

## LABOR LAW ARTICLE 6: A MISUNDERSTOOD LAW THAT FULLY PROTECTS ALL EMPLOYEES' WAGES

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### INTRODUCTION

Wage theft occurs when an employer fails to pay wages or benefits owed.<sup>1</sup> It harms low-income employees the most.<sup>2</sup> But depriving almost anyone of earned paychecks, commissions, bonuses, or severance pay causes harm.<sup>3</sup> For some, the harm is life-altering,<sup>4</sup> but few can afford the cost of a lawsuit for breach of contract.<sup>5</sup> And those who can will never be made whole because the plaintiff must pay his own attorney's fees.<sup>6</sup>

However, an adequate means of legal redress does exist. New York Labor Law Article 6 (Labor Law sections 190–199-a) embodies “the state’s longstanding policy against the forfeiture of earned but undistributed wages.”<sup>7</sup> Some key provisions of Article 6 are Labor Law sections 190, 191, 193 and 198.<sup>8</sup>

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<sup>1</sup> See, e.g., *Peters v. Early Healthcare Giver, Inc.*, 97 A.3d 621, 630 & n.13 (Md. 2014) (“[Wage theft is] a short-hand term referring to an apparently widespread failure to pay workers their wages due and owing.”).

<sup>2</sup> See Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1545–46 (2016); Martha C. White, *Wage Theft Costing Low-Income Workers Billions*, NBC NEWS (Sept. 28, 2014), <http://www.nbcnews.com/business/economy/wage-theft-costing-low-income-workers-billions-n212406>.

<sup>3</sup> See, e.g., Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POL’Y INST. (Sept. 11, 2014), <http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/>.

<sup>4</sup> See, e.g., Meixell & Eisenbrey, *supra* note 3.

<sup>5</sup> See Gilles, *supra* note 2, at 1546.

<sup>6</sup> See *id.*; Danny Cevallos, *What Makes Chipotle ‘Wage Theft’ Lawsuit Possible*, CNN (Sept. 1, 2016), <http://www.cnn.com/2016/09/01/opinions/chipotle-class-action-lawsuit-wages-opinion-cevallos/>.

<sup>7</sup> See *Dreyfuss v. eTelecare Global Solutions-U.S., Inc.*, No. 08 Civ. 1115, 2010 U.S. Dist. LEXIS 107725, at \*14–15 (S.D.N.Y. Sept. 30, 2010) (citations omitted); see also *P & L Group, Inc. v. Garfinkel*, 541 N.Y.S.2d 535, 537 (App. Div. 1989) (“Unless authorized by law or by consent, an employer is not permitted the self-help remedy of withholding employees’ compensation. Labor Law [sections] 197 and 198 reflect a strong legislative policy aimed at protecting an employee’s right to wages earned.”).

<sup>8</sup> N.Y. LAB. LAW §§ 190, 191, 193, 198 (McKinney 2017).

Section 190(1) defines “wages” as “the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission, or other basis.”<sup>9</sup> With limited exceptions, “wages” also includes “benefits or wage supplements.”<sup>10</sup> Section 191 regulates the frequency of wage payments to different classes of employees, except executives, administrators, and professionals earning over nine hundred dollars per week.<sup>11</sup> Section 193 bars “any deduction” from wages unless it is both authorized and for the employee’s benefit.<sup>12</sup> Section 198 provides that an employee who wins a wage claim will recover the full amount of the underpayment, along with prejudgment interest, attorney’s fees, “and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due.”<sup>13</sup> It further provides that “[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages accrued during the six years previous to the commencing of such action.”<sup>14</sup>

Despite this rights-affirming or rights-creating language, some courts believe that Article 6 does *not* give all employees the right to recover unpaid wages.<sup>15</sup> How can that be? To quote Oscar Wilde: “The truth is rarely pure and never simple.”<sup>16</sup> Here, the truth is obscured by a series of obstacles. The first is Article 6’s confusing text and structure. Article 6 is deficiently drafted and needlessly complex—a proverbial “horse designed by a committee,” that is to say, a camel.<sup>17</sup> Section 198(3)’s explicit command “[a]ll employees shall have the right to recover full wages, benefits and wage

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<sup>9</sup> *Id.* § 190(1).

<sup>10</sup> *Id.*

<sup>11</sup> See *id.* § 190(7), § 191(1)(a)–(d).

<sup>12</sup> *Id.* § 193(1)(b); see also *Pachter v. Bernard Hodes Group, Inc.*, 891 N.E.2d 279, 283 (N.Y. 2008) (holding that executives are covered by the provision of Article 6 unless specifically excluded).

<sup>13</sup> LAB. LAW § 198(1-a).

<sup>14</sup> *Id.* § 198(3).

<sup>15</sup> See, e.g., *Chu Chung v. New Silver Palace Rest., Inc.*, 272 F. Supp. 2d 314, 316 (S.D.N.Y. 2003) (“[Some] cases that deal with different provisions of Article VI . . . do so narrowly, without looking at other provisions of Article VI of the New York Labor Law.”); *Gottlieb v. Kenneth D. Laub & Co.*, 626 N.E.2d 29, 30–31, 32 (N.Y. 1993).

<sup>16</sup> OSCAR WILDE, THE IMPORTANCE OF BEING EARNEST 15 (1898).

<sup>17</sup> See Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 29–30 (2002); Scott A. Lucas, *Does New York’s Wage Payment Law Have a Gaping Loophole?*, 41 NYSBA LAB. & EMP. L.J. 49, 49 (2016).

supplements”—is buried near the end of a statutory maze.<sup>18</sup> It is thus overlooked by many.

The second obstacle is a mistaken belief that Section 198(3) does *not* in fact mean what it says. That mistaken belief exists because the leading case interpreting section 198, *Gottlieb v. Kenneth D. Laub & Co.*, was decided before section 198(3)'s rights-affirming or rights-creating language was added to the statute.<sup>19</sup> *Gottlieb* held that the then-existing version of section 198 was non-substantive, for example, it did not provide a freestanding basis to recover unpaid wages.<sup>20</sup> Few people seemed to notice that section 198 was amended four years later as part of 1997's Unpaid Wages Prohibition Act.<sup>21</sup> As a result, some courts mistakenly apply *Gottlieb*'s holding to the *current* version of section 198,<sup>22</sup> which, unlike the pre-1997 version, has rights-affirming or rights-creating language.<sup>23</sup>

The third obstacle concerns some courts' mistaken belief that employers can keep employees' wages without violating Labor Law section 193's bar against unauthorized deductions from wages. Those courts incorrectly believe that a failure to pay earned wages is not a deduction from wages.<sup>24</sup> The fourth obstacle concerns the mistaken belief that Article 6 does not give all employees the right to recover earned severance pay and benefits. That mistaken belief exists because some courts fail to take section 198(3)'s command at face value, and compound that error by misconstruing a separate statutory exemption from *criminal* liability (Labor Law section 198-c) as an exemption from *civil* liability.<sup>25</sup>

As detailed below, the idea that Article 6 does *not* give all employees the right to recover unpaid wages is irreconcilably inconsistent with Article 6's text and purpose. This article has three parts. Part I explores the significance of the Unpaid Wages

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<sup>18</sup> LAB. LAW § 198(3).

<sup>19</sup> See *id.*; *Gottlieb*, 626 N.E.2d at 32.

<sup>20</sup> See *Gottlieb*, 626 N.E.2d at 32 (“[The current version contains no redress for claims] outside the substantive provisions of Article 6.”).

<sup>21</sup> Unpaid Wages Prohibition Act of 1997, ch. 605, §§ 2, 4, 1997 N.Y. Laws 3392, 3393 (1997).

<sup>22</sup> See, e.g., *Malinowski v. Wall St. Source, Inc.*, No. 09 Civ. 9592, 2012 U.S. Dist. LEXIS 11575, at \*7–8 (S.D.N.Y. Jan. 31, 2012); *Lucas*, *supra* note 17, at 49, 53 & n.6.

<sup>23</sup> See LAB. LAW § 198(3); see also *Gottlieb*, 626 N.E.2d at 32 (demonstrating how a court in 1993 interpreted the law, noting differences from the current law that is now published).

<sup>24</sup> See, e.g., *Monagle v. Scholastic, Inc.*, No. 06 Civ. 14342, 2007 U.S. Dist. LEXIS 19788, at \*5 (S.D.N.Y. Mar. 9, 2007) (“Section 193 has nothing to do with failure to pay wages or severance benefits, governing instead the specific subject of making deductions from wages.” (citing *Kletter v. Flemming*, 820 N.Y.S.2d 348, 350 (App. Div. 2006))).

<sup>25</sup> See LAB. LAW § 198-c (McKinney 2017).

Prohibition Act amendment to Labor Law section 198. Part II explores the purported distinction between deducting and failing to pay wages under Labor Law section 193. Part III explores how Article 6 protects an employee's right to earned severance pay.

### I. HIDING IN PLAIN SIGHT: THE AMENDED VERSION OF LABOR LAW SECTION 198

The issue of whether employers can keep employees' wages without violating section 193's bar against unauthorized "deductions" from wages should be academic. That's because a different section of Article 6, section 198, was amended in 1997 as part of the Unpaid Wages Prohibition Act to include the following rights-affirming or rights-creating language: "All employees shall have the right to recover full wages, benefits and wage supplements accrued during the six years previous to the commencing of such action . . . ."<sup>26</sup> This rights-affirming or rights-creating language superseded the Court of Appeals' 1993 decision in *Gottlieb v. Kenneth D. Laub & Co.*<sup>27</sup>

#### A. *The Confusion Caused by Gottlieb v. Kenneth D. Laub & Co.*

Before it was amended in 1997, Labor Law section 198 lacked any rights-affirming or rights-creating language.<sup>28</sup> It simply prescribed the remedies for violating Article 6's other provisions.<sup>29</sup> Instead, the leading case interpreting section 198 was *Gottlieb v. Kenneth D. Laub & Co.* Claiming to be an employee, a real estate salesperson sued for common law breach of contract, and added a claim for attorney's fees under Labor Law section 198(1-a).<sup>30</sup> *Gottlieb* held that an employee who asserted a common-law contract claim, but did not allege a violation of any substantive provision of Article 6, could not collect attorney's fees under Labor Law section 198(1-a).<sup>31</sup>

*Gottlieb's* holding was understandable because Labor Law section 198's rights-affirming or rights-creating language did not yet exist,

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<sup>26</sup> See Unpaid Wages Prohibition Act of 1997, ch. 605, § 4, 1997 N.Y. Laws 3392, 3393 (1997); see also Wage Theft Prevention Act of 2010, ch. 564, § 7, N.Y. Laws 1, 7 (2010) (adding the words "and liquidated damages" to Labor Law section 198(3)).

<sup>27</sup> See N.Y. LAB. LAW § 198(3) (McKinney 2017); *Gottlieb*, 626 N.E.2d at 23.

<sup>28</sup> See Unpaid Wages Prohibition Act of 1997 § 4; see also LAB. LAW § 198(3); *Gottlieb*, 626 N.E.2d at 29, 32.

<sup>29</sup> See *Gottlieb*, 626 N.E.2d at 32.

<sup>30</sup> *Id.* at 30–31.

<sup>31</sup> See *id.*; see *Pachter v. Bernard Hodes Group, Inc.*, 891 N.E.2d 279, 283 (N.Y. 2008) (citing *Gottlieb*, 626 N.E.2d at 33) (discussing the limitation of the holding in *Gottlieb*).

and the plaintiff never invoked Labor Law section 193.<sup>32</sup> But *Gottlieb* caused much confusion by suggesting that Article 6 does *not* protect the fruits of an employee's labor, i.e., the wages promised in exchange for the subject work, *unless* the plaintiff is covered by Labor Law section 191, which regulates the frequency of wage payments to certain classes of employees.<sup>33</sup>

That suggestion is incorrect. Unlike Labor Law Article 19 (which governs payment of minimum wages and overtime),<sup>34</sup> or Articles 8 and 9 (which govern prevailing wage obligations),<sup>35</sup> Article 6 does not dictate how much an employee is paid or whether his earnings are computed on a time, piece, commission, or other basis. Instead, with few exceptions,<sup>36</sup> the parties' verbal or written employment agreement determines the earnings (wages) that Article 6 protects.<sup>37</sup> Thus, a contractual right to the wages at issue is not a *bar* to a Labor Law section 193 claim, but a *prerequisite*.<sup>38</sup>

#### *B. The Unpaid Wages Prohibition Act Amendment to Labor Law Section 198*

In its first post-*Gottlieb* amendment to Article 6, the legislature enacted the Unpaid Wages Prohibition Act.<sup>39</sup> Among other things, it amended Labor Law section 198 to make clear that “[a]ll employees shall have the right to recover full wages, benefits and wage supplements accrued during the six years previous to the

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<sup>32</sup> See LAB. LAW § 198(3); *Gottlieb*, 626 N.E.2d at 31, 34.

<sup>33</sup> See *Gottlieb*, 626 N.E.2d at 32 (implying that agreed upon wages are not “statutory wages” protected by Article 6). *Gottlieb* also says that nothing in the statute states that employees “in all other respects are excluded from wage enforcement protection under . . . Article 6.” *Id.*

<sup>34</sup> See generally LAB. LAW § 232 (providing overtime standards); *id.* § 650 (providing public policy rationales for minimum wage).

<sup>35</sup> See generally *id.* § 220 (declaring that eight hours is a legal work day).

<sup>36</sup> See, e.g., *id.* § 194(1)(a)–(d) (“No employee shall be paid a wage at a rate less than the rate at which an employee of the opposite sex in the same establishment is paid for equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions . . . .”).

<sup>37</sup> See, e.g., *Hammond v. Lifestyle Forms & Display Co.*, No. 08 CV 3964, 2009 U.S. Dist. LEXIS 133649, at \*5–6 (E.D.N.Y. Jan. 9, 2009) (citations omitted); see also *Ryan v. Kellogg Partners Institutional Servs.*, 968 N.E.2d 947, 955, 956 (N.Y. 2012) (citations omitted) (analyzing parties' alleged oral agreement to determine whether Labor Law section 193 was violated when employer neglected to pay nondiscretionary bonus).

<sup>38</sup> See, e.g., *Walpert v. Jaffrey*, 127 F. Supp. 3d 105, 135 (S.D.N.Y. 2015) (“Plaintiff's cause of action under New York Labor Law is dependent upon the success of his breach of contract claim.” (quoting *Dreyfuss v. eTelecare Global Solutions-U.S., Inc.*, No. 08 Civ. 1115, 2010 U.S. Dist. LEXIS 107725, at \*12 n.8 (S.D.N.Y. Sept. 30, 2010))).

<sup>39</sup> Unpaid Wages Prohibition Act of 1997, ch. 605, §§ 2, 4, 1997 N.Y. Laws 3392, 3393 (1997).

commencing of such action.”<sup>40</sup> The legislature later enacted the Wage Theft Protection Act, which added “liquidated damages” to the list of things that “[a]ll employees shall have the right to recover” in Labor Law section 198(3).<sup>41</sup>

The Court of Appeals also took corrective action. Having veered off course in *Gottlieb*, it held in *Pachter v. Bernard Hodes Group, Inc.* that Article 6’s provisions cover employees unless “expressly excluded.”<sup>42</sup> Despite *Pachter* and the amendments to Labor Law section 198, *Gottlieb*’s unwarranted influence persists because few courts have noticed that Labor Law section 198 now has rights-affirming or rights-creating language.<sup>43</sup> One court even mistook the current version of section 198 for the pre-*Gottlieb* version, suggesting that *Gottlieb* somehow negated the *post-Gottlieb* legislative command that “[a]ll employees shall have the right to recover full wages.”<sup>44</sup>

### *C. Is the Current Version of Labor Law Section 198 Non-Substantive? Does it Even Matter?*

*Gottlieb* held that the much different version of Labor Law section 198 in effect in 1993 was non-substantive.<sup>45</sup> But what about the current version? Does it provide a freestanding right to recover unpaid wages? In other words, is it “substantive”?

The Court of Appeals has made clear that labels such as “remedial” and “substantive” are not very important in construing statutory amendments.<sup>46</sup> Thus, “even so-called ‘remedial’ statutes may in effect impose a liability where none existed before.”<sup>47</sup> Labor Law section 198(3) either affirms or imposes a liability because it commands that “[a]ll employees shall have the right to recover full

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<sup>40</sup> *Id.*

<sup>41</sup> Wage Theft Prevention Act of 2010, ch. 564, § 7, N.Y. Laws 1, 7 (2010).

<sup>42</sup> *Pachter v. Bernard Hodes Group, Inc.*, 891 N.E.2d 279, 283 (N.Y. 2008).

<sup>43</sup> See, e.g., *Malinowski v. Wall St. Source, Inc.*, No. 09 Civ. 9592, 2012 U.S. Dist. LEXIS 11575, at \*6–8 (S.D.N.Y. Jan. 31, 2012) (citations omitted).

<sup>44</sup> Compare *id.* at \*7–8 (citations omitted) (providing that the section is applicable only in certain situations); with N.Y. LAB. LAW § 198(3) (McKinney 2017) (stating that the section is applicable to all employees). Since Labor Law section 198(3) is part of Article 6 and mandates the full payment of wages, section 198(1-a)’s reference to the “failure to pay the wage required by this article” encompasses section 198(3)’s mandate that “[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages.” LAB. LAW § 198(1-a) (emphasis added); *id.* § 198(3).

<sup>45</sup> See *Gottlieb v. Kenneth D. Laub & Co.*, 626 N.E.2d 29, 33–34 (N.Y. 1993).

<sup>46</sup> See, e.g., *Becker v. Huss Co.*, 373 N.E.2d 1205, 1209 (N.Y. 1978) (citing *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 290 (N.Y. 1921)).

<sup>47</sup> *Anonymous v. Anonymous*, 243 N.Y.S.2d 630, 637 (Fam. Ct. 1963) (citing *Jacobus v. Colgate*, 111 N.E. 837, 840 (N.Y. 1916)).

wages, benefits and wage supplements and liquidated damages.”<sup>48</sup>

When the legislature amends a statute, it is deemed to have intended a material change in the law.<sup>49</sup> Therefore, the clear and unequivocal command of Labor Law section 198(3) is not purely “remedial,” but is “substantive” as well.<sup>50</sup> However, the debate about whether section 198(3) is “purely remedial” or also “substantive” is academic. This is so for three reasons.

First, courts must give effect to a statute’s “plain meaning,”<sup>51</sup> and section 198(3)’s meaning could hardly be plainer. Second, “different parts of the same act, though contained in different sections, are to be construed together as if they were all in the same section.”<sup>52</sup> Therefore, the bar against unauthorized wage deductions in section 193, which is unquestionably “substantive,” must be construed together with section 198’s command that “[a]ll employees shall have the right to recover full wages.”<sup>53</sup> Third, statutes are not to be interpreted in a way that would leave one section without meaning or force.<sup>54</sup> All employees must have the right to recover full wages because if they did not, then section 198’s command that “[a]ll employees shall have the right to recover full wages” would have no meaning or force—an unacceptable result.<sup>55</sup> If the source of all employees’ right to recover wages is not section 198, then it must be section 193’s bar against unauthorized deductions from wages (because section 193 is the only other Article 6 provision through which all employees can recover unpaid wages).<sup>56</sup>

In short, the Article 6 right of all employees to recover unpaid wages arises under either section 198(3), or section 193, or (most

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<sup>48</sup> LAB. LAW § 198(3) (emphasis added).

<sup>49</sup> See *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1401 (2014) (“When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.” (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995))); *In re OnBank & Trust Co.*, 688 N.E.2d 245, 247 (N.Y. 1997) (citation omitted) (“[Courts] decline to read the amendment in such a way as to render some of its terms superfluous.”).

<sup>50</sup> See, e.g., *Tini v. AllianceBernstein L.P.*, 968 N.Y.S.2d 488, 489 (App. Div. 2013) (“[A]s unpaid salary and commission constitute ‘[w]ages’ under Labor Law [section] 190(1), plaintiff has stated a claim under Labor Law [section] 198.”).

<sup>51</sup> *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 696 N.E.2d 978, 980 (N.Y. 1998).

<sup>52</sup> *Cook v. Carmen S. Pariso*, 734 N.Y.S.2d 753, 759 (App. Div. 2001).

<sup>53</sup> See N.Y. STAT. § 97 (McKinney 2017); LAB. LAW §§ 193(1), 198(3).

<sup>54</sup> See STAT. § 98; see also *Albano v. Kirby*, 330 N.E.2d 615, 618–19 (N.Y. 1975) (citing *In re Chase Nat’l Bank*, 28 N.E.2d 868, 871 (N.Y. 1940)); *Cook*, 734 N.Y.S.2d at 759 (“[D]ifferent parts of the same act, though contained in different sections, are to be construed together as if they were all in the same section.”).

<sup>55</sup> See LAB. LAW § 198(3).

<sup>56</sup> See, e.g., *Maggione v. Bero Constr. Corp.*, 431 N.Y.S.2d 943, 944, 945 (Sup. Ct. 1980); see also LAB. LAW § 193(1)(b) (providing a framework for proper deductions from wages).

likely) both.<sup>57</sup> But most courts have not noticed or given effect to section 198(3)'s amended rights-creating or rights-affirming language.<sup>58</sup> Until that judicial oversight is corrected, employees not covered by Labor Law section 191 (the timely pay provision) must look to Labor Law section 193 to recover earned but unpaid wages and liquidated damages.<sup>59</sup> However, an increasing number of courts have closed off that avenue of relief as well.<sup>60</sup>

In addition to overlooking section 198(3)'s rights-affirming or rights-creating language, those courts have also drawn a distinction between "failing to pay" wages and "deducting" wages, thereby allowing employers who fail to pay earned wages to escape Article 6 liability.<sup>61</sup> However, as detailed below, there is no difference between "deducting" and "failing to pay" wages.

## II. THE FALSE DISTINCTION BETWEEN "DEDUCTING" AND "FAILING TO PAY" WAGES UNDER LABOR LAW SECTION 193

The idea of a distinction between "deducting" and "failing to pay" wages under section 193 first appeared in 2007 in *Monagle v. Scholastic, Inc.*, forty-one years after Labor Law section 193 was enacted.<sup>62</sup> *Monagle* asserted: "Section 193 has nothing to do with failure to pay wages or severance benefits, governing instead the specific subject of making deductions from wages."<sup>63</sup> As support, *Monagle* cited *Kletter v. Fleming*.<sup>64</sup> *Kletter*, in turn, cited *Slotnick v. RBL Agency*<sup>65</sup> for the proposition that section 193 does not apply where the plaintiff does not allege a "specific deduction."<sup>66</sup> But

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<sup>57</sup> See LAB. LAW §§ 193(1), 198(3); see also *Maggione*, 431 N.Y.S.2d at 945 ("[Section 193] applies to an 'employee' and there are no exceptions in that section referring to the type of employee.").

<sup>58</sup> See, e.g., *Malinowski v. Wall St. Source, Inc.*, No. 09 Civ. 9592, 2012 U.S. Dist. LEXIS 11575, at \*7-8 (S.D.N.Y. Jan. 31, 2012) (citations omitted).

<sup>59</sup> See, e.g., *id.* at \*8; *Pachter v. Bernard Hodes Group, Inc.*, 891 N.E.2d 279, 283, 285 (N.Y. 2008).

<sup>60</sup> See, e.g., *Perella Weinberg Partners LLC v. Kramer*, 58 N.Y.3d 384, 390 (App. Div. 2017) ("[A] wholesale withholding of payment is not a 'deduction' within the meaning of Labor Law [section] 193" (citations omitted)).

<sup>61</sup> See, e.g., *Monagle v. Scholastic, Inc.*, No. 06 Civ. 14342, 2007 U.S. Dist. LEXIS 19788, at \*1, \*2, \*5 (S.D.N.Y. Mar. 9, 2007) (citing *Kletter v. Flemming*, 820 N.Y.S.2d 348, 350 (App. Div. 2006)).

<sup>62</sup> See LAB. LAW § 193; *Monagle*, 2007 U.S. Dist. LEXIS 19788, at \*5 (citing *Kletter*, 820 N.Y.S.2d at 350).

<sup>63</sup> *Monagle*, 2007 U.S. Dist. LEXIS 19788, at \*5 (citing *Kletter*, 820 N.Y.S.2d at 350).

<sup>64</sup> See, e.g., *id.*

<sup>65</sup> *Slotnick v. RBL Agency Ltd.*, 706 N.Y.S.2d 431 (App. Div. 2000).

<sup>66</sup> *Kletter*, 820 N.Y.S.2d at 350 (citing *Slotnick*, 706 N.Y.S.2d at 432).

*Slotnick* had nothing to do with section 193.<sup>67</sup> Thus, *Kletter* and *Monagle* were not grounded in precedent.

Why should section 193's sweeping bar against "any deduction[s]" be construed to bar only "specific deduction[s]"?<sup>68</sup> *Kletter* and *Monagle* gave no reason.<sup>69</sup> Nor did they define what a "specific" deduction means.<sup>70</sup> If a specific sum is owed and not paid, is that not a specific deduction? Must there be a written deduction notation? If so, why? *Kletter* and *Monagle* did not raise, much less answer, these basic questions.

After *Monagle*, a split of authority emerged on whether employers can keep employees' earned wages without violating section 193's bar against unauthorized "deductions" from wages.<sup>71</sup> The distinction between "deducting" and "failing to pay" wages does have a certain intuitive appeal. When we think of a "deduction," we think of a smaller sum taken from a larger sum.<sup>72</sup> So, the phrase "deduction from wages" calls to mind a paystub notation denoting a subtraction from wages.<sup>73</sup> Further, an employer's total withholding of wages is not among the examples of unauthorized deductions mentioned in Labor Law section 193's legislative history.

Nonetheless, in *Ryan v. Kellogg Partners Institutional Services*, the Court of Appeals implicitly (and correctly) rejected the idea that a deduction from wages must involve a smaller sum taken from a larger sum.<sup>74</sup> The plaintiff in *Ryan* sued under Labor Law section 193 to recover \$175,000 in unpaid wages in the form of a

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<sup>67</sup> See *Slotnick*, 706 N.Y.S.2d 432.

<sup>68</sup> See N.Y. LAB. LAW § 193 (McKinney 2017) (emphasis added); *Monagle*, 2007 U.S. Dist. LEXIS 19788, at \*5 (citation omitted).

<sup>69</sup> See, e.g., *Monagle*, 2007 U.S. Dist. LEXIS 19788, at \*5; *Kletter*, 820 N.Y.S.2d at 350.

<sup>70</sup> See *id.*

<sup>71</sup> See, e.g., *Goldberg v. Jacquet*, No. 15-3104, 2016 U.S. App. LEXIS 12017, at \*1-2 (2d Cir. Jun. 30, 2016) (citing *Kletter*, 820 N.Y.S.2d at 350); *Kule-Rubin v. Bahari Group Ltd.*, No. 11 Civ. 2424, 2012 U.S. Dist. LEXIS 29000, at \*11-12 (S.D.N.Y. Mar. 5, 2012) ("[Defendant violated section 193 when he] refused to pay plaintiffs for the entire month of November 2010."); *Dreyfuss v. eTelecare Glob. Sols.-U.S., Inc.*, No. 08 Civ. 1115, 2010 U.S. Dist. LEXIS 107725, at \*13 (S.D.N.Y. Sept. 30, 2010); *Monagle*, 2007 U.S. Dist. LEXIS 19788, at \*5 (citation omitted) (drawing a distinction between deducting and failing to pay wages); *Miteva v. Third Point Mgmt. Co.*, 323 F. Supp. 2d 573, 577 (S.D.N.Y. 2004); *Ryan v. Kellogg Partners Institutional Servs.*, 968 N.E.2d 947, 956 (N.Y. 2012) (holding that neglecting to pay a nondiscretionary bonus violated Labor Law section 193); *Tortorella v. Postworks N.Y., LLC*, No. 112686/10, 2011 N.Y. Misc. LEXIS 3603, at \*19 (Sup. Ct. July 13, 2011) ("Section 193 . . . prohibits the withholding of wages and not simply a specific deduction as argued by the plaintiffs.").

<sup>72</sup> See, e.g., *Deduction*, BLACK'S LAW DICTIONARY (6th ed. 1990).

<sup>73</sup> See *Lucas, supra* note 17, at 51.

<sup>74</sup> See *Ryan*, 968 N.E.2d at 956 (finding an unauthorized deduction from wages where there was a failure to pay an additional, vested bonus).

nondiscretionary bonus, plus attorney's fees.<sup>75</sup> The plaintiff won at trial, and the Appellate Division affirmed, as did the Court of Appeals, which held: "Since Ryan's bonus . . . constitutes 'wages' within the meaning of Labor Law [section] 190 (1), Kellogg's neglect to pay him the bonus violated Labor Law [section] 193."<sup>76</sup>

Despite *Ryan*, some courts still believe that employers can keep employees' earned wages without "deducting" them.<sup>77</sup> As explored in greater detail below, this narrow view of Labor Law section 193 is incorrect for eight reasons:

- It contravenes section 193's purpose;
- It wrongly assumes that a deduction from wages can be seen (like a paystub notation);
- The term "any deduction" is sweeping in scope;
- A total failure to pay wages is a deduction "from" wages;
- A specific mental state need not be proved to establish a section 193 violation;
- Allowing all employees to recover unpaid wages under section 193 does not conflict with section 191's limitation on who can sue for an employer's untimely payment of wages;
- Court of Appeals precedent refutes the notion that section 193 only bars much smaller, or "targeted," forms of wage theft; and
- The deduction/failure to pay dichotomy is irrational.

#### *A. The Deduction/Failure to Pay Dichotomy Contravenes the Purpose of Section 193*

Labor Law section 193 was "derived from former sections 10 [through] 13 of the Labor Law . . . , which required employers to 'full[y] and prompt[ly] pay earned wages."<sup>78</sup> "[T]he inequity that the legislature sought to prevent" in enacting Labor Law section 193

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<sup>75</sup> See *id.* at 950, 956.

<sup>76</sup> *Id.* at 951–52, 956 (citing *Pachter v. Bernard Hodes Group, Inc.*, 891 N.E.2d 279, 284 (N.Y. 2008)); see also *Tuttle v. Geo. McQuesten Co.*, 642 N.Y.S.2d 356, 358 (App. Div. 1996) (holding summary judgment was appropriately granted on plaintiff's Labor Law section 193 claim based upon his employer's withholding of deferred payments that he had earned).

<sup>77</sup> See, e.g., *Hart v. Rick's N.Y. Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901, 952 (S.D.N.Y. 2013) ("[Section 193] naturally presupposes deductions from actual, paid wages. Because plaintiffs were never paid such wages, defendants are not liable under [section] 193(1).").

<sup>78</sup> *Marsh v. Prudential Sec.*, 802 N.E.2d 610, 613 (N.Y. 2003) (alteration in original) (emphasis added) (quoting *In re Hudacs v. Frito-Lay, Inc.*, 683 N.E.2d 322, 324 (N.Y. 1997)).

was employers benefitting from employees' earned wages.<sup>79</sup>

This begs the question: what could be more destructive of section 193's purpose than to exempt from liability employers who benefit the most from employees' wages, i.e., those who keep *all* of an employee's earned wages? If a deduction from wages is something other than a deprivation of the wages due and owing, then what is it? If an employer chooses to keep all or part of a wage payment that it owes, can it escape section 193 liability simply by not making a deduction notation? If so, why?

Courts adopting this myopic view of Labor Law section 193 fail to ask the critical question: *why* is it wrong for an employer to make an unauthorized deduction from an employee's wages? Surely it is not because taking part of an employee's paycheck is worse than taking all of it. Rather, it is because an employee's wages represent the fruits of his or her labor, and therefore deserve special protection.<sup>80</sup> The idea that section 193 exempts total wage thefts cannot be reconciled with the law's goal of preventing employers from benefitting from employees' wages.<sup>81</sup>

But what if the employer cannot afford to pay? Article 6 has no financial hardship defense.<sup>82</sup> One who induces another to perform work by promising payment in return has a duty to avoid making a promise he cannot keep.<sup>83</sup> Also, grafting a financial hardship exception to Article 6 liability might force non-bankruptcy courts to pick and choose between creditors, and to decide which expenditures should and should not have been made. That approach would be untenable and inconsistent with Article 6's text and purpose.

#### *B. The Deduction/Failure to Pay Dichotomy Wrongly Assumes that a Deduction from Wages Can be Seen (Like a Paystub Notation)*

Contrary to the view of some courts,<sup>84</sup> a paystub notation is not a

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<sup>79</sup> *In re Angello v. Labor Ready, Inc.*, 859 N.E.2d 480, 484 (N.Y. 2006).

<sup>80</sup> *See People v. Budd*, 22 N.E. 670, 682 (N.Y. 1889) ("[T]he liberty mentioned in the bill of rights . . . includes a right to labor and to receive the fruits of one's labor." (Gray, J., dissenting)).

<sup>81</sup> *See Angello*, 859 N.E.2d at 484.

<sup>82</sup> *See, e.g.*, *Polyfusion Elecs., Inc. v. Promark Elecs., Inc.*, 970 N.Y.S.2d 651, 652–53 (App. Div. 2013) (imposing double damages against manufacturer under Labor Law section 191-c where, due to financial difficulties, it failed to pay earned commissions within five days of the date the parties' contract was terminated).

<sup>83</sup> *See Thornton E. Robison, Enforcing Extorted Contract Modifications*, 68 IOWA L. REV. 699, 710 n.52 (1983).

<sup>84</sup> *See, e.g.*, *Strohl v. Brite Adventure Ctr., Inc.*, No. 08 CV 259, 2009 U.S. Dist. LEXIS 78145, at \*28 (E.D.N.Y. Aug. 28, 2009) ("[D]efendants did not 'deduct' any amounts from [the

“deduction.”<sup>85</sup> It is only a *manifestation* of a deduction<sup>86</sup>—a proverbial shadow on the wall of the cave. Deducting and failing to pay wages are the same thing. “A ‘deduction’ literally is an act of taking away or subtraction.”<sup>87</sup> To understand how wages are “taken away,” one must first answer a more fundamental question: what are wages? Wages are “a specialized type of property”<sup>88</sup> that “belong to the wage earner until they are pledged or committed to another.”<sup>89</sup> “As a right, claim, or interest against the employer, wages yet to be received are intangible property.”<sup>90</sup>

So, how does one “take away” something with no physical form? Since unpaid wages are intangible and cannot be physically seized,<sup>91</sup> the logical definition of “take” in the unpaid wage context is “to deprive one of the use or possession of; to assume ownership.”<sup>92</sup> Thus, since a “deduction” is a taking,<sup>93</sup> and a “taking” is a deprivation,<sup>94</sup> a deduction (taking) occurs when an employee is “deprived” of his earned wages.<sup>95</sup>

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plaintiff[s] wages, but simply failed to pay her all the wages she had earned.” (citing *Ireton-Hewitt v. Champion Home Builders Co.*, 501 F. Supp. 2d 341, 353 (N.D.N.Y. 2007))). The *Strohl* case involved a plaintiff who alleged that her employer adjusted her total hours downward as a penalty for punching in before or after her 8:00 a.m. start time. *See id.*

<sup>85</sup> *See Weston v. Bd. of Educ.*, 666 N.Y.S.2d 747, 748 (App. Div. 1997) (recognizing that there was a deduction for retirement from a notation on an employee’s pay stub).

<sup>86</sup> *See id.*

<sup>87</sup> *In re Angello v. Labor Ready, Inc.*, 859 N.E.2d 480, 482 (N.Y. 2006); *Abate*, BLACK’S LAW DICTIONARY (6th ed. 1990) (“To do away with or nullify.”); *Deduction*, BLACK’S LAW DICTIONARY (6th ed. 1990) (defining deduction as abatement); *see also* *Snyder Constr. Co. v. New York*, 426 N.Y.S.2d 102, 103 (App. Div. 1980) (“The critical word ‘deduction’ . . . connotes a permanent retainage, whereas the word ‘withhold’ connotes a temporary suspension.”), *rev’d on other grounds*, *Snyder Constr. Co. v. New York*, 420 N.E.2d 978 (N.Y. 1981).

<sup>88</sup> *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340 (1969).

<sup>89</sup> *Epps v. Cortese*, 326 F. Supp. 127, 133 (E.D. Pa. 1971); *see also* *United States v. Larson*, No. 07-CR-304S, 2013 U.S. Dist. LEXIS 146452, at \*14–15 (W.D.N.Y. Oct. 9, 2013) (“[A] contract and contractual rights can be assigned, and therefore constitute something of value that can be exercised, transferred, or sold.”).

<sup>90</sup> *Am. Standard Life & Accident Ins. Co. v. Speros*, 494 N.W.2d 599, 605 n.9 (N.D. 1993).

<sup>91</sup> *See Dourlain v. United States/IRS*, No. 5:06-CV-424, 2008 U.S. Dist. LEXIS 90465, at \*9 (N.D.N.Y. Aug. 27, 2008).

<sup>92</sup> *Take*, BLACK’S LAW DICTIONARY (6th ed. 1990); *see also* *Spring Valley Water-Works v. Bartlett*, 16 F. 615, 640 (C.C. D. Cal. 1883) (“[T]his distinction between taking property and depriving its owner of its use seems metaphysical and illusory.”).

<sup>93</sup> *See In re Angello v. Labor Ready, Inc.*, 859 N.E.2d 480, 482 (N.Y. 2006).

<sup>94</sup> *See Take*, *supra* note 92.

<sup>95</sup> *See, e.g., Ryan v. Kellogg Partners Institutional Serv.*, 968 N.E.2d 947, 956 (N.Y. 2012) (citations omitted) (holding that employer’s failure to pay a nondiscretionary bonus violated Labor Law section 193); *Tuttle v. Geo. McQuesten Co.*, 642 N.Y.S.2d 356, 357 (App. Div. 1996) (“[W]ithheld moneys constituted ‘wages’ pursuant to Labor Law [section] 190 and, thus, under Labor Law article 6, defendant was not entitled to withhold these payments as a matter of law.”); *see also* *Snyder Constr. Co. v. New York*, 426 N.Y.S.2d 102, 103 (App. Div. 1980) (“The critical word ‘deduction’ . . . connotes a permanent retainage, whereas the word ‘withhold’ connotes a temporary suspension.”), *rev’d on other grounds*, *Snyder Constr. Co. v. New York*,

Not surprisingly, courts interpreting other payment laws generally refuse to distinguish between a deduction and a failure to pay. For example, in *Sniadach v. Family Finance Corp. of Bay View*, a due process case, the U.S. Supreme Court found an employer's interim freezing of wages pursuant to a wage garnishment to be a "taking of one's property [that] is so obvious."<sup>96</sup> Since a taking is a deduction,<sup>97</sup> and a temporary wage deprivation of indefinite duration is an obvious taking,<sup>98</sup> a permanent wage deprivation is an even more obvious taking (deduction). Applying the same logic, a California appeals court in *Grier v. Alameda-Contra Costa Transit Dist.*<sup>99</sup> held that "to withhold wages for work actually performed . . . constitutes a deduction from wages."<sup>100</sup>

Likewise, courts interpreting federal wage and hour laws generally refuse to distinguish between a deduction and a failure to pay.<sup>101</sup> Typical in this regard is *De Leon-Granados v. Eller & Sons Trees, Inc.* In holding an employer liable for willfully violating federal wage and hour laws, the *De Leon-Granados* court explained: "Department of Labor officials made clear that there was no difference between deducting an expense and failing to reimburse the expense."<sup>102</sup>

### C. The Term "Any Deduction" is Sweeping in Scope

Even if a failure to pay earned wages were an "indirect" rather than "direct" deduction (a dubious assumption), Labor Law section 193 bars not only "direct," "specific," or "payroll" deductions; instead, it bars "any [unauthorized] deduction[s]."<sup>103</sup> The word "any" means 'all' or 'every' and imports no limitation,"<sup>104</sup> and "is as inclusive as any other word in the English language."<sup>105</sup>

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<sup>96</sup> 420 N.E.2d 978 (N.Y. 1981).

<sup>97</sup> *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 341–42 (1969).

<sup>98</sup> *Angello*, 859 N.E.2d at 482 ("A 'deduction' literally is an act of taking away or subtraction.").

<sup>99</sup> *Sniadach*, 395 U.S. at 342.

<sup>100</sup> *Grier v. Alameda-Contra Costa Transit Dist.*, 127 Cal. Rptr. 525 (Ct. App. 1976).

<sup>101</sup> *Id.* at 532.

<sup>102</sup> *See, e.g., De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F. Supp. 2d 1295, 1315 (N.D. Ga. 2008).

<sup>103</sup> *Id.*; *see Gaxiola v. Williams Seafood of Arapahoe, Inc.*, 776 F. Supp. 2d 117, 132 (E.D.N.C. 2011); *see also Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1236 (11th Cir. 2002) ("[T]here is no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to bear.").

<sup>104</sup> *See N.Y. LAB. LAW § 193(1)* (McKinney 2017).

<sup>105</sup> *Zion v. Kurtz*, 405 N.E.2d 681, 686 (N.Y. 1980).

<sup>106</sup> *New Amsterdam Cas. Co. v. Stecker*, 143 N.E.2d 357, 359 (N.Y. 1957) (citation omitted); *see also Dep't of Hous. v. Rucker*, 535 U.S. 125, 131 (2002) ("[T]he word 'any' has an

Accordingly, the phrase “any deduction” may be interpreted as “clearly sweeping in its scope and embrac[ing] both direct and indirect” deductions.<sup>106</sup> Further, Article 6’s drafters were familiar with the more restrictive term “[p]ayroll deductions” because it is found in Personal Property Law Article 3-A,<sup>107</sup> which is referenced in Labor Law section 193(4).<sup>108</sup> But the drafters chose not to use that more restrictive term when drafting section 193(1)’s bar against “any” unauthorized deduction from wages.<sup>109</sup>

Giving the term “any deduction” its plain (i.e., sweeping) meaning also maintains the consistency of purpose between sections 193(1) and 193(3)(a). Labor Law section 193(3)(a) was added to section 193 to “prohibit wage deductions by indirect means where direct deduction would violate the statute.”<sup>110</sup> An employer that would violate section 193 by “paying full wages but then seeking [re]payment at another time”<sup>111</sup> cannot escape liability by refusing to ever pay those wages.<sup>112</sup> Finally, because courts must liberally construe Article 6’s substantive provisions,<sup>113</sup> any uncertainty about section 193’s scope should be resolved in favor of protecting earned wages.<sup>114</sup>

#### *D. A Failure to Pay Wages is a Deduction “From” Wages*

Notwithstanding the intangible nature of wages, it has been suggested that a failure to pay wages is not a “deduction *from . . . wages*” because a number cannot be deducted from itself.<sup>115</sup> That

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expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” (citation omitted); *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 174 (2d Cir. 2005) (“[S]o long as ‘Congress did not add any language limiting the breadth of that word,’ the term ‘any’ must be given literal effect.” (citations omitted)).

<sup>106</sup> *Cf. United States v. Lanni*, 466 F.2d 1102, 1108–09 (3d Cir. 1972) (“[A]ny payment’ is clearly sweeping in its scope and embraces both direct and indirect payments.”).

<sup>107</sup> *See, e.g.*, N.Y. PERS. PROP. LAW §§ 46(2), 48-d (McKinney 2017).

<sup>108</sup> LAB. LAW § 193(4).

<sup>109</sup> *Id.* § 193(1).

<sup>110</sup> *In re Angello v. Labor Ready, Inc.*, 859 N.E.2d 480, 483 (N.Y. 2006).

<sup>111</sup> *Id.* (citation omitted).

<sup>112</sup> *Id.*

<sup>113</sup> *See, e.g.*, *Klepner v. Codata Corp.*, 527 N.Y.S.2d 158, 160 (Sup. Ct. 1988) (construing, *inter alia*, Labor Law section 193); *see also Samiento v. World Yacht, Inc.*, 883 N.E.2d 990, 993–94 (N.Y. 2008) (construing Labor Law section 196(d)).

<sup>114</sup> *See Cohen v. Stephen Wise Free Synagogue*, No. 95 Civ. 1659, 1996 U.S. Dist. LEXIS 4240, at \*13 (S.D.N.Y. Apr. 4, 1996); *Martinez v. Alubon, Ltd.*, 978 N.Y.S.2d 119, 121 (App. Div. 2013) (citation omitted) (broadly construing Labor Law section 193).

<sup>115</sup> *See, e.g.*, *Hart v. Rick’s N.Y. Cabaret Int’l, Inc.*, 967 F. Supp. 2d 901, 952 (S.D.N.Y. 2013) (citation omitted) (“[Section 193(1)] prohibits only improper ‘deduction[s] *from the wages of an employee*.’ But in this case, plaintiffs were not paid wages at all.” (emphasis added)).

view was incorrect for three reasons. First, a number *can* be deducted from itself.<sup>116</sup> Second, in a statute, the word “from” must have a reasonable construction in reference to the subject matter because it may have different meanings under different circumstances.<sup>117</sup> Construing the bar against “any deduction from the wages of an employee” to allow an employer to keep *all* of an employee’s wages is unreasonable because it conflicts with section 193’s goal of preventing employers from benefitting from employees’ earned wages.<sup>118</sup>

Third and last, the statute does not limit the term “wages” (in the phrase “any deduction from . . . wages”) to the wages earned in a single pay cycle.<sup>119</sup> Whether a number can be deducted from itself is thus irrelevant in all but the rarest of cases (i.e., where an employee never receives a single payment or benefit at any time during her employment).<sup>120</sup>

#### *E. A Specific Mental State Need Not Be Proved to Establish a Labor Law Section 193 Violation*

One could argue that a deduction from wages only occurs when the employer acts with a culpable mental state,<sup>121</sup> as shown by a deduction notation on a paystub.<sup>122</sup> But a culpable mental state

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<sup>116</sup> See *Citizens for Reform v. Citizens for Open Gov’t, Inc.*, 931 So. 2d 977, 987 (Fla. Dist. Ct. App. 2006) (“Mahavira, a 9th century Indian mathematician, understood and explained . . . [that] any number minus itself equals zero.”).

<sup>117</sup> *Riley v. Prudential Soc., Inc.*, 19 N.Y.S.2d 963, 964 (App. Div. 1940) (“[F]rom’ . . . may have an inclusive or an exclusive meaning, depending upon the context and the subject-matter.” (citations omitted)); *see also Smith v. Helmer*, 7 Barb. 416, 420 (N.Y. Gen. Term 1849) (citing *Mohawk Bridge Co. v. Utica & Schenectady R.R. Co.*, 6 Paige Ch. 554, 561 (N.Y. Ch. 1837)).

<sup>118</sup> See N.Y. LAB. LAW § 193(1) (McKinney 2017); *In re Angello v. Labor Ready, Inc.*, 859 N.E.2d 480, 484 (N.Y. 2006).

<sup>119</sup> See LAB. LAW § 193(1).

<sup>120</sup> See, e.g., *Antolino v. Distribution Mgt. Consolidators Worldwide, LLC*, No. 101541, 2011 N.Y. Misc. LEXIS 5737, at \*3 (Sup. Ct. Nov. 28, 2011) (providing an example of where an employee was claiming that no payments whatsoever had been made).

<sup>121</sup> See, e.g., *Gold v. Am. Med. Alert Corp.*, No. 14 Civ. 5485, 2015 U.S. Dist. LEXIS 108122, at \*9–10 (S.D.N.Y. Aug. 13, 2015) (“[Labor Law section 193] is plausibly susceptible to a broader interpretation . . . [which] would include an employer withholding the entire amount of a salary because it contends, as here, that it fired an employee for good cause.”).

<sup>122</sup> See, e.g., *Strohl v. Brite Adventure Ctr., Inc.*, No. 08 CV 259, 2009 U.S. Dist. LEXIS 78145, at \*28–29 (E.D.N.Y. Aug. 28, 2009) (dismissing an improper deduction claim where the plaintiff alleged the defendant violated Labor Law section 193 by adjusting her total hours downward as a penalty for punching in before or after her 8:00 a.m. start time). In *Strohl*, the court noted that the “defendants did not ‘deduct’ any amount from [the plaintiff’s] wages, but simply failed to pay her all the wages she had earned.” *See id.* at \*28 (citation omitted).

need not be shown.<sup>123</sup> Indeed, even employers who prove they acted in good faith are subject to Article 6 liability for unpaid wages and attorney's fees (but not liquidated damages).<sup>124</sup> Thus, while an employer's thinking may be relevant in determining the scope of the parties' agreement, and whether the employer acted in good faith (a defense to the imposition of liquidated damages), it is relevant to little else.<sup>125</sup>

That's because a wage is either owed or it is not. When employers enter employment agreements and set work schedules, pay scales, and commission rates, they make choices about what obligations they will incur.<sup>126</sup> They have a statutory duty to give employees enough information to know what they will be paid for their work.<sup>127</sup> Thus, an employer will be actually or constructively aware of when an employee's wages are due, and, by extension, when they are unpaid.<sup>128</sup> Moreover, grafting an intent requirement onto Labor Law section 193 would make Labor Law section 193 incongruous with Article 6's other provisions, which have no intent requirement.<sup>129</sup>

Finally, even if Labor Law section 193 had an intent requirement, it is naïve to suppose that one who enriches him or herself by keeping the fruits of another person's labor does so with no intent. "[T]he common law rule [is] that a man is held to intend the foreseeable consequences of his conduct,"<sup>130</sup> and it is foreseeable that an employee's wages will not be paid if the employer fails to carefully define, keep track of, and honor its wage payment obligations.<sup>131</sup>

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<sup>123</sup> See LAB. LAW § 191 (providing no provision of required culpability).

<sup>124</sup> See *id.*; see, e.g., *Slotnick v. RBL Agency Ltd.*, 706 N.Y.S.2d 431, 431 (App. Div. 2000).

<sup>125</sup> See, e.g., *Ryan v. Kellogg Partners Institutional Serv.*, 968 N.E.2d 947, 952 & n.8 (N.Y. 2012) (regarding the burden of showing good faith to avoid liquidated damages).

<sup>126</sup> See, e.g., *Cron v. Hargro Fabrics*, 655 N.Y.S.2d 531, 533 (App. Div. 1997) (discussing obligations imposed on the employer that were created by the employment contract).

<sup>127</sup> See LAB. LAW § 195(1)(a).

<sup>128</sup> See *id.*

<sup>129</sup> See, e.g., *Mize v. State Div. of Human Rights*, 304 N.E.2d 231, 233 (N.Y. 1973) (citations omitted) (construing Labor Law section 194 under the same standards as the federal Equal Pay Act, which, as discussed in *Belfi v. Prendergast* (191 F.3d 129, 135 (2d Cir. 1999)), provides for strict liability); *People v. Vetrí*, 131 N.E.2d 568, 571 (N.Y. 1955) (citations omitted) (construing the predecessor to Labor Law section 191); *Polyfusion Elec., Inc. v. Promark Elec., Inc.*, 970 N.Y.S.2d 651, 652–53 (App. Div. 2013) (citations omitted) (construing Labor Law section 191-c).

<sup>130</sup> *Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 45 (1954) (citations omitted).

<sup>131</sup> See generally *Ellis v. United States*, 206 U.S. 246, 257 (1907) ("If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in

*F. Allowing All Employees to Recover Unpaid Wages Under Section 193 Does not Conflict with Section 191's Limitation on Who Can Sue for an Employer's Untimely Payment of Wages*

A few courts have suggested that executive, administrative, and professional employees should not be able to recover unpaid wages under section 193 because they are not allowed to do so under section 191.<sup>132</sup> That argument is misplaced for five reasons. First, Labor Law sections 193 and 191 serve different purposes. Whereas Labor Law section 193 protects all employees, regardless of position or income, against wage theft,<sup>133</sup> Labor Law section 191 gives extra protection to manual, clerical, and other employees often associated with modest incomes by requiring that they be paid at specified intervals.<sup>134</sup> That makes some sense, because even a short delay in paying a lower-income employee's wages can cause severe hardship.<sup>135</sup>

Second, there is no basis for the assumption that Article 6 cannot simultaneously protect some classes of employees against unpaid wages under section 191 *and* section 193. Article 6 expressly provides that its remedies "may be enforced simultaneously or consecutively so far as not inconsistent with each other."<sup>136</sup> Third, while the protections of sections 191 and 193 overlap, they are not identical. For example, if section 191 did not exist, employers would have no duty to pay certain classes of employees within prescribed intervals.<sup>137</sup> Conversely, if a waiter agreed to have a day's pay deducted from his weekly pay if he broke a dish, and a day's pay

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which the law ever considers intent."); *cf. Spodek v. Liberty Mut. Ins. Co.*, 547 N.Y.S.2d 100, 103 (App. Div. 1989) ("At bar, the tenants' complaint alleges conversion, a tort which can occur even though there is no wrongful intent to possess the property of another." (citations omitted)).

<sup>132</sup> See, e.g., *Quinones v. PRC Mgmt. Co. LLC*, No. 14-CV-9064, 2015 U.S. Dist. LEXIS 88029, at \*14, \*16 (S.D.N.Y. July 7, 2015) (citation omitted) ("[The claim was] a dressed-up claim to recover unpaid wages that must be brought under [Labor Law section] 191 or as a common law contract claim."); *Gordon v. Kaleida Health*, 299 F.R.D. 380, 391 (W.D.N.Y. 2014) ("Section 191 provides the remedy for these hourly employees' claims that they were not compensated for time worked during meal periods.").

<sup>133</sup> N.Y. LAB. LAW § 193(1) (McKinney 2017).

<sup>134</sup> *Id.* § 191(1)(a), (d).

<sup>135</sup> The need to promptly pay low wage workers has been recognized for millennia. *See Deuteronomy* 24:14–15 (English Standard Version) ("You shall not oppress a hired servant who is poor and needy, whether he is one of your brothers or one of the sojourners who are in your land within your towns. You shall give him his wages on the same day, before the sun sets (for he is poor and counts on it), lest he cry against you to the Lord, and you be guilty of sin.").

<sup>136</sup> LAB. LAW § 198(2).

<sup>137</sup> See, e.g., *id.* § 191(1)(a).

was withheld as a result, he would have a section 193 claim, but not a section 191 claim.<sup>138</sup>

Fourth, unlike a Labor Law section 191 claim, a Labor Law section 193 claim arguably does not ripen the moment that earned and due wages are unpaid.<sup>139</sup> Fifth and finally, unlike section 193, section 191 does not protect benefits and wage supplements.<sup>140</sup>

#### *G. Court of Appeals Precedent Refutes the Notion that Section 193 Only Bars Much Smaller, or “Targeted,” Forms of Wage Theft*

Some courts believe that Labor Law section 193 does *not* protect the full payment of wages, but only bars a much smaller form of wage theft, namely, charging employees for damaged goods, spoiled merchandise, and the like.<sup>141</sup> But such a limitation is found nowhere in the statute.<sup>142</sup> Section 193 bars “any” unauthorized deductions, not merely those that offset losses from damaged goods

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<sup>138</sup> See, e.g., *id.* § 193(1)(a)–(b).

<sup>139</sup> See *Beshty v. GM*, 327 F. Supp. 2d 208, 223 (W.D.N.Y. 2004), *aff'd*, 144 F. App'x. 196 (2d Cir. 2005) (dismissing as moot a section 193 claim where plaintiff's unpaid wages were paid after receiving a demand letter from plaintiff's counsel, but before plaintiff's lawsuit commenced). However, *Beshty*'s holding appears to be incorrect, since employees whose wages are unpaid are also entitled to liquidated damages under section 198(1-a) and (3). See, e.g., *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 700, 716 (1945) (holding that an employer's untimely, pre-suit payment of overtime did not extinguish plaintiff's claim for liquidated damages); *see also Lanzetta v. Florio's Enters., Inc.*, 763 F. Supp. 2d 615, 622 n.10 (S.D.N.Y. 2011) (“A claim for unpaid wages accrues on the date on which the employee should have been paid for services rendered but was not.” (citing *Doo Nam Yang v. ACBL Corp.*, 427 F. Supp. 2d 327, 337 (S.D.N.Y. 2005)); *Martin v. United States*, 117 Fed. Cl. 611, 620 (Fed. Cl. 2014) (“To hold otherwise would create sufficient uncertainty as to when a violation occurs, and statutory enforcement would prove unworkable.”); Craig Becker, *The Check is in the Mail: Timely Payment Under the Fair Labor Standards Act*, 40 UCLA L. REV. 1241, 1250 (1993). Perhaps the most sensible approach in the section 193 context would be requiring an “unreasonable delay” before deeming the wages unpaid. See, e.g., *Rogers v. City of Troy*, 148 F.3d 52, 60 (2d Cir. 1998) (adopting such a requirement in certain limited circumstances before liability attaches).

<sup>140</sup> LAB. LAW § 190(1) (“The term ‘wages’ also includes benefits or wage supplements . . . except for the purposes of sections one hundred ninety-one and one hundred ninety-two of this article.”); *see also Falk v. FFF Indust., Inc.*, 731 F. Supp. 134, 143 (S.D.N.Y. 1990) (“[T]he Court finds that wages for the purpose of [sections] 193 and 198 includes salary and other benefits.”). That exclusion of “benefits and wage supplements” from section 191 makes sense. The time for providing a benefit or wage supplement can vary greatly depending on the nature of the promised benefit or wage supplement. Thus, it would be burdensome to force employers to provide promised benefits and wage supplements within section 191's strict wage payment intervals.

<sup>141</sup> See, e.g., *Goldberg v. Jacquet*, No. 14 Civ. 1581, 2015 U.S. Dist. LEXIS 117860, at \*6 (S.D.N.Y. Aug. 31, 2015) (quoting *Gold v. Am. Med. Alert Corp.*, No. 14 Civ. 5485, 2015 U.S. Dist. LEXIS 108122, at \*11 (S.D.N.Y. Aug. 13, 2015)); *see also Gold*, 2015 U.S. Dist. LEXIS 108122, at \*11 (“[T]he ‘deductions’ [section 193 prohibits] are better understood as, and limited to, things like fines, payments, or other forms of pay docking.”).

<sup>142</sup> See generally LAB. LAW. § 193 (containing no mention of the above listed limitations).

or spoiled merchandise.<sup>143</sup>

Courts that believe section 193 only bars deductions for damaged goods, spoiled merchandise, and the like often cite *Hudacs v. Frito-Lay, Inc.* However, *Hudacs* does not support that view.<sup>144</sup> *Hudacs* involved a challenge to an employer's requirement that route salespeople must repay missing cash that had been entrusted to them.<sup>145</sup> *Hudacs* explained that Labor Law section 193 may or may not bar payments from an employee to an employer, depending on the circumstances.<sup>146</sup> In fleshing out that issue, *Hudacs* stated that "section 193 was intended to place the risk of loss for such things as damaged or spoiled merchandise on the employer rather than the employee."<sup>147</sup> *Hudacs* did not suggest that section 193 only bars deductions for lost or damaged property.<sup>148</sup> To the contrary, *Hudacs* stated that section 193 traces its roots to earlier statutory enactments "designed primarily to ensure full and prompt payment of wages to employees."<sup>149</sup> Later Court of Appeals decisions also confirm that section 193 was designed to ensure full payment of wages.<sup>150</sup>

The legislative history's attention to smaller, or "targeted," wage deprivations reflects an interest in protecting employees' earned wages from any infringement, even small or indirect ones.<sup>151</sup> It does not imply that section 193 allows total wage thefts.<sup>152</sup> Yet some courts have concluded just that, and have even come up with language to make total wage thefts sound relatively benign. For example, in *Gold v. American Medical Alert Corp.*, the court stated that section 193 was not violated by "merely the total withholding of wages"<sup>153</sup>—as if a partial withholding of wages would have somehow

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<sup>143</sup> *Id.*

<sup>144</sup> *In re Hudacs v. Frito-Lay, Inc.*, 683 N.E.2d 322, 323, 325 (N.Y. 1997).

<sup>145</sup> *See id.*

<sup>146</sup> *See id.* at 325.

<sup>147</sup> *Id.* (citation omitted).

<sup>148</sup> *See id.*

<sup>149</sup> *Id.* at 324 (citation omitted).

<sup>150</sup> *See Ryan v. Kellogg Partners Institutional Servs.*, 968 N.E.2d 947, 948, 956 (N.Y. 2012) (citation omitted) (holding that an employer's neglect to pay a \$175,000 nondiscretionary bonus violated Labor Law section 193); *In re Angello v. Labor Ready, Inc.*, 859 N.E.2d 480, 484 (N.Y. 2006) (confirming that the legislature's intent in enacting Labor Law section 193 was to address employers benefitting from employees' earned wages); *Marsh v. Prudential Sec. Inc.*, 802 N.E.2d 610, 613 (N.Y. 2003) (citation omitted) ("[Section 193] was derived from former sections 10 [through] 13 of the Labor Law . . . , which required employers to 'full[y] and prompt[ly]' pay earned wages." (emphasis added)).

<sup>151</sup> *See Gold v. Am. Med. Alert Corp.*, No. 14 Civ. 5485, 2015 U.S. Dist. LEXIS 108122, at \*11 (S.D.N.Y. Aug. 13, 2015).

<sup>152</sup> *See id.*

<sup>153</sup> *Id.* at \*5 (emphasis added).

inflicted greater harm.<sup>154</sup>

Grafting a “targeted” deduction requirement onto section 193’s bar against “any deduction”<sup>155</sup> misses the forest through the trees. Saying that section 193 is not violated by “merely the *total* withholding of wages”<sup>156</sup> is like saying driving 100 miles per hour does not violate a school zone’s 25 miles per hour speed limit if the legislative history only mentions car accidents between 30 and 40 miles per hour. Or that groping female subordinates is not barred by a sex discrimination law if the legislative history only mentions sexist language and leering. In short, there is nothing “mere” about the “total withholding of wages;” rather, it is the most extreme example of the inequity—employers benefitting from employees’ earned wages—that the legislature sought to prevent in enacting section 193.<sup>157</sup>

#### *H. The Deduction/Failure to Pay Dichotomy is Irrational*

If Labor Law section 193 only protected against “things like fines, payments, or other forms of pay docking,”<sup>158</sup> then an offending employer could easily avoid section 193 liability by keeping the employee’s entire paycheck, or by tendering a smaller paycheck without using words like “fine” or “pay docking.”<sup>159</sup> Such an approach is irrational because it elevates form over substance, ignores the law’s text, and undermines its purpose.

### III. ARTICLE 6 PROTECTS EARNED SEVERANCE PAY

Article 6’s confusing text and structure has also generated a split of authority on whether earned severance pay is recoverable under Article 6.<sup>160</sup> But the question is not really a close one. As shown below, Article 6 clearly protects all employees’ right to recover earned severance pay.

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<sup>154</sup> *See id.* at \*5–6.

<sup>155</sup> N.Y. LAB. LAW § 193(1) (McKinney 2017).

<sup>156</sup> *Gold*, 2015 U.S. Dist. LEXIS 108122, at \*5 (emphasis added).

<sup>157</sup> *See id.*; *see also In re Angello v. Labor Ready, Inc.*, 859 N.E.2d 480, 484 (N.Y. 2006) (“[Section 193 focuses on] the inequity that the legislature sought to prevent.”). The legislature wanted section 193 to prohibit employers from benefitting from employees’ earned wages. *See id.*

<sup>158</sup> *Gold*, 2015 U.S. Dist. LEXIS 108122, at \*11.

<sup>159</sup> *Id.*

<sup>160</sup> *See Doyle v. Turner*, No. 86 CIV. 2792, 1994 U.S. Dist. LEXIS 13623, at \*4–5 (S.D.N.Y. Sept. 23, 1994) (noting that severance was recoverable); *but see Fraiberg v. 4Kids Entm’t, Inc.*, 906 N.Y.S.2d 64, 67 (App. Div. 2010) (noting that severance was not covered under Article 6).

For example, “[s]everance payments are made in consideration for employment—for a ‘service . . . performed’ by ‘an employee for the person employing him.’”<sup>161</sup> Severance pay is “earned” at the time an employee is dismissed.<sup>162</sup> Labor Law section 198(3) commands that “[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages.”<sup>163</sup> That *should* settle the question, since severance pay is a wage, benefit, and/or wage supplement.<sup>164</sup>

Nonetheless, there is a deep split between the courts that recognize Article 6 civil claims for unpaid benefits and wage supplements for executive, administrative, and professional employees,<sup>165</sup> and those that do not.<sup>166</sup> The main problem, as explained in Part I above, is that many courts overlook or fail to apply section 198(3)’s rights-affirming or rights-creating language. Thus, it is useful to understand how Article 6’s other provisions protect earned severance pay.

Surprisingly, the main obstacle to a clear understanding of this issue is a criminalizing statute—Labor Law section 198-c. Section

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<sup>161</sup> *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1400 (2014) (quoting Treas. Reg. § 3121 (2012)).

<sup>162</sup> *See In re Bethlehem Steel Corp.*, 479 F.3d 167, 171 (2d Cir. 2007).

<sup>163</sup> N.Y. LAB. LAW § 198(3) (McKinney 2017). This article does not address the circumstances under which the Employee Retirement Income Security Act (29 U.S.C. § 1001) (“ERISA”) will preempt an Article 6 claim for unpaid benefits or wage supplements. *See, e.g.*, *Karmilowicz v. Hartford Fin. Servs. Grp.*, No. 11 CIV. 539, 2011 U.S. Dist. LEXIS 77481, at \*37 (S.D.N.Y. July 14, 2011) (noting that severance pay cannot be recovered under Article 6 when the severance benefits are governed by ERISA).

<sup>164</sup> Labor Law section 190(1) defines “wages” to include “benefits or wage supplements” as they are defined in Labor Law section 198-c, and “separation . . . pay” is included in section 198-c’s definition “benefits or wage supplements.” *See* LAB. LAW §§ 190(1), 198-c(2).

<sup>165</sup> *See, e.g.*, *Pachter v. Bernard Hodes Group, Inc.*, 505 F.3d 129, 132 n.3 (2d Cir. 2007) (“[T]he limitation [in section 198-c(3)] appears to apply only to that particular section . . .”); *Quinones v. PRC Mgmt. Co. LLC*, No. 14-CV-9064(VEC), 2015 U.S. Dist. LEXIS 88029, at \*15 (S.D.N.Y. July 7, 2015) (citing *Pachter*, 891 N.E.2d at 284) (“Reductions from [‘benefits or wage supplements’ defined in section 198-c(2)] after compensation is earned or vested are prohibited under [Labor Law section] 193.”); *Di Bari v. Morellato & Sector USA, Inc.*, No. 0109387/2008, 2012 N.Y. Misc. LEXIS 3875, at \*4 (Sup. Ct. Aug. 9, 2012) (citation omitted) (“Critically, section 193 does not exclude executives from protection, unlike, e.g., section 198-c.”); *Biedermann v. Skyline Restoration, Inc.*, No. 2071-05, 2008 N.Y. Misc. LEXIS 9595, at \*12–13 (Sup. Ct. June 18, 2008) (“Wages’ also includes benefits or wage supplements such as reimbursement for expenses, as well as health, welfare, and retirement benefits earned by the employee. Thus, if plaintiff is an ‘employee’ within the meaning of Article 6, plaintiff’s wages would include his auto expense and insurance reimbursement.” (citation omitted)).

<sup>166</sup> *See, e.g.*, *Malinowski v. Wall St. Source, Inc.*, No. 09 Civ. 9592, 2012 U.S. Dist. LEXIS 11575, at \*8 (S.D.N.Y. Jan. 31, 2012) (citations omitted); *Fraiberg v. 4Kids Entm’t, Inc.*, 906 N.Y.S.2d 64, 67 (App. Div. 2010); *Cohen v. ACM Med. Lab.*, 678 N.Y.S.2d 432, 435 (Sup. Ct. 1998), *aff’d*, 1999 N.Y. App. Div. LEXIS 9900, at \*1 (Oct. 1, 1999); *Demay v. Wheatley Hills Golf Club, Inc.*, No. 001954/11, 2013 N.Y. Misc. LEXIS 5494, at \*23–24 (Sup. Ct. Nov. 29, 2013) (dismissing Article 6 vacation pay claim).

198-c contains three subsections:

- Labor Law section 198-c(1) authorizes criminal fines and/or jail against employers who fail to pay employees' benefits or wage supplements;
- Labor Law section 198-c(2) defines "benefits and wage supplements;" and
- Labor Law section 198-c(3) states that "*[t]his section* shall not apply to any person in a bona fide executive, administrative, or professional capacity" who earns over \$900 per week.<sup>167</sup>

Since employers who fail to pay benefits or wage supplements owed to executives, administrators, and professionals are exempt from *criminal* liability under section 198-c(3), some courts have held that they are also exempt from *civil* liability under section 198-c.<sup>168</sup> That view is technically correct because a claim for unpaid severance arises under sections 193 and 198, not section 198-c.<sup>169</sup> However, some courts have erroneously relied on section 198-c's criminal liability exception to deny recovery of unpaid severance under sections 193 and 198 as well.<sup>170</sup> None of those courts have

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<sup>167</sup> LAB. LAW § 198-c(1), c(2), c(3) (emphasis added).

<sup>168</sup> See *id.* § 198-c(3) (noting that executives, administrators, and professionals are exempt from the criminal penalties outlined in subsection one); *see Akwei v. Port Auth. of N.Y.*, No. 102555/97, 1998 N.Y. Misc. LEXIS 705, at \*10-11 (Sup. Ct. Apr. 7, 1998) (citations omitted). Ill-informed plaintiffs often bring Article 6 civil claims for unpaid benefits and wage supplements under Labor Law section 198-c, a criminal statute that does not provide a civil cause of action, rather than under sections 193, 198(1-a), and 198(3). *See, e.g., Akwei*, 1998 N.Y. Misc. LEXIS 705, at \*1, \*10-11. That tends to reinforce the erroneous notion that executive, administrative, and professional employees do not have a civil cause of action under Article 6 for unpaid benefits and wage supplements. *See, e.g., Castagna v. Luceno*, No. 09-CV-9332(CS), 2011 U.S. Dist. LEXIS 45567, at \*71 (S.D.N.Y. Apr. 26, 2011) (citations omitted) (holding that Article 6 permits a private right of action for employees to sue for unpaid severance, but erroneously implying that section 198-c is the source of that right); *Romanello v. Sanpaolo*, No. 109314/09, 2010 N.Y. Misc. LEXIS 2277, at \*14 (Sup. Ct. May 17, 2010) ("[Plaintiff] claim[ed] that failure to provide [severance] benefits is a violation of Labor Law [section] 198-c, and [brought] the seventh cause of action to recover thereunder [i.e., under section 198-c, and not under section 193]."), *rev'd sub. nom.*, 949 N.Y.S.2d 345, 352 (App. Div. 2012), *modified on other grounds*, 998 N.E.2d 1050, 1053 (N.Y. 2013); *see also Garg v. Wyckoff Heights Med. Ctr., Inc.*, No. 7631/13, 2013 N.Y. Misc. LEXIS 6446, at \*11 (Sup. Ct. Dec. 30, 2013). Courts need not "find" a cause of action under Labor Law section 198-c because: (a) benefits and wage supplements are "wages" under section 190(1) and, by extension, under all of Article 6's civil provisions except where expressly excluded; and (b) an employer's neglect to pay wages is actionable under section 193. *See Ryan v. Kellogg Partners Institutional Servs.*, 968 N.E.2d 947, 956 (N.Y. 2012) (citations omitted); *Pachter*, 891 N.E.2d at 283-84.

<sup>169</sup> See *Cohen*, 678 N.Y.S.2d at 435.

<sup>170</sup> See, e.g., *Romanello*, 2010 N.Y. Misc. LEXIS 2277, at \*14 ("[Plaintiff] claim[ed] that failure to provide [severance] benefits is a violation of Labor Law [section] 198-c, and [brought] the seventh cause of action to recover thereunder [that is, under section 198-c, and not under section 193].").

explained how or why it reached that conclusion.<sup>171</sup>

The belief that a criminalizing statute, Labor Law section 198-c, bars *civil* claims under Labor Law sections 193 and 198 by executives, administrators, and professionals is incorrect for four reasons, each expanded upon below:

- A statute that incorporates another statute's definition only incorporates the definition, not the entire statute;
- Using section 198-c(3)'s criminal liability exception to bar civil claims under separate Article 6 provisions creates an irreconcilable conflict, and defeats one of Article 6's main goals;
- Using section 198-c(3)'s criminal liability exception to bar civil claims under separate Article 6 provisions creates other absurdities; and
- Using section 198-c(3)'s criminal liability exception to bar civil claims under separate Article 6 provisions ignores the Court of Appeals' teachings in *Pachter v. Bernard Hodes Group, Inc.*<sup>172</sup>

#### *A. A Statute that Incorporates another Statute's Definition Only Incorporates the Definition, not the Entire Statute*

Article 6's definition of "wages" comes from Labor Law section 190(1), which incorporates Labor Law section 198-c's definition of "benefits or wage supplements."<sup>173</sup> A statute that incorporates another statute's definition only incorporates the definition, not the entire statute.<sup>174</sup> Thus, section 190(1) incorporates section 198-c(2)'s definition of "benefits or wage supplements," but not section 198-c(3)'s exception to criminal liability.<sup>175</sup>

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<sup>171</sup> See, e.g., *Cohen*, 678 N.Y.S.2d at 435.

<sup>172</sup> See *Pachter*, 891 N.E.2d at 281.

<sup>173</sup> N.Y. LAB. LAW §§ 190(1), 198-c(2) (McKinney 2017).

<sup>174</sup> See, e.g., *Keller v. Comm'r*, 568 F.3d 710, 725 (9th Cir. 2009). The same principle applies in contract law. See *Fix v. Quantum Indus. Partners LDC*, 374 F.3d 549, 553 (7th Cir. 2004) ("As the Supreme Court has noted, 'a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified.'" (quoting *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 240 U.S. 264, 277 (1916))).

<sup>175</sup> See LAB. LAW § 190(1); *Miteva v. Third Point Mgmt. Co.*, 323 F. Supp. 2d 573, 579 (S.D.N.Y. 2004).

*B. Using Section 198-c(3)'s Criminal Liability Exception to Bar Civil Claims under Separate Article 6 Provisions Creates an Irreconcilable Conflict and Defeats One of Article 6's Main Goals*

“A statutory exception must be strictly construed so that the major policy underlying the legislation is not defeated.”<sup>176</sup> The idea that section 198-c(3)’s criminal liability exception shelters offending employers from *civil* liability under Labor Law sections 193 and 198 irreconcilably conflicts with Labor Law section 198(3)’s command that “[a]ll employees shall have the right to recover full . . . benefits and wage supplements and liquidated damages.”<sup>177</sup>

*C. Using Section 198-c(3)'s Criminal Liability Exception to Bar Civil Claims Under Separate Article 6 Provisions Creates Absurd Results*

If Labor Law section 198-c(3)’s criminal liability exception barred Article 6 *civil* claims for unpaid benefits and wage supplements by executives, administrators, and professionals,<sup>178</sup> then, for example, Labor Law section 194 (i.e., the New York Equal Pay Act) would not bar employers from providing unequal benefits and wage supplements to employees because of their gender—an absurd result.<sup>179</sup> The Court of Appeals made a similar point in *Pachter v. Bernard Hodes Group, Inc.*, stating: “[U]nder the interpretation of ‘employee’ proposed by Hodes, Labor Law [section] 194 would not prohibit employers from paying similarly situated executives at different rates of compensation solely on account of their gender—an absurd proposition that the legislature surely did not intend.”<sup>180</sup>

*D. Using Section 198-c(3)'s Criminal Liability Exception to Bar Civil Claims under Separate Article 6 Provisions Ignores the Court of Appeals' Teachings in Pachter*

In *Pachter*, the Court of Appeals held that executives are employees under Article 6 “except where expressly excluded.”<sup>181</sup> *Pachter* also stated that section 198-c contains the subject

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<sup>176</sup> *In re Radich v. Council of Lackawanna*, 462 N.Y.S.2d 928, 931 (App. Div. 1983), *aff'd*, 460 N.E.2d 223 (N.Y. 1983).

<sup>177</sup> LAB. LAW § 198(3).

<sup>178</sup> *Id.* § 198-c(3).

<sup>179</sup> *Id.* § 194.

<sup>180</sup> *Pachter v. Bernard Hodes Group, Inc.*, 891 N.E.2d 279, 283 (N.Y. 2008).

<sup>181</sup> *Id.*

exclusion.<sup>182</sup> “The primary definition of ‘contain’ is ‘to keep within limits[;] hold back or hold down . . .’”<sup>183</sup> This is also consistent with the U.S. Court of Appeals for the Second Circuit’s observation that “the limitation [in section 198-c(3)] appears to apply only to that particular section.”<sup>184</sup> Nonetheless, some courts have not followed *Pachter*’s core message—that one section’s exclusions do not apply to other sections unless expressly stated.<sup>185</sup>

Even if there were room for doubt about the scope of section 198-c(3)’s exception to criminal liability, “all doubts [regarding statutory exceptions] should be resolved in favor of the general provision rather than the exception.”<sup>186</sup> Thus, courts should confine section 198-c(3)’s exception to that section, and should not disregard section 198(3)’s command that “[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages.”<sup>187</sup>

## CONCLUSION

Though poorly drafted and unnecessarily complex, Article 6 fully protects all employees’ wages, benefits, and wage supplements. All courts should reject the false dichotomy between “deducting” and “failing to pay” wages, and respect the legislature’s command that “[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages.”<sup>188</sup> Only then will Article 6’s promise be fulfilled.

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<sup>182</sup> See *id.* at 282.

<sup>183</sup> *Multiform Desiccants, Inc. v. Medzam, Ltd.*, No. 91-CV-0095E, 1995 U.S. Dist. LEXIS 18548, at \*25 n.11 (W.D.N.Y. Dec. 7, 1995).

<sup>184</sup> *Pachter v. Bernard Hodes Group, Inc.*, 505 F.3d 129, 132 n.3 (2d Cir. 2007); *see also Miteva v. Third Point Mgmt. Co.*, 323 F. Supp. 2d 573, 579 (S.D.N.Y. 2004) (“[Section 198-c] makes exclusions that are specifically for purposes of *that section only*.”).

<sup>185</sup> For example, after citing *Pachter*, the court in *Wiggins v. Hain Pure Protein Corp.*, cited cases interpreting section 198-c(3) and concluded that “executives . . . may not bring a claim under section 193 for deductions of non-wage benefits.” *Wiggins v. Hain Pure Protein Corp.*, 829 F. Supp. 2d 231, 242 (S.D.N.Y. 2011) (first citing *Wagner v. EdisonLearning, Inc.*, No. 09 Civ. 831, 2009 U.S. Dist. LEXIS 32965, at \*10 (S.D.N.Y. April 17, 2009); then citing *Fraiberg v. 4Kids Entm’t, Inc.*, 906 N.Y.S.2d 64, 67 (App. Div. 2010)); *see also Quinones v. PRC Mgmt. Co. LLC*, No. 14-CV-9064, 2015 U.S. Dist. LEXIS 88029, at \*15 (S.D.N.Y. July 7, 2015) (“Reductions from [benefits or wage supplements] defined in section 198-c(2)] after compensation is earned or vested are prohibited under [Labor Law section] 193.” (citing *Pachter*, 891 N.E.2d at 284)).

<sup>186</sup> *Van Amerogen v. Donnini*, 577 N.E.2d 1035, 1036 (N.Y. 1991) (citations omitted).

<sup>187</sup> N.Y. LAB. LAW § 198(3) (McKinney 2017).

<sup>188</sup> *Id.*