

Wage Exemption Amount for Restraining Notices and Levies to Increase on December 31, 2018

December 27, 2018

Under New York's Exempt Income Protection Act ("EIPA"), certain funds in deposit accounts are exempt from most restraining notices and levies. One exemption under the EIPA is for an amount deemed to be protected wages, with the amount of such exemption tied to the minimum wage. As a result of an increase in the New York State minimum wage that takes effect on December 31, 2018, the amount of the wage exemption under the EIPA will increase as of that date.

The EIPA took effect in 2009 and, among other things, requires financial institutions to exempt certain funds in deposit accounts from the reach of creditors seeking to restrain or levy on those accounts. There are two exemptions under the EIPA: (1) for wages; and (2) for the direct deposit or electronic payment of amounts "reasonably identifiable as statutorily exempt" funds during the 45-day period preceding the service of the restraining notice or levy.

Under the wage exemption, a financial institution must make a certain amount available to the depositor based on the amount of the federal or New York State minimum wage (whichever is higher). Because the New York State minimum wage will increase on December 31, 2018, the amount of the wage exemption under the EIPA will also increase as of that date. Under legislation signed into law in 2016, the minimum wage in New York State now varies depending generally on the location in New York State where the person is employed. As of December 31, 2018, the minimum wage in New York City will be \$15.00 an hour if the employer has 11 or more employees or \$13.50 an hour if the employer has 10 or less employees; the minimum wage in Nassau, Suffolk and Westchester Counties will be \$12.00 an hour; and the minimum wage in all other parts of the state will be \$11.10 an hour.

The corresponding wage exemptions based on the new minimum wage amounts are as follows: \$3,600 in New York City if the employer has 11 or more employees or \$3,240 if the employer has 10 or less employees; \$2,880 in Nassau, Suffolk and Westchester Counties; and \$2,664 in all other parts of the state.

The New York State Department of Financial Services ("DFS") provided guidance to banking institutions in April 2017 on how to determine the applicable wage exemption given the possibility that the institution may not know where its customer is employed or (in the case of employees in New York City) the size of the employer. The DFS guidance states that:

(i) If, after reasonable due diligence, a banking institution obtains the most current information regarding the employment address of an account holder and, if applicable, the most current information regarding the size of an account holder's employer located in New York City, the banking institution should calculate the amount of exempt wages based on such information.

(ii) However, if, after reasonable due diligence, a banking institution is unable to obtain the most current information, as described under (i) above, the banking institution may use the highest minimum wage in effect in the State at the time of such calculation, thereby protecting the account holder's wages as required by law.

Please note that the DFS guidance does not specify what type of activity constitutes "reasonable due diligence" with respect to these issues.

As noted above, in addition to the wage exemption, there is an exemption for statutorily exempt funds. Under this separate exemption, if there was a direct deposit or electronic payment of statutorily exempt funds in an account during the 45-day period preceding the service of the restraining notice or levy, then the institution generally must make available to the depositor up to \$2,850 from the account despite the restraining notice or levy. The current amount of \$2,850 was increased to that amount in April 2018 and is subject to change again in April 2021, and every three years thereafter based on changes in the consumer price index.

Please note that this advisory is a general overview of the application of the EIPA and is not intended as legal advice. The requirements of the EIPA are very detailed and must be reviewed in their totality and in connection with federal rules protecting certain funds from garnishment.

If you have any questions regarding the EIPA or the exemption of depositor funds from restraint or levy, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at jsimon@cullenanddykman.com.

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