How to Get Back Accidental Overpayments

Failure to make required source deductions is a common mistake that results in over payments to employees. Once you discover past failures to withhold, you're allowed to correct them by making additional deductions in *subsequent* payments to the employee. But you need to be extremely careful. If you don't meet strict restrictions, making subsequent deductions to correct previous failures to withhold will only make the problem worse—for both you and the employee.

WHAT THE LAW REQUIRES

Back in the pre-employment protection era, when employers thought an employee was accidentally overpaid, they'd just take the money out of the employee's paycheque willy-nilly. Power over the paycheque made the employer judge and jury in every dispute and there wasn't a thing employees could do about it.

Over the years, laws emerged to rectify this imbalance and protect employees. One legal change contained in employment standards laws was to require employers to have specific legal authority to make deductions from an employee's paycheck. There are 3 sources of this authority:

1. Statutes: Statutes or pieces of legislation not only authorize but in many cases require employers to make source deductions. Several government programs rely on employer source deductions and remittances, including federal programs like the income tax, CPP and EI, and provincial equivalents like provincial income tax, QPP and QPIP. Employment standards laws may also authorize but not require employers to make deductions for certain purposes, e.g., for meals, lodging, uniforms and/or tools.

2. Court Orders: The employer's authority to make source deductions may come from the order of a court or other administrative body, such as those that collect family support payments. These orders to deduct from an employee's pay are usually termed garnishments and employers are required to obey them.

3. Employee Consent: Employees may voluntary consent to deductions from their paychecks, e.g., to pay for benefits like contributions to retirement plans or to pay dues to their unions. Consent typically must be in writing and can be given under a collective agreement, individual employment contract or as part of the sign-up procedure for enrolling in employee benefits programs.

WHAT TO DO

So how do you go about using this authority to recover amounts that you accidentally didn't withhold? The answer depends on whether your failure to withhold was a statutory deduction, a deduction required by a garnishment or one for which the employee gave consent.

Strategy 1: Deductions to Correct Failures to Withhold Income Tax

Failures to deduct enough money for income tax can be costly to employers and result in penalties. In addition, the amount that the employer fails to deduct is subject to interest at a rate specified by the CRA. The only good news is that CRA can't double-dip and impose additional penalties on the employer for failing to remit the amount that wasn't deducted. In other words, penalties and interest for failure to remit can be assessed only on amounts actually deducted.

Unfortunately for employers, the federal tax laws don't require or authorize employers to recover such amounts via source deductions from subsequent paychecks. Neither do Québec tax laws. Consequently, deducting shortfalls in withholding's from pay doesn't enable you to avoid penalties and interest under tax laws. All it does is expose you to the risk of liability for improper deductions under employment standards laws.

Strategy 2: Deductions to Correct Failures to Withhold CPP EI, QPP & QPIP

Unlike income tax, failure to withhold deductions for CPP, EI, QPP and QPIP *can be* recovered via subsequent deductions without the employee's consent, subject to 2 key restrictions:

- **Deductions Must Be Within 12 Months of Failure to Withhold**. The employers can only make deductions from payments made within 12 months of the original failure to withhold.
- **Only One Deduction Can Be Recovered at a Time:** Only one missed deduction can be recovered at a time.

Example:

In 2014, UO Canada Ltd. fails to withhold $25 in EI premiums from an employee's paycheck over the course of 4 semi-monthly payments: Jan. 14, Jan. 31, Feb. 15 and Feb. 28, 2014. Payroll discovers the mistake on Jan. 18, 2015, as it prepares to issue the 2014 T4s.

It's too late to get back the $25 missed on the Jan. 14, 2014 payment. But there's still time to make deductions to recover the other $75 in failures to withhold. Remember, though: Missed deductions must be recovered one at a time. So, UO can get back the first $25 missed (from the Jan. 31, 2014 payment) on Jan. 31, 2015; it then has to wait until the Feb. 15, 2015 to recover the $25 missed on Feb. 15, 2014; and the third $25 source deduction originally missed on Feb. 28, 2014, would have to be recovered on Feb. *29*, 2015. Since that's more than 12 months from the original missed withholding, it can't be recovered. (We understand that 2015 isn't a leap year, but we hope you'll indulgence us so we can make the point.)

The Bottom Line: Of the total $100 in EI deductions that UO Canada failed to withhold, UO can recover only $50 in subsequent deductions.

Strategy 3: Deductions to Correct Failures to Deduct for Garnishments

An employer's authority to make deductions for garnishments is based on the terms of

the actual order. And because orders differ, it’s impossible to provide a general rule. However, employers who discover failures to withhold in response to a garnishment should immediately notify the court or administrative body that issued the garnishment order and ask for instructions. It’s also a good idea to ask a lawyer review the initial garnishment order and offer advice.

Strategy 4: Deductions to Correct Failures to Make Consented-to Deductions

To determine what, if anything, you can do about a missed voluntary deduction, you must look not at the employment standards laws but to the terms of the document that includes the employee’s consent, i.e.:

The employee’s employment agreement;

- The collective agreement if the employee is represented by a union; and/or
- The group benefits plan to the extent the consent authorizes deductions for the purpose of contributing to such a plan.

If amounts the employer failed to deduct are relatively small, there’s probably not going to be a problem with one-time deductions to catch-up on any amounts not previously taken. However, if the amounts concerned are large, employees are probably going to want to spread out the deductions over time

Conclusion

The 4 things you should take away from this:

1.You can’t make source deductions to recover failures to withhold income tax;

2.You can make source deductions to recover failure to withhold EI, QPP and QPIP as long as you make them:

a. Within 12 months of the original failure to withhold; and

b. One missed deduction at a time;

3.Deductions to recover failure to withhold under garnishments must be based on what the garnishment order says; and

4.Deductions to recover failure to make voluntary withholding must be based on what the original consent to withhold says.