized such logic in construing the Pennsylvania Wage Payment and Collection Law's catchall provision which allows deductions whenever there is authorization by the employee in writing and approval by the Pennsylvania Department of Labor: "[T]he Department, in promulgating the Act, has carefully delineated those deductions which are permitted. Provisions 1 through 12 of 34 Pa.Code § 9.1 specifically set forth acceptable deductions and ***we believe public policy, and no less common sense, dictates that the Department have equal, if not greater, concern for those deductions which are not enumerated,*** but fall under 34 Pa.Code § 9.1(13) ('other deductions')." *Ressler*, 487 A.2d at 429 (emphasis supplied).

B. <u>Check Your State's Department of Labor's Website for Helpful Language.</u>

1) Your state's Department of Labor's website may contain employee-friendly language which construes a provision of the state's wage payment law in a more liberal fashion than a literal reading of the statute/regulations would suggest. For example, Alaska, Maryland, Massachusetts, and Pennsylvania's DOL websites impose stricter requirements upon the employer regarding deductions than is readily apparent from the text of these states' laws.
2) The Virginia Department of Labor and Industry Division of Labor and Employment Law's *Field Operations Manual*, Chapter 10, p. 38 defines "voluntary" for purposes of deciding whether a written authorization is voluntary: "Because of the unequal bargaining power of employers and employees, the voluntary nature of any agreement may be questionable. Any agreement which is clearly not in the employee's interest will be considered involuntary. As a test, the Representative [of the DOL] should determine who benefits from the agreement. ***If the employee benefits (or profits) from the agreement and the employee does not benefit, the agreement may be considered involuntary***." (emphasis supplied).

C. <u>Argue that the Employee's Written Authorization Is Not Sufficient Either Because (i) a Separate Written Authorization is Needed Prior to Each and Every Particular Deduction and/or (ii) that the Employee Has Only *Acknowledged* the Deduction and Has Not *Authorized* the Deduction.</u>

1) Michigan's wage payment statute has been held to require signed authorization by the employee for each paycheck from which a deduction is made. *See Gainey Transp. Servs., Inc. v. Duffy*, 484 N.W.2d 7, 9 (Mich. Ct. App. 1992) (finding that "the statute requires a separate written consent by the employee for each paycheck from which a deduction is made."). Admittedly, the wording of Michigan's statute is pretty clear that this is required.
2) However, there is an argument that where other states require the employee's written authorization for a deduction, it must be for each and every deduction, even though the statute/regulations may not expressly state this. For example, although Maryland's wage payment statute does not contain such express language, the Maryland Department of Labor has come to this conclusion: "This should take the form of a ***separate*** and ***distinct*** statement, signed by the employee, concerning only the deduction and nothing more." *See* Maryland Department of Labor, Regulation and Licensing, *available at* https://www.dllr.state.md.us/labor/wagepay/
3) Likewise, Pennsylvania's Department of Labor website also has similar language which is not found anywhere within its statute or code: "It is not valid to sign a "blanket" authorization at the time of hire to cover any future deductions. Further, as a rule, deductions cannot reduce your gross pay below minimum wage, and the deductions must be for the employee's benefit." *See* Pennsylvania Department of Labor & Industry, *available at* http://www.portal.state.pa.us/
4) Alaska's Department of Labor & Workforce Development Wage and Hour Administration states that "It is not valid to sign a 'blanket' authorization at the time of hire to cover future deductions." *See* FAQ, *available at* http://labor.alaska.gov/lss/whfaq.htm; *see also* Attorney General of Massachusetts, *available at* http://www.mass.gov/ago/doing-business-in-massachusetts/labor-laws-and-public-construction/wage-and-hour/ ("Employers may only deduct only the amount that would have been paid during the time the employee was late.").
5) In a Minnesota appellate court decision, *Kahnke Bros, Inc., v. Darnall*, the court found that the employee's signature on an employer's form regarding a deduction merely demonstrated that the employee ***acknowledged*** the deduction but did not demonstrate ***authorization*** as required by the statute. *See* 346 N.W.2d 194, 196 (Minn. App. Ct. 1984).

D. <u>Argue that Even With Written Authorization, the Deduction is Improper as it Does Not Benefit the Employee and, Further, an Employee Cannot Waive His/Her Rights Under State's Wage Payment Law.</u>

1) Judge Wettick from the Pennsylvania Common Pleas Court in Allegheny County held that even though a particular subsection of Pennsylvania's regulations under its wage payment law did not expressly state that the deduction needed to be for the benefit of the employee, a statutory construction of the regulations in their entirety led to the conclusion that this particular subsection also required that the deduction be for the benefit of the employee. *See Watson v. Prestige Delivery Sys.*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 65, *18-19 (Allegh. Cty. Feb. 7, 2013) ("The purpose of the [PWPCL] is to protect employees from economic coercion. [. . .] Consequently, the Department of Labor and Industry, in enacting regulations authorizing deductions "for the convenience of employes," would not have intended to give employers a free pass as long as the job-seeking worker would sign a piece of paper authorizing a deduction."); *see also Eluto v. Helmsey Spear, Inc.*, 2008 NY Slip Op 31390U, *4n.2 (N.Y. Sup. Ct. May 16, 2008) ("even assuming that [plaintiff] did agree to the Chargeback Policy as a term and condition of his employment, that would not necessarily preclude his claim that deductions from his wages pursuant to that policy were unlawful under LL § 193."); *Kim v. Suk Inc.*, 2014 U.S. Dist. LEXIS 28316, *14-18 (S.D.N.Y. March 4, 2014); *Yu G. Ke. V. Saigon Grill, Inc.*, 595 F. Supp. 2d 240, 252 (S.D.N.Y. 2008).
2) However, the Supreme Court of Nevada reached an unfortunate result in finding that language within its wage and payment statute allowing "other deductions authorized by written order of an employee" did not require that the deduction be for the benefit of the employee. *See Coast Hotels and Casinos, Inc.*, 34 P.3d 546, 549-51 (Nev. 2001).

E. <u>Use the Public Policy Behind Your State's Wage Payment Law.</u>

1) Even if your state's wage payment law does not expressly set forth its purpose, search the caselaw for any mention as to the public policy that courts have afforded your state's law.
2) Many courts have noted the public policy behind their wage payment law is to provide much-needed protection to employees concerning their wages:
    a. California - *Hudgins v. Neiman Marcus Group, Inc.*, 34 Cal. App. 4th 1109, 1119 (Cal. App. 1st Dist. 1995) ("the Legislature has recognized the employee's dependence on wages for the necessities of life and has, consequently, disapproved of unanticipated or unpredictable deductions because they impose a special hardship on employees."); *see also Kerr's Catering Service*, 57 Cal. 2d 319, 328 (Ca. 1962); *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1, 7 (Cal. App. 1st Dist. 1981).

b. Colorado - *Jet Courier Service, Inc. v. Mulei*, 771 P.2d 486, 501 (Colo. 1989) (holding that "good faith legal justification" language within the wage payment statute needed to be construed "in light of the language and purposes" of the Colorado wage act).
c. Indiana - *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 706 (Ind. 2002) (J. Boehm, concurring) ("the vast majority of workers who are dependent on their paychecks for their day-to-day expenses. These employees need the money currently, not at the end of protracted litigation, and often do not have the economic staying power to engage in a court battle over relatively small amounts."); *see also Huff v. Biomet, Inc.*, 654 N.E.2d 830, 835 (Ind. Ct. App. 1995) (The Wage Payment Statute is a penal statute which, being in derogation of the common law, must be strictly construed.").
d. Massachusetts - *Cumpata v. Blue Cross Blue Shield of Mass., Inc.*, 113 F. Supp. 2d 164, 166 (D. Mass. 2000) ("The statute was intended and designed to protect wage earners from the long-term detention of wages by unscrupulous employers."); *see also Driscoll*, 2009 Mass. Super. LEXIS 276 at * 5-6 ("The purpose of the Wage Act is to prevent employers from unreasonably detaining wages rightfully earned by employers.").
e. New Jersey - *State v. Rosen*, 123 A.2d 79, 82 (N.J. Cty. Ct. 1956) ("A reading of this entire chapter dealing with wages clearly indicates the intent of the Legislature in enacting these statutes, it was the intent to make wages earned by employees a paramount claim to all others upon the assets of the employer.")
f. Pennsylvania - "[W]e believe the notion of economic superiority exercised by an employer in the payment (or non-payment) of wages is of equal import." *Ressler*, 487 A.2d at 429; *see also Weingrad v. Fischer & Porter Co.*, 47 D. & C.2d 244 (C.C.P. Bucks Co. (1968) ("It is clear from the foregoing that the purpose of statutes of this nature is to effect a quick payment of wages or compensation *due* in order to undercut any position of economic superiority possessed by the employer.").
g. West Virginia - *Robertson*, 205 W. Va. at 567 ("The history of the Code provisions on wage assignments shows a deliberate, legislative intent to allow assignment of wages if, and only if, certain specified conditions are met. From the initial provisions allowing unfettered assignment of wages, the legislature has changed the law of West Virginia to permit only limited assignments, and then only when clearly defined legislative formalities are observed.").
h. Wisconsin - *Erdman v. Jovoco, Inc.*, 512 N.W.2d 487, 492 (Wisc. 1994) ("The legislative history of the statute does not include an express statement of the legislature's purpose, but its sponsorship by the Wisconsin Federation of Labor and its enactment during the depression strongly suggest that it was intended to protect employees. [. . .] The legislative history and case law surrounding *sec 103.455* make it clear that the legislature intended to ensure that employes

would not unfairly bear the employer's costs of operating a business.").

F. <u>Argue that Because the Contractual Agreement Does Not Clearly State When the Commission is Earned, it is Earned Upon Receipt.</u>

- *See Koehl*, 142 Cal. App. 4th at 1334; *Aledia v. HSH Nordbank AG*, 2009 U.S. Dist. LEXIS 24953 (S.D.N.Y. March 25, 2009).

G. <u>Argue that Because the Contractual Agreement Does Not Specifically Identify the Commission as an Advance, the Commission is Earned Upon Receipt.</u>

- *See Harris v. Investor's Business Daily, Inc.*, 138 Cal. App. 4th at 41; *AT&T Corp. v. Fowler*, 2007 Ky. App. Unpub. LEXIS 209, *9 (Ken. App. Ct. Sep. 14, 2007).

H. <u>Argue That the Deductions Are For Losses Beyond the Employee's Control and Thus Impermissible.</u>

- Many cases that held deductions or chargebacks from unearned commissions to be permissible only did so after first finding that such "subtractions from gross commissions [did not] amount to an unlawful transfer of business expenses from defendant to plaintiffs or turn plaintiffs into defendant's insurer." *Macey v. Wells Fargo Bank*, Case No. JCCP 4654 (Sup. Ct. Cal. May 22, 2013); *see also Steinhebel*, 126 Cal. App. 4th at 711 (finding that "charge-back policy does not hold appellants personally financially responsible for cash or merchandise shortages or business losses" but instead "merely imposed reasonable conditions on payment of commission."); *Prachasaisoradej*, 42 Cal. 4th at 236; *Erdman*, 512 N.W. 2d at 499 ("Agreements between the employer and the employe which are contrary to the objective of the statute are void.").

I. <u>Argue that the Employer's Position As to When the Commission is Finally Earned is Unreasonable</u>.

1) For example, a Kansas appellate court agreed with the reasoning of a lower court that even if the employer had attempted to prevent a bonus from being considered wages, and thus not subject to the wage payment act, this result should be prohibited: "Assuming, arguendo, that the deductions, through a more artfully crafted employment agreement were set out as conditions precedent, ***this Court believes these conditions of employment should be declared unreasonable and violative of the spirit and letter of the Kansas Wage and Hour law.***" *Yuille v. Pester Marketing Co.*, 682 P.2d 676, 681 (Kan. Ct. App. 1984) (emphasis supplied).
2) *See Gold v. New York Life Ins. Co.*, 2011 U.S. Dist. LEXIS at * 20 (holding that deductions from insurance agent's commissions up until the death of a policy holder was "unreasonable.")

STATES' DEDUCTION LAWS

State	Deduction Law	Deductions prohibited
Alabama	Code of Ala. § 17-17-5	• Prohibits deductions to public employees' compensation for payments to political action committees or political activity. *See Ala. Educ. Ass'n v. State Superintendent of Educ.*, 2014 U.S. App. LEXIS 2171 (11th Cir. Ala. Feb. 5, 2014)
Alaska	Alaska Admin. Code. tit 8, § 15.160, et seq. (8 AAC § 15.160)	• Must be a written agreement. • If employee requests for a deduction from pay, employer "may not derive any profit or benefit from the transaction." • Prohibits deductions for cash shortages or damage to property unless employee admits responsibility in writing. • Deductions for purchase of uniforms prohibited if *inter alia* it is distinctive and cannot be worn during normal social activities.
Arizona	A.R.S. § 23-352; A.R.S. § 23-361.02	• Deductions not allowed unless "the employer is required or empowered to do so by state or federal law." • Prior written authorization required. • Must be a reasonable good faith dispute as to the amount of wages due. • Prohibits certain political deductions. *See United Food & Commer. Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167 (D. Ariz. 2013)
Arkansas	Ark Code Ann. § 11-4-404	• Prohibits the purchase of good and supplies from wages
California	Cal. Lab. Code § 203, et seq.; Lab Code § 400, et seq.; Cal Lab. Code § 2860; 8 Cal. Admin. Code § 11380.	• Deduction allowed if (i) employer is required or empowered under state or federal law; (ii) deduction must be "expressly authorized in writing" to cover insurance premiums, hospital or medical dues, or other deductions that do not amount to a deduction from the standard wage; or (iii) deduction to cover a health and welfare or pension plan expressly authorized by a collective bargaining or wage agreement. • However, many court decisions have further limited the scope of deductions allowed. • Deductions not allowed for photographs of employees/applicants, uniforms, business expenses incurred by employee, and medical or physical examination. *See* Labor Code Sections 401, 2802, and 222.5.
Colorado	Colo. Rev. Stat. § 8-4-105	• Lists 5 categories of permissible deductions: 1) deductions mandated by local, state or federal law; 2) deductions for loans, advances, property provided by employer ***pursuant to a written agreement***;

		3) Deductions to cover cost for a theft if police report is filed; 4) deductions authorized by an employee that are revocable, such as medical insurance, stock purchases, retirement plans; or 5) Deductions for amount of money or value that employee was entrusted with prior to termination.
Connecticut	Conn. Gen. Stat. §§ 31-71, 31-73; 31-51hh	• Deductions are only allowed in 5 circumstances 1) pursuant to state or federal law; 2) employer has written authorization from the employee for deductions ***on a form approved by the commissioner***; 3) deductions authorized in writing for medical, hospital, or surgical care without financial benefit to the employer; 4) for contributions to a retirement plan; 5) pursuant to the law of another state regarding employee's work for employer. • Deductions for loss or shortage caused by customer are prohibited.
Delaware	19 Del. C. § 1107; Reg. WP 2-4	• Deductions not allowed unless: 1) Employer allowed under federal or state law; 2) Deductions are for medical, surgical or hospital care without financial benefit to the employer; 3) signed authorization from the employee "for a lawful purpose ***accruing to the benefit of the employee.***" • Deductions are not allowed for cash/inventory shortages; damaged property; failure to return employer's property. • Cash advances or charges for goods or services allowed only if there is a signed written agreement setting forth repayment schedule and the amount owed.
District of Columbia	D.C. Code § 16-572	• Only type of deduction allowed is a court judgment or wage garnishment per a court order.
Florida	None.	
Georgia	Ga. Code. Ann. § 45-7-54.	• Only prohibits certain deductions pertaining to state governmental employees.
Hawaii	HRS § 388-6	• Deductions only allowed when either allowed by law or if authorized in writing by the employee. • The following deductions are not allowed: fines, cash shortages in certain circumstances; fines/penalties/replacement costs for breakage; certain business losses not attributable to employee's willful or intentional disregard; medical or physical examination required by employer or government.
Idaho	Idaho Code § 45-609	• Deductions only allowed if employer is required or empowered under state or federal law or the employer has a written authorization from the employee for deductions for a lawful purpose.
Illinois	§ 820 ILCS 115/9	• Deductions allowed only if (1) required by law; (2) to

		the benefit of the employee; (3) in response to a valid wage assignment or wage deduction order; (4) ***made with the express written consent of the employee, given freely at the time the deduction is made***; or (5) or in other circumstances relating to governmental employees.
Indiana	Ind. Code Ann. § 22-2-6-2	• Deduction (called assignment) is only allowed where it is 1) made at the request of the employee; 2) in writing; 3) signed by employee; 4) ***revocable by employee at any time upon written notice;*** and 5) is made for one of thirteen delineated purposes. • Some of the thirteen allowable deductions include premium for insurance company; dues to labor organization; purchase price of merchandise; amount of a loan; premiums on insurance policies, etc. • Thus, deduction for the cost of a mandatory uniform would be improper. However, request by employee for deduction to purchase optional uniform would be proper. *See* Indiana Department of Labor, Frequently Asked Questions, *available at* http://www.in.gov/dol/
Iowa	Iowa Code § 91A.5	• Deductions only allowed where 1) pursuant to state or federal law or 2) "employer has written authorization from the employee to so deduct for any lawful purpose ***accruing to the benefit of the employee***." • 7 specific deductions expressly prohibited, such as, certain cash shortages, losses not attributable to employee's willful or intentional disregard.
Kansas	K.S.A. § 44-319; Kan. Admin. Regs. § 49-20-1	• Deductions only allowed where: 1) pursuant to state or federal law; 2) for medical, surgical, or hospital care that does not financially benefit the employer; 3) the employer has written authorization from the employee to so deduct for any lawful purpose ***accruing to the benefit of the employee.***; or 4) for contributions to a retirement plan. • The regulations provide examples of deductions that benefit the employee such as *inter alia* contributions to pension plans, contributions to labor organizations, and the actual cost to the employer of meals and lodging. • The regulations also provide examples of deductions that do not benefit the employee such as *inter alia* deductions for cash and inventory shortages; deductions for uniforms or equipment that are not necessary and are customarily supplied by the employer; and ***any other deduction not set forth by statute or regulations***. • Statue expressly states that upon a written notice and explanation, employer may take a deduction from an employee to repay a loan or advance which the employer made to the employee during the course of and within the scope of employment;

Kentucky	Ky. Rev. Stat. Ann. § 337.060	• Deductions only allowed where 1) authorized by law; 2) expressly authorized in writing by the employee to cover insurance premiums, hospital and medical dues, or other deductions not amounting to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute, 3) other deductions relating to union dues as a result of joint wage agreement, statute or CBA. • Deductions for fines, certain cash shortages, breakage, and certain losses not allowed.
Louisiana	La. Rev. Stat. § 323:635	• "No person, acting either for himself or as agent or otherwise, shall assess any fines against his employees or deduct any sum as fines from their wages. This Section shall not apply in cases where the employees wilfully or negligently damage goods or works, or in cases where the employees wilfully or negligently damage or break the property of the employer, or in cases where the employee is convicted or has pled guilty to the crime of theft of employer funds, but in such cases the fines shall not exceed the actual damage done."
Maine	Me. Rev. Stat. Ann. tit. 26, § 625.	• No deductions allowed except for 1) repayment of loans, debts, or advances; 2) repayment of merchandise purchased from the employer; 3) sick or accident benefits; 4) insurance premiums agreed to by the employee; and 5) rent, light, or water expenses of the company that owns the building.
Maryland	Md. Code. Ann. Lab. & Empl. § 3-503	• Deduction not permitted unless: (1) ordered by a court of competent jurisdiction; (2) authorized expressly in writing by the employee; (3) allowed by the Commissioner because the employee has received full consideration for the deduction; or (4) otherwise made in accordance with any law or any rule or regulation issued by a governmental unit.
Massachusetts	ALM GL ch. 149, § 148, ALM GL ch. 149, § 150	• Deductions allowed only where they constitute a "valid set off" - a term not defined in statue but interpreted by caselaw, such as in *Camara v. Attorney General*, 458 Mass. 756 (2011). • Pursuant to *Camara*, a valid set off occurs "where there exists a clear and established debt owed to the employer by the employee."
Michigan	Mich. Comp Laws § 408.477	• Except for deductions pursuant to law or a CBA, deductions allowed only if there is the full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction." • A deduction "for the benefit of the employer requires written consent from the employee ***for each wage payment subject to the deduction*** [. . .]" • Deductions for overpayments are allowed.

Minnesota	Minn. Stat. §§ 177.24, 181.03, 181.06; Minn. R. 5200.0090	• Wording of Minn. Stat. § 177.24 seems to suggest that any deductions not specifically delineated in Minnesota's MLFSA and Minnesota's wage payment statutes/regulations are not permissible: "Deductions, direct or indirect, from wages or gratuities not authorized by this subdivision may only be taken as authorized by sections 177.28, subdivision 3, 181.06, and 181.79." • List of permissible deductions when there is a written contract include *inter alia* deductions for insurance, contributions to various organizations, and participation in certain employee benefit plans. • Deductions expressly not allowed include *inter alia* lost or stolen property, damage to property, or to recover any other claimed indebtedness running from employee to employer, unless the employee, ***after the loss has occurred or the claimed indebtedness has arisen, voluntarily authorizes the employer in writing to make the deduction*** or unless the employee is held liable in a court of competent jurisdiction for the loss or indebtedness." Such written authorization "shall set forth the amount to be deducted from the employee's wages during each pay period." However, this particular rule does not apply to commissioned salespeople or where there the employee has provided prior written authorization.
Mississippi	None	
Missouri	None.	
Montana	Mont. Code. Ann. §§ 39-3-204, 39-3-205	• Deductions not allowed unless they are for board, room, and "other incidentals supplied by the employer" or as otherwise provided by law, or in certain circumstances upon termination of employment. • *See* Montana Department of Labor and Industry, Employment Relations Division, *available at* http://erd.dli.mt.gov/labor-standards/wage-and-hourwage-payment-act/5-erd/labor-standards/162-wage-and-hour-faq.html (stating that unless deduction is authorized by law, required that "[t]he employee has authorized in writing and the deduction is for the employee's benefit.")
Nebraska	Neb. Rev. Stat. § 48-1230(1)	• "An employer may deduct, withhold, or divert a portion of an employee's wages only when the employer is required to or may do so by state or federal law or by order of a court of competent jurisdiction or the employer has written agreement with the employee to deduct, withhold, or divert."
Nevada	Nev. Rev. Stat. Ann. § 608.110	• Allows for deductions to "any hospital association or to any relief, savings or other department or association maintained by the employer or

		employees for the benefit of the employees, or other deductions authorized by written order of an employee."
New Hampshire	N.H. Rev. Stat. Ann. ch. 275, § 48	• Permissible deductions include those authorized by law or where "[t]he employer has a written authorization by the employee for deductions for a lawful purpose ***accruing to the benefit of the employee*** as provided in regulations issued by the commissioner, as provided in subparagraph (d) or for any of the following: [listing for example union dues, retirement contributions, voluntary cleaning of uniforms]." • Subparagraph (d) provides a long list of permissible deductions.
New Jersey	N.J. Stat. Ann. § 34:11-4.4; N.J. Admin. Code tit. 12, § 55-2.2	• The New Jersey Wage Payment Law statute states that an employer may not "withhold or divert" any portion of wages but then delineates 10 specific permissible deductions, one of which includes payments for employer loans, and also provides a general catchall category: "Such other contributions, deductions and payments as the Commissioner of Labor and Workforce Development may authorize by regulation ***as proper and in conformity with the intent and purpose of this act***, if such deductions are approved by the employer."
New Mexico	N.M. Stat. Ann. § 50-4-1, et seq.	• Only permissible deductions are those that are lawfully required and those that are "***specifically stated in a written contract of hiring entered into at the time of hiring.***"
New York	N.Y. Lab. Law § 193(1), 12 N.Y. Comp. Codes R. & Regs. Pts. 137-2.5, et seq.	• States that no deductions from wages allowed unless they are: (a) made in accordance with any provisions in the law including subsection c [dealing with overpayment] or subsection d [dealing with repayment of advances of salary or wages]; or (b) "***expressly authorized in writing by the employee and are for the benefit of the employee*** provided that such authorization is voluntary and only given following receipt by the employee of written notice of all terms and conditions of the payment and/or its benefits and the details of the manner in which deductions will be made. Whenever there is a substantial change in the terms or conditions of the payment, including but not limited to, any change in the amount of the deduction, or a substantial change in the benefits of the deduction or the details in the manner in which deductions shall be made, the employer shall, as soon as practicable, but in each case before any increased deduction is made on the employee's behalf, notify the employee prior to the implementation of the change. [. . .]" The statue

		then provides a limited list of permissible deductions such as insurance premium, employer benefits, union dues. • Note: in Nov. 6, 2015 the statutory language will change, notably *inter alia* eliminating the language regarding deductions pertaining to advances and overpayment of wages.
North Carolina	N.C. Gen. Stat. § 95-25.8; 13 N.C. Admin. Code 12.0305	• Deductions allowed when: 1) permitted under state or federal law; 2) when the amount of the proposed deduction is known and agreed upon in advance, written authorization from the employee signed on or before the payday and stating the dollar amount or the % of wages to be deducted; or 3) when the amount of proposed deduction is not known and agreed upon in advance, written authorization from the employee signed from the employee on or before the payday and stating the reason for the deduction. Prior to the deduction, the employee must (i) receive 3-day advance written notice of the actual amount to be deducted; (ii) receive written notice of their right to withdraw the authorization; and (iii) be given a reasonable opportunity to withdraw the authorization in writing. • Seven-day notice required for deductions related to cash shortages, property loss.
North Dakota	N.D. Cent. Code §34-14-04.	• Besides deductions taken pursuant to state or federal law, deductions may only be taken for: 1) Advances paid to employees, other than undocumented cash; 2) a recurring deduction authorized in writing; 3) a nonrecurring deduction authorized in writing, when the source of the deduction is cited specifically; 4) a nonrecurring deduction for damage, breakage, shortage, or negligence must be authorized by the employee at the time of the deduction.
Ohio	None.	
Oklahoma	Okla. Admin. Code §§ 380:30-1-7, 380:30-1-11	• Unless legislation or court order states otherwise, only the following deductions are allowed: 1) repayment of loan or advancer; 2) purchase of employer's merchandise or uniforms; 3) payment for health/retirement benefits or insurance premiums; 4) contributions to compensation plan or other

		investment plan provided by the employer as a benefit to the employee; 5) compensate the employer for breakage or loss of merchandise, inventory shortage, or cash shortage caused by the employee; where the employee was the sole party responsible for the cash or items damaged or lost, at the time the damage or loss occurred. • Any of the above payroll deductions "***must be in writing, and signed by the employee before any deduction authorized by such agreement is taken.***"
Oregon	Or. Rev. Stat. § 652.610	• Deductions are not permissible unless: 1) Required by law; 2) "The deductions are authorized in writing by the employee, ***are for the employee's benefit*** and are recorded in the employer's books;" 3) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer and that the deduction is recorded in the employer's books; 4) pursuant to a CBA 5) pertaining to a garnishment 6) deduction made upon employee's termination if authorized pursuant to written agreement between employee and employer and *inter alia* loan was made for benefit of employee.
Pennsylvania	43 P.S. § 260.3; 34 Pa. Code § 9.1	• Prohibiting deductions unless they fall into one of 13 categories of deductions. • The first 10 categories include deductions for retirement plans, labor organization dues, repayment of loans. • 11th category states: "Deductions for purchases or replacements by the employe from the employer of goods, wares, merchandise, services, facilities, rent or similar items provided such deductions are authorized by the employe in writing or are authorized in a collective bargaining agreement." • 12th category states: "Deductions for purchases by the employe for his convenience of goods, wares, merchandise, services, facilities, rent or similar items from third parties not owned, affiliated or controlled directly or indirectly by the employer if the employe authorizes such deductions in writing." • The 13th category is a general catchall provision but with very restrictive language: "Such other deductions authorized in writing by employees as in the discretion of the Department is proper and in conformity with the intent and purpose of the Wage Payment and Collection Law. (43 P. S. §§ 260.1—260.12)."

Rhode Island	R.I. Gen. Laws §§ 28-14-3, 28-14-24	• Allows deductions for union dues pursuant to a CBA. • Expressly allows for 9 categories of deductions where there is a "written request made by the individual employee." • Where employee is owed wages, employer not allowed a set-off or counterclaim for (a) money for damages to employer's property caused by employee's negligence; (b) money due to employer for rent; (c) or money allegedly owed to the employer. However, employer may recover for a loan or advance if "evidenced by a statement in writing signed by the employee." • Rhode Island Department of Labor and Training, *available at http://www.dlt.ri.gov/ls/lsfaqs.htm* ("An employer may not deduct for shortages, damages, rent, uniforms ***or any other reason*** (except applicable taxes). An employer may make a deduction for loans or advances against future earnings if evidenced by a statement in writing, signed by the employee, with the amount to be deducted each pay period. The statement may read "balance due upon separation.") (emphasis supplied).
South Carolina	S.C. Code Ann. § 41-10-40	• "An employer shall not withhold or divert any portion of an employee's wages unless the employer is required or permitted to do so by state or federal law or the employer has given written notification to the employee of the amount and terms of the deductions as required by subsection (A) of § 41-10-30."
South Dakota	None.	
Tennessee	Tenn. Code. Ann §§ 50-2-103, 50-2-107, 50-2-110	• Employer allowed to offset an employee's wages if: 1) there is an agreement with an employee to advance the employee wages prior to the date the wages are due and owing, 2) employee signs the written agreement prior to the offset; and 3) the employer notifies the employee prior to the payment of wages due and owing regarding (i) the amount the employees owes; (ii) that the wages may be offset if not paid prior to due date; (iii) that the employee may submit an affidavit to the employer and the DOL disputing the amount owed within 7 days of the notification. • *See* Tennessee Department of Labor and Workforce Development, *available at* https://www.tn.gov/labor-wfd/faq_laws.shtml#paydeductions ("Under Tennessee law deductions can only be taken out of pay if the employee has authorized it by a written statement.")
Texas	Tex. Lab. Code Ann. § 61.018; 40 Tex. Admin. Code § 821.28	• Employer may not withhold employee's wages unless: 1) ordered to do so by a court; 2) authorized by state or federal law; or 3) "has written authorization from the employee to

		deduct part of the wages for a lawful purpose." • "Written authorization for deductions shall be specific as to the lawful purpose for which the employee has accepted the responsibility or liability. Written authorizations shall be: (1) sufficient to give the employee a reasonable expectation of the amount to be withheld from pay; and (2) a clear indication that the deduction is to be withheld from wages."
Utah	Utah Code Ann. § 34-28-3; Utah Admin. Code R610-3-18	• Employer may not withhold or divert part of an employee's wages unless: 1) court order; 2) state or federal law; 3) "the employee expressly authorizes the deduction in writing;" or 4) pursuant to certain employee benefit plans. • Utah Admin. Code R610-3-18 provides a long list of permissible deductions: "The following sums shall constitute lawful deductions or offsets from wages due an employee."
Vermont	Vt. Stat. Ann. tit. 21, § 384, Sections X and XI of Vermont Department of Labor's Rules.	• Deductions permitted for board, lodging, apparel, rent, or utilities "paid or furnished or other items or services or such other conditions or circumstances as may be usual in a particular employer-employee relationship." • Deductions for goods or services if the employee provides written authorization. • Deductions for claimed damages, cash register shortages or medical exam not allowed.
Virginia	Va. Code Ann. § 40.1-29	• Unless deduction is taken in accordance with law, "written and signed authorization of the employee" is required. • Upon request of employee, employer required to provide employee "the amount and purpose of any deductions." • Blanket authorizations for deductions not allowed: "No employer shall require any employee, except executive personnel, to sign any contract or agreement which provides for the forfeiture of the employee's wages for time worked as a condition of employment or the continuance therein, except as otherwise provided by law."
Washington	Wash. Rev. Code §§ 49.48.010, 49.52.050, 49.52.060, 49.52.070; Wash. Admin. Code §§ 296-126-025, 296-126-028 & 296-126-030.	• Prohibits deductions from final pay unless (1) required by state or federal law; or (2) specifically agreed upon orally or in writing by the employee and employer; or (3) for medical, surgical, or hospital care or service, pursuant to any rule or regulation. • Regarding deductions from an employee's ongoing pay: "The provisions of RCW 49.52.050 shall not make it unlawful for an employer to withhold or divert

		any portion of an employee's wages when required or empowered so to do by state or federal law or when a deduction has been ***expressly authorized in writing in advance by the employee for a lawful purpose accruing to the benefit of such employee*** nor shall the provisions of RCW 49.52.050 make it unlawful for an employer to withhold deductions for medical, surgical, or hospital care or service, pursuant to any rule or regulation: PROVIDED, ***That the employer derives no financial benefit from such deduction*** and the same is openly, clearly and in due course recorded in the employer's books." • The prohibitions against certain deductions found in the code apply only to non-exempt employees. • Regarding final wages, permitted if pursuant to state or federal law, medical, surgical, or hospital care, or court judgment. Also, permitted if agreed to either in writing or orally regarding medical/benefit plans or payment to creditor or third party if for the benefit of the employee. Lists other deductions that may be taken from final pay such as for certain cash shortages, theft, etc. • Regarding ongoing wages, permissible deductions include those 1) required by state or federal law; 2) medical, surgical, or hospital care; 3) satisfy court order; or 4) "during an on-going employment relationship, an employer may deduct wages when the employee expressly authorizes the deduction in writing and in advance for a lawful purpose ***for the benefit of the employee***." • "Neither the employer nor any person acting in the interest of the employer can derive any financial profit or benefit from any of the deductions under this regulation."
West Virginia	W. Va. Code §§ 21-5-1, 21-5-3, 21-5-4, 21-5-9.	• Only authorized deductions include those for club dues, pension plans, payroll savings plans, credit unions, charities and hospitalization and medical insurance. • All other deductions (or assignments) are subjected to strict procedural requirements: "No assignment of or order for future wages shall be valid for a period ***exceeding one year from the date of the assignment or order***. An assignment or order shall be acknowledged by the party making the same before a notary public or other officer authorized to take acknowledgments, and any order or assignment shall specify thereon the total amount due and collectible by virtue of the same and three fourths of the periodical earnings or wages of the assignor shall at all times be exempt from such assignment or order and no assignment or order shall be valid which does not so state upon its face: Provided, That no such order or assignment shall be valid unless

		the written acceptance of the employer of the assignor to the making thereof, is endorsed thereon: Provided, however, That nothing herein contained shall be construed as affecting the right of employer and employees to agree between themselves as to deductions to be made from the payroll of employees."
Wisconsin	Wis. Stat. § 103.455	• Deductions for "defective or faulty workmanship, lost or stolen property or damage to property" not permitted "unless [(i)]the employee authorizes the employer in writing to make that deduction or [(ii)] unless the employer and a representative designated by the employee determine that the defective or faulty workmanship, loss, theft or damage is due to the employees negligence, carelessness, or willful and intentional conduct, or [(iii)] unless the employee is found guilty or held liable in a court of competent jurisdiction by reason of that negligence, carelessness, or willful and intentional conduct."
Wyoming	Department of Employment, Labor and Statistics, Rules and Regulations, ch. 1, § 6(b)-(f)	• Provides numerous permissible deductions. The list does not appear to be exclusive. For example, offset for purchase of goods or services permissible as long as employee has "actual or constructive possession of the goods or services purchased" which is "evidenced by the employee's writing acknowledgment."

Potential State Claims for Unlawful Deductions from Compensation

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I. Why Bring a Cause of Action Under State Law for Unlawful Deductions?

II. Criterion Needed for Wrongful Deduction Case

III. Tips in Bringing a Lawsuit for Wrongful Deductions Under State Law

I. Why Bring a Cause of Action Under State Law for Unlawful Deductions?

A. Benefit from opt-out nature of Rule 23 class action versus opt-in nature of FLSA collective action.

I. Why Bring a Cause of Action Under State Law for Unlawful Deductions?

B. Obtaining class certification when there is a uniform deduction policy should be easily attainable (comparatively speaking).

I. Why Bring a Cause of Action Under State Law for Unlawful Deductions?

C. The amount of damages are easily ascertainable .

I. Why Bring a Cause of Action Under State Law for Unlawful Deductions?

D. In most states, this area of law is still relatively unchartered.

I. Why Bring a Cause of Action Under State Law for Unlawful Deductions?

E. The ability to litigate the wage claim in state court.

II. Criterion Needed for Wrongful Deduction Case

A. Plaintiff must be an employee.

II. Criterion Needed for Wrongful Deduction Case

B. There must be deductions.

II. Criterion Needed for Wrongful Deduction Case

C. The deductions must be from "wages" and must constitute an impermissible deduction according to state law.

II. Criterion Needed for Wrongful Deduction Case

D. Deductions from advances generally do not trigger a state's wage payment law.

II. Criterion Needed for Wrongful Deduction Case

E. Even where an employer characterizes the deductions as coming from an advance, some courts nonetheless have held that the deductions were improper.

II. Criterion Needed for Wrongful Deduction Case

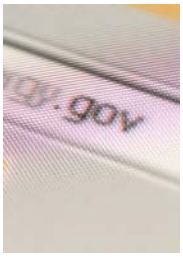
F. There is a limit to an employer's argument that deductions are always just a preliminary calculation made prior to the employee receiving his/her final wages.

III. Tips in Bringing a Lawsuit for Wrongful Deductions Under State Law

A. Carefully read statutory text (both the statute and any regulations).

III. Tips in Bringing a Lawsuit for Wrongful Deductions Under State Law

B. Check your state's Department of Labor's website for helpful language.



III. Tips in Bringing a Lawsuit for Wrongful Deductions Under State Law

C. Argue that employee's written authorization is not sufficient either because (i) a separate written authorization is needed prior to each and every particular deduction; and/or (ii) that the employee has only *acknowledged* the deduction and has not *authorized* the deduction.

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D. Argue that even with written authorization, deduction is improper as it does not benefit the employee and, further, that an employee cannot waive his/her rights under state's wage payment law.

III. Tips in Bringing a Lawsuit for Wrongful Deductions Under State Law

E. Use the public policy behind your state's wage payment law.

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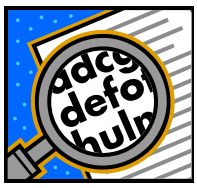
F. Argue that because the contractual agreement does not clearly state when the commission is earned, it is earned upon receipt.



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G. Argue that because the contractual agreement does not specifically identify the commission as an advance, the commission is earned upon receipt.

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H. Argue that deductions from commissions are for losses beyond the employee's control and thus impermissible.

III. Tips in Bringing a Lawsuit for Wrongful Deductions Under State Law

I. Argue that the employer's position as to when the commission is finally earned is unreasonable.

Questions?