

RECOVERY AND CLAW- BACK /

RECOVERY
AND
CLAW-
BACK
/

CON TENT

AUS TRIA	6
BEL GIUM	12
FRA NCE	24
GER MA NY	30
POL AND	40
SPA IN	46
SWE DEN	52
THE NETH ERL ANDS	60
UK	68
NOT ES	80

AUS TRIA



/ Thomas Angermair
Partner
+43 1 533 4795-24
thomas.angermair@dorda.at

Overview of recovery/claw-back of monies from an employee's salary

1. Can an employer recover monies from an employee's salary in the following situations:	YES/NO	Comment
• It has erroneously overpaid salary or bonus to an employee	YES	Erroneous overpayments can only be recovered to the extent that the employee has not used them up in good faith.
• The employee has caused damage to company property	YES	Depending on the employee's level of culpability, damages may be recoverable only in part (or, in cases of slightest culpability, not at all).
• The employee has used a corporate credit card (e.g. AMEX etc.) for private expenditure	YES	
• The employee has been paid an educational or sign on bonus	YES	Expenses incurred for educational purposes can be recovered, if the training was suitable to further the employee's career prospects (rather than to train the employee specifically for his job position with the employer) and the employee terminated the employment relationship without cause or was terminated on solid grounds. Furthermore, educational expenses are only recoverable on the basis of a written agreement between the employer and employee, whereby the recoverability of educational expenses shall decrease on a pro rata basis over a period of (generally) up to four years. The full recoverability of sign-on bonuses is controversial under Austrian law. Pursuant to statutory law, if the employment is terminated prior to the employee's remuneration or parts thereof becoming payable, the employee is entitled to prorated payment of such remuneration. The Austrian Supreme Court has yet to rule on whether this principle equally applies to sign-on bonuses specifically meant to retain employees. This means that sign-on bonuses may only be recoverable in part, if the employment relationship is terminated prematurely.
• The employee has received a severance package and then is subsequently rehired	YES	Provided that this has been agreed upon between the parties. Such an agreement is highly uncommon in the Austrian employment practice.

2. How can an employer maximize its ability to make a recovery from salary?	The employer can increase his chances of making a recovery by means of a claw-back clause in the employment agreement. However, a claw-back clause does not always prevent a consumption of erroneous overpayments in good faith by the employee.
3. Are there any defences that an employee can use to prevent recovery from his/her salary?	The employee can argue that he has used up the overpayment in good faith. The employee will not be deemed to have acted in good faith, if he gave rise to the overpayment himself or had reason to doubt its correctness.
4. Are there any statutory considerations or other limitations, judicial or otherwise, that need to be taken into account in recovering monies from an employee's salary?	Overpayments are only recoverable for a statutory limitation period of three years. However, if the employee culpably caused the overpayment, then the statutory limitation period spans 30 years.
5. Are there any special considerations applicable if the employer is attempting recovery of monies on termination of the employee's employment?	No. Claw-back clauses can equally be applied after the effective termination of employment. At the same time, the employee can also invoke consumption of overpayments in good faith (e.g. in respect of severance payments).

6. Are there any specific issues not identified above that might impact recovery from salary in respect of:	YES/NO	Comment
• Erroneously overpaid salary/ bonus to an employee	NO	
• Damage to company property	YES	If the damage was brought about by an excusable mistake on the employee's behalf, then the recoverability may be excluded entirely.
• Corporate credit card being used for private expenditure	YES	Fraudulent use of the corporate credit card may constitute grounds for dismissal of employee with immediate effect.
• An educational or sign on bonus e.g. where the employee has not undertaken the course or delivered on the expectations that led to the sign on bonus	YES	Educational expenses are only recoverable, if the employee has successfully completed the training. The criteria as to whether or not a training has been completed successfully are subject to debate and may vary depending on the specifics of each training. The training may, on the other hand, be deemed successful for recoverability purposes, if the employee failed to undertake the course or take the examination.
• The employee has received a severance package and then is subsequently rehired	YES	Statutory severance (as far as applicable) enjoys a preferential taxation and social insurance regime. This preferential regime does not apply where the employee continues to be employed by the same employer, unless the employee is being rehired on materially different terms.

Other methods of recovery for monies owed to an employer by an employee or ex-employee

7.

Are there any other methods of recovery that an employer can use to recover overpayments from an existing employee/ex-employee?

Overpayments can be set off against employee entitlements which are due for payment. The employee's remuneration may however not fall below a minimum subsistence level.
8.

Are there any defences that an employee can use to prevent recovery dependent on the type of process used?

Where an overpayment was unlawfully set off against employee entitlements, the employee may raise his claims in court. Additionally, failure to pay out the employee's remuneration may constitute grounds for the employee's resignation with immediate effect in which case the employee may be entitled to further damages.
9.

Which Courts or Tribunals would have jurisdiction in such situations?

The Austrian labour courts would be competent in such situations.
10.

Are there any tactical issues that you might use in seeking to recover monies owed by the employee?

The burden of proof for the employee's consumption of overpayments falls upon the employer. The employer may therefore want to argue on the grounds that

• the overpayment was clearly recognizable for the employee (e.g. due to an atypical course of events);

• the overpayment was blatantly excessive; or

• the employee had objective reasons to doubt the correctness of the payment rendered to him.
- RECOVERY AND CLAW-BACK
- 10
- Factors to consider in seeking recovery
11.

Are there any additional factors you need to consider in recovering monies from employees/ex-employees whether legal or otherwise? E.g. staff morale, ability to pay, impact on recruitment/works council of trade union issues

Terms of employment should be reviewed with view to detecting any contractual exclusion of set-off.

Only entitlements of the same kind may be set off against each other. The employer will therefore be unable to offset monetary claims against benefits in kind.

12.

Is recovery/claw-back common practice in your jurisdiction or in particular sectors?

Agreements on the recovery of educational expenses incurred by the employer are fairly common practice under Austrian jurisdiction.

Due to the principle of consumption in good faith and the burden of proof placed on the employer, the recovery of overpayments can be problematic under Austrian jurisdiction.

13.

Give examples of any interesting cases you have had or you know of

Employees whose employment relationship commenced after 31 December 2002 are not entitled to receive severance from the employer upon termination of employment, but rather the employer contributes a certain amount towards a severance fund on behalf of the employee. Upon termination of the employment relationship, the employee is then entitled to receive severance from the severance fund.

In a recent judgment (2017), the Austrian Supreme Court ruled that the same principles of employment law (especially consumption in good faith) apply to the recoverability of overpayments rendered by a severance fund to a former employee.

Additionally, the Court held that whether or not the employee acted in good faith must be assessed on a case by case basis. However, the Court proceeded to clarify that reservations made by the severance fund (or employer) upon payment would as such not be sufficient for a consumption of the overpayment to be deemed in bad faith.
- 11
- RECOVERY AND CLAW-BACK

BELGIUM



/ **Philippe De Wulf**
Partner
+32 (0) 2 426 14 14
philippe.dewulf@altius.com

Overview of recovery/claw-back of monies from an employee’s salary

1. Can an employer recover monies from an employee’s salary in the following situations: • It has erroneously overpaid salary or bonus to an employee	YES/NO	Comment
	THE ISSUE IS DEBATED	<p>The employee will be obliged to repay the overpaid wage or bonus which constitutes an undue payment by the employer. However, the question whether or not such overpaid amounts may be deducted from the employee’s salary is disputed.</p> <p>Article 23 of the Belgian Wage Protection Act stipulates that only the following deductions may be made from the employee’s salary that has been earned but not yet paid:</p> <p>1° withholding tax, social security contributions and deductions on the basis of individual or collective agreements (e.g. premiums for the group insurance) 2° fines imposed under the work regulations 3° compensation owed by the employee for any damage caused during the performance of the employment contract for which he or she is liable as a result of fraud, a serious fault or a frequently appearing minor fault (article 18 of the Employment Contracts Act) 4° advances paid by the employer 5° the amount of a warrantee the employer may ask for to secure the employee’s obligations 6° the wage that was overpaid to the employee with a ‘sliding work schedule’.</p> <p>According to certain jurisprudence and legal doctrine, an undue payment can be qualified as an ‘advance payment’ allowing the employer to deduct this amount from the employee’s salary without his/her consent. However, all deductions together may not exceed 1/5 of the employee’s salary after the deduction of social security contributions and withholding tax.</p> <p>However, other jurisprudence and legal doctrine holds that an undue payment does not fall within one of the exhaustively listed exceptions of Article 23 of the Wage Protection Act and therefore salary deductions will only be possible with the employee’s express consent and after the salary has become payable (or by legal means).</p>

<ul style="list-style-type: none"> • The employee has caused damage to company property 	<p>YES (IF CERTAIN CONDITIONS ARE MET)</p>	<p>If the employee has caused damage to company property, it must first be determined whether or not the employee can be held liable. Indeed, on the basis of article 18 of the Employment Contracts Act, an employee is only liable for fraud, serious misconduct or any frequently recurring minor misconduct. If the conditions of article 18 are met (the damage is the result of fraud, serious misconduct or any frequently recurring minor misconduct on the part of the employee), then the amount of this damage can be deducted from the employee's salary (art. 23, 3°), but only on the condition that:</p> <p>(i) the employer's claim is certain, due and payable</p> <p>(ii) an agreement for the amount of compensation payable by the employee has been concluded between the employer and the employee, after the event giving rise to the damage, or that amount has been determined by a court of law (see question 2 below for an alternative if no written agreement can be obtained).</p> <p>Once again, all deductions together may not exceed 1/5 of the employee's salary after deduction of social security contributions and withholding tax.</p>		<p>In principle, deductions from an employee's salary may not exceed 1/5 of the employee's salary after deduction of social security contributions and withholding tax. However, this limitation to 1/5 of the employee's net salary does not apply:</p> <ul style="list-style-type: none"> • for fraud (as in this example); or • if the employee resigns before he/she has paid off the compensation owed to the employer on the basis of article 18 of the Employment Contracts Act. <p>Therefore, the whole amount of the damages can be deducted at once from the employee's salary.</p>
<ul style="list-style-type: none"> • The employee has used a corporate credit card (e.g. AMEX etc.) for private expenditure 	<p>YES</p>	<p>The use of a corporate credit card for private expenditure can be qualified as fraud. The employee will thus be liable for damages on the basis of article 18 of the Employment Contracts Act (see higher).</p> <p>On the basis of article 23, 3° of the Wage Protection Act, the amount representing the private expenditure can be deducted from the employee's salary provided that an agreement on the amount of damages has been concluded between the employer and the employee or provided that this amount has been determined by a court of law.</p>	<p>NO</p>	<p>In principle, an educational or sign-on bonus cannot be recovered from the employee's salary, unless there is a question of fraud or an undue payment (see answers to the questions above).</p> <p>However, if the employee resigns and a so-called 'training clause' was entered into between the employer and the employee, meaning that the employee must reimburse part of the training cost paid by the employer for leaving the company before the end of the agreed period, then the question is open to debate about whether or not the employer can deduct the agreed sum from the employee's salary. Some legal scholars argue that the education cost paid by the employer can be qualified as an 'advance payment', which can thus be deducted from the employee's salary on the basis of article 23, 4°. Others consider that the reimbursement of part of the educational cost is not covered by article 23 and can therefore not be deducted from the employee's salary. According to the latter perspective, the employer will need a court order to claim this amount from the employee if the employee refuses to pay this amount willingly.</p>
		<ul style="list-style-type: none"> • The employee has been paid an educational or sign on bonus 		<p>Such severance package cannot be recovered from the employee's salary.</p>
		<ul style="list-style-type: none"> • The employee has received a severance package and then is subsequently rehired 		

2. How can an employer maximize its ability to make a recovery from salary?

- In the case of deduction from the salary of the compensation due by the employee when he or she is liable on the basis of article 18 of the Employment Contracts Act, the employee's agreement regarding the amount of the compensation that will be withheld is, in principle, required. However, obtaining a written agreement from the employee will not always be possible.
- According to the majority of legal doctrine, the employee's consent can also be given tacitly. Therefore, it will be sufficient that (i) the employer has evidence to determine the amount of the compensation, (ii) it then sends a default letter to the employee including this amount with a statement that in the event of non-payment, it will deduct this amount from the employee's salary. If, subsequently, the employee does not proceed with the payment within the set timeframe and does not contest the notice of default, then the employer can proceed with the withholding of this amount from the salary. In practice, this alternative method is widely used by companies.
- The limitations of article 23 of the Wage Protection Act (deductions only possible in limited cases, 1/5 limit), as set out above, only apply to 'salary' within the meaning of this Act and not to holiday pay. Consequently, the employer can make unlimited deductions from the employee's holiday pay (provided that the 'garnishment limits' are respected: see question 4 below).
- Article 23 of the Wage Protection Act only applies if the salary has not yet become payable. Once the salary has become payable, the employee can validly waive the limits of this article 23 and agree to a deduction from his/her salary that exceeds the 1/5 ceiling. Once the salary has become payable, the employer can try to enter into such an agreement with the employee.
- Especially with regard to bonus/commission pay, the contractual determination of this pay will play an important role. Indeed, article 23 of the Wage Protection Act does not provide that parties are not free to determine the amount of the salary and the modalities of calculating it; article 23 merely states that deductions may only be made from the 'agreed salary' under the restrictive conditions stipulated in this article.

3. Are there any defences that an employee can use to prevent recovery from his/her salary?

Therefore, if, for example, in a system of advances on commissions, it is stipulated in the employment contract that commissions will only be due up to the amount that exceeds the advances granted, such will constitute an agreement on the determination of the salary, which is perfectly possible.

However, if no contractual provision is agreed upon, the employee can claim full payment of the commissions and the employer will only be able to recover the advances already granted within the limits of article 23 of the Wage Protection Act.

- If deductions from salary were made by the employer in violation of article 23 of the Wage Protection Act, then the employee may invoke this article to claim full payment of his/her salary. Moreover, an unlawful deduction by the employer, which is contested by the employee and confirmed by a court, may constitute a criminal offence.
- The employee could ask his/her employer for a repayment plan with reasonable and feasible installments.
- The employee could invoke the nullity of a clause in the employment contract that stipulates that the employer can carry out deductions on the employee's salary outside the cases and limits provided for in article 23 of the Wage Protection Act (e.g. a clause stipulating that cash shortages may be deducted from the salary).

4. Are there any statutory considerations or other limitations, judicial or otherwise, that need to be taken into account in recovering monies from an employee's salary?

In principle, deductions from an employee's salary may not exceed 1/5 of the employee's salary after deduction of social security contributions and withholding tax. However, this limitation to 1/5 of the employee's net salary does not apply:

- for fraud; or
- if the employee resigns before he/she has paid off the compensation owed to the employer on the basis of article 18 of the Employment Contracts Act.

In addition to the limits set by article 23 of the Wage Protection Act (deduction of a maximum 1/5 of the net salary, except in the case of fraud or resignation), the 'garnishment limits' must also be respected when deductions are made from the employee's salary (article 1409 of the Judicial Code). These garnishment limits are the following (figures as per 1 January 2018):

- Under a net amount of 1,105 EUR: no deductions possible
- Between 1,105 EUR and 1,187 EUR net: 20%
- Between 1,187.01 EUR and 1,309 EUR net: 30%
- Between 1,309.01 EUR and 1,432 EUR net: 40%
- Over 1,432.01 EUR net: 100%

These income limits are increased by 68 EUR for each dependent child.

5. Are there any special considerations applicable if the employer is attempting recovery of monies on termination of the employee's employment?

No, a severance indemnity is considered to be salary that is subject to the same restrictions from article 23 of the Wage Protection Act, which means that only limited recoveries can be made on such severance pay.

If the employee resigns (as opposed to being dismissed by the employer), then the 1/5th limit set out above will not apply.

Reference is also made to the example for the training clause, set out under question 1.

6. Are there any specific issues not identified above that might impact recovery from salary in respect of:

• Erroneously overpaid salary/ bonus to an employee

YES/NO

NO

Comment

See comments to question 1.

• Damage to company property

NO

See comments to question 1.

• Corporate credit card being used for private expenditure

NO

See comments to question 1.

• An educational or sign on bonus e.g. where the employee has not undertaken the course or delivered on the expectations that led to the sign on bonus

YES

If the employee has not delivered on the expectations that led to a sign on bonus, the employer will, in principle, not be able to recover such a bonus from the employee's salary.

Also if the employee has not undertaken the course for which he/she has received an educational bonus, the employer will, in principle, not be able to recover such a bonus from the employee's salary, unless the employer can prove that the failure to follow the course was with a fraudulent intent, which gives rise to the employee's liability on the basis of article 18 of the Employment Contracts Act. In such a case, this bonus could be deducted from the employee's salary within the limits of article 23 of the Wage Protection Act set out above.

• The employee has received a severance package and then is subsequently rehired

NO

See comments to question 1.

Other methods of recovery for monies owed to an employer by an employee or ex-employee

7. Are there any other methods of recovery that an employer can use to recover overpayments from an existing employee/ex-employee?
8. Are there any defences that an employee can use to prevent recovery dependent on the type of process used?
9. Which Courts or Tribunals would have jurisdiction in such situations?
10. Are there any tactical issues that you might use in seeking to recover monies owed by the employee?

- Yes, for instance:
- Try to obtain the consent from the employee.
 - Article 23 of the Wage Protection Act only applies if the salary has not yet become payable. Once the salary has become payable, the employee can validly waive the limits of this article 23 and agree to a deduction from his/her salary that exceeds the ceiling of 1/5. Once the salary has become payable, the employer can try to enter into such an agreement with the employee.
 - If the employee refuses to pay, then the employer will be obliged to go to court.
 - In the context of legal proceedings before court, a judicial set-off will be possible.

Not really, except from contesting the amount due.

In principle, the labour court.

See answer to question 2.

Factors to consider in seeking recovery

11. Are there any additional factors you need to consider in recovering monies from employees/ex-employees whether legal or otherwise? E.g. staff morale, ability to pay, impact on recruitment/works council of trade union issues

- As regards the employee's ability to pay and as indicated under question 4, the 'garnishment limits' must be respected when deductions are made from the employee's salary (article 1409 of the Judicial Code).
- If the company has a trade union delegation (i.e. a body within the undertaking with unionised representatives of the employees that must be set-up at the request of one or more trade unions in undertakings employing the relevant minimum number of employees as determined by a CBA), then the competencies of this trade union delegation will include, amongst others, the supervision of the observation of employment legislation, the presenting and discussing of individual and collective grievances, the right to be informed about changes that might affect contractual employment and remuneration conditions; and the right to assist employees with individual complaints. Considering these competencies, the trade union delegation could be involved when recovering money from employees.

12. Is recovery/claw-back common practice in your jurisdiction or in particular sectors?

Recovery is frequent, especially the recovery of employee's traffic fines, which are paid by the employer.

Claw-back clauses, i.e. clauses that entitle the company to recover all or part of the (variable) remuneration already paid when certain events have occurred (e.g. when it appears that a bonus has been paid on the basis of operating profit data that subsequently proved to be false), are debated under Belgian law (considering that this can have a major impact on the employee's right of ownership) and are therefore not common practice. As such, Belgian law does not regulate claw-back clauses.

However, in the financial sector, specific requirements, such as claw-backs, may be applied to 'identified staff' (i.e. members of the board of directors and management committee and those categories of staff whose professional activities have a significant impact on the institution's risk profile). However, the Banking Act, which governs claw-back within the financial services sector, explicitly states that any claw-back provisions are without prejudice to the general rules of contract and employment law. This entails that, in principle, a claw-back will only be enforceable if criminal offences have been committed to obtain the variable compensation or if the employee's liability within the meaning of article 18 of the Employment Contracts Act can be invoked, i.e. if the employee is liable for fraud, serious misconduct or any frequently recurring minor misconduct. This right to recover the amounts involved does not prejudice the application of the general recovery rules explained above (Article 23 of the Wage Protection Act).

In addition, the Corporate Governance Act, which applies to listed companies, provides that if companies foresee a repayment of variable salary for directors on the basis of incorrect financial data, then the remuneration report on manager and director remuneration must indicate to what extent there is a recovery right for the company. It does not, however, deal with the potential conflict with employment law provisions or the question of whether such clauses would be enforceable.

13. Give examples of any interesting cases you have had or you know of

We have had an interesting case of salary 'sacrifice'. Employees would receive a company car in exchange for a salary 'sacrifice', but their salary was too low for the 'sacrifice' to be implemented without violating the minimum wage scales. In that case, the following solution was found: the employer only implemented a portion of the salary 'sacrifice' on the monthly remuneration up to the level of the minimum wage scale and then made withholdings on the employees' bonus for the remainder and with the employees' consent.

FRA NCE



/ Patrick Thiébart
Partner
+33 (0)1 45 05 80 08
pthiebart@jeantet.fr



/ Olivier Angotti
Partner
+33 (0)1 45 05 81 78
oangotti@jeantet.fr



/ Déborah David
Partner
+33 (0)1 45 05 82 06
ddavid@jeantet.fr

Overview of recovery/claw-back of monies from an employee's salary

1. Can an employer recover monies from an employee's salary in the following situations:	YES/NO	Comment
		As a general comment, the possibilities for an employer to recover monies from an employee's salary are strictly regulated, either through a judicial action which needs a judge intervention (action for recovery of undue payments, employee's civil or criminal liability action) or through the set off procedure which is subject to specific conditions.
• It has erroneously overpaid salary or bonus to an employee	YES	When the employer has erroneously paid to the employee overpaid salary or bonus, the employer can recover the sums through a so-called action for recovery of undue payment ("action en répétition de l'indû") under certain conditions: the employer must prove (i) that the sums are effectively undue and (ii) the absence of liberal intent of the employer. The statute of limitation of such action is 3 years.
• The employee has caused damage to company property	YES	When the employee has caused damage to company property (damage to or loss of company equipment, negligence causing the theft of equipment or money belonging to the company, theft committed by the employee himself, etc...), the employer may engage the employee's civil or criminal liability.
• The employee has used a corporate credit card (e.g. AMEX etc.) for private expenditure	YES	If the employee has used a corporate credit card for private expenditure, the employer can dismiss the employee for gross misconduct without prejudice to the engagement of the criminal liability of the employee.
• The employee has been paid an educational or sign on bonus	YES	Educational expenses borne exclusively and in totality by the employer are recoverable if a written agreement has been signed before the training between the employer and the employee ("clause de dédit-formation"). Under this clause, the employee undertakes to reimburse the educational expenses in case of resignation within a certain time-period generally comprised between 2 and 5 years. The employee must reimburse part of the training cost paid by the employer for leaving the company before the end of the agreed period.

<ul style="list-style-type: none">• The employee has received a severance package and then is subsequently rehired	YES	<p>If the employee does not execute the training clause and does not reimburse the sums, the employer may recover the amount of the expenses through the set off procedure subject to specific conditions or through judicial action.</p>
		<p>The payment of a sign on bonus is generally provided in the employment contract and subject to specific conditions; e.g. the payment is due at the end of the probationary period.</p> <p>If an employee is rehired after termination of his employment contract, a recovery of the severance package may only be possible provided it has been agreed between the parties. Nevertheless, such situation is highly uncommon under French employment practice.</p>
2. How can an employer maximize its ability to make a recovery from salary?		The employer can include a claw-back clause in the employment contract but in any case the provisions of this clause must fulfill the public policy conditions of the set off procedure.
3. Are there any defences that an employee can use to prevent recovery from his/her salary?		In this situation, the employee can try to demonstrate that the overpayment does not constitute an undue payment.
4. Are there any statutory considerations or other limitations, judicial or otherwise, that need to be taken into account in recovering monies from an employee's salary?		<p>In case of set off, the procedure is subject to specific conditions, in particular the seizable portion of the salary.</p> <p>When the sums overpaid qualify as salary, they are recoverable only for a statutory limitation period of three years.</p>
5. Are there any special considerations applicable if the employer is attempting recovery of monies on termination of the employee's employment?		<p>On termination of the employee's employment, overpayments can be set off on sums due to the employee which do not qualify as salaries, e.g. severance indemnity.</p> <p>On the contrary, there are specific limitations when the sums qualify as salary (please see comment to question 4).</p>

6. Are there any specific issues not identified above that might impact recovery from salary in respect of:	
<ul style="list-style-type: none">• Erroneously overpaid salary/ bonus to an employee	See comments to question 1
<ul style="list-style-type: none">• Damage to company property	See comments to question 1
<ul style="list-style-type: none">• Corporate credit card being used for private expenditure	See comments to question 1
<ul style="list-style-type: none">• An educational or sign on bonus e.g. where the employee has not undertaken the course or delivered on the expectations that led to the sign on bonus	See comments to question 1
<ul style="list-style-type: none">• The employee has received a severance package and then is subsequently rehired	See comments to question 1

Other methods of recovery for monies owed to an employer by an employee or ex-employee

7. Are there any other methods of recovery that an employer can use to recover overpayments from an existing employee/ex-employee?

Under certain circumstances, undue payments can be set off against salaries up to the seizable portion of the salary. The set off can be (i) automatic (legal set off), (ii) can result from a judicial decision (judicial set off) or (iii) from an agreement between employer and employee (contractual set off).

Legal set off

The employer is entitled to proceed to a legal set off if the following conditions are met: the reciprocal debts must be certain (undisputed), liquid (determined in their amount) and due (the term has expired).

Judicial set off

The judge must pronounce the set off if the debts are certain and related, i.e. the debts result from the same contract.

Contractual set off

The parties can agree to a contractual set off. Nevertheless, they cannot derogate to the public policy provisions of the Labour Code limiting the cases of set off of the salary and the amounts due to the employer and the seizability of the salary.

8. Are there any defences that an employee can use to prevent recovery dependent on the type of process used?

In this situation, if the employee does not agree with the recovered amount, he may challenge the set off made by the employer in court.

9. Which Courts or Tribunals would have jurisdiction in such situations?

In principle French Labor courts would be competent.

10. Are there any tactical issues that you might use in seeking to recover monies owed by the employee?

See comments to question 2.

Factors to consider in seeking recovery

11. Are there any additional factors you need to consider in recovering monies from employees/ex-employees whether legal or otherwise? E.g. staff morale, ability to pay, impact on recruitment/works council of trade union issues

If the employee does not agree with the amount to be set off, he can ask the trade union delegation (if any) to assist him with the discussions with the employer.

12. Is recovery/claw-back common practice in your jurisdiction or in particular sectors?

In this situation, we can face this kind of issue in particular in case of litigation.

13. Give examples of any interesting cases you have had or you know of

French case law already judged as legal the set off of the amount of severance pay due by an employer to his salaried store manager against the amount of the inventory deficit recorded. Indeed, severance pay is not the counterpart of a work and therefore does not constitute a salary. To the contrary, the inventory deficit cannot be set off with a compensation in lieu of notice, as it qualifies as salary.

GERMANY



/ Prof. Dr. Martin Reufels
Partner
+49 221 20 52 331
m.reufels@heuking.de



/ Regina Glaser
Partner
+49 211 600 55 276
r.glaser@heuking.de

Overview of recovery/claw-back of monies from an employee's salary

1. Can an employer recover monies from an employee's salary in the following situations:	YES/NO	Comment
<ul style="list-style-type: none"> It has erroneously overpaid salary or bonus to an employee 	YES (if there is a re-payment claim)	<p>If two parties have reciprocal claims of the same nature, one party may declare set-off to the other if the claim to which it is entitled is due and enforceable (sec. 387, 388 German Civil Code).</p> <p>Due to the set-off, the claims, insofar as they correspond, are deemed to have expired at the moment at which they are suitable for set-off (sec. 389 German Civil Code).</p> <p>So in case the employer has a (due and enforceable) claim for repayment of the overpaid salary, the employer can offset this claim against the employee's wage entitlements, by declaring the set-off to the employee. As a result the employee's claim is deemed to have expired at the moment it became payable.</p> <p>To the extent that the wage entitlement is protected against seizure, set-off against the claim is not possible (sec. 394 German Civil Code).</p> <p>The extent to which a wage entitlement is protected against seizure results from sec. 850a – 850i German Code of Civil Procedure (for more details see below under 4.).</p> <p>An employer who has set off a claim against an employee's wage entitlement bears the burden of proof that the set-off has been effected in compliance with the provisions on protection against seizure.</p> <p>However not every overpaid salary justifies a repayment claim.</p> <p>In the absence of a contractual repayment clause, overpaid salary can only be reclaimed under the provisions governing the restitution of unjustified enrichment (sec. 812-822 German Civil Code).</p>

• The employee has caused damage to company property		<p>If the employee believes in good faith that he/she is entitled to retain the (overpaid) salary, his/her liability to undertake restitution includes only the amount to which he/she is still enriched (sec.sec. 818 III, 819 I German Civil Code).</p> <p>The employee is in good faith, if he/she did not know and could not know that he/she was not entitled to retain the salary.</p> <p>The employee is enriched, if the overpaid salary is still part of his/her assets.</p> <p>If the employee has spent the overpaid salary on material assets, he/she is enriched to the amount of the value.</p> <p>If the employee has spent the money otherwise and thus saved expenses, it has to be determined whether the expenses are so-called luxury expenses.</p> <p>Luxury expenses are those expenses that the employee would not have made if he/she had not received the overpaid salary. To the amount the employee spend the money on luxury expenses, he or she is not enriched.</p> <p>In principle, the employee bears the burden of proof, that he or she is no longer enriched.</p> <p>There may be an exception to this principle if the overpayment was only negligible.</p>	
	YES (if there is a damage claim)	<p>If the employee can be held liable for the damage he has caused to company property, the employer can offset the claim for damages against the employee's wage entitlements (for details about prerequisites and limits of set-off see above).</p> <p>In the event of an employer causing damage to company property, both tortious (sec. 823 German Civil Code) and contractual (sec. 280 German Civil Code) damage claims may be considered.</p>	• The employee has used a corporate credit card (e.g. AMEX etc.) for private expenditure

	<p>However the employer's liability for damages he caused to company property is restricted, if the damage-causing behaviour was work-related. According to the principles of in-company damage compensation, the liability of the employer is dependent on the degree of his fault.</p> <p>The principles of in-company damage compensation are case-law developed on the base of sec. 254 German Civil Code (contributory negligence).</p> <p>If the employee caused the damage by slight negligence, he/she is not liable for the damages at all.</p> <p>In the case of medium negligence, the liability is shared between employee and employer. The relation between the liability of employer and employee is determined by an individual liability quota.</p> <p>In order to determine this quota, the circumstances of the individual case must be taken into account (e.g.: extent of damage, salary level, work-related risk, insurability of risks).</p> <p>If the damage was caused by gross negligence or intent, the employer is in principle fully liable.</p>
YES	<p>If the credit card has been used without authorization, the employer is entitled to both contractual (sec. 280 German Civil Code) and tortious (sec. 823 German Civil Code) claims for damages.</p> <p>The claim may be set off against the employer's wage entitlements (for details about prerequisites and limits of set-off see above).</p>

• The employee has been paid an educational or sign on bonus

YES
(if there is a re-payment claim)

If the educational or sign on bonus is paid on certain conditions (e.g. minimum length of stay in the company) and the agreement includes a repayment clause, the employer can offset the resulting claim against the employee's wage entitlements.

(for details about prerequisites and limits of set-off: see above).

In the absence of a repayment clause, the employer is dependent on the rules governing the restitution of unjust enrichment to recover the bonus granted.

• The employee has received a severance package and then is subsequently rehired

YES
(if there is a re-payment claim)

If the severance agreement includes a repayment clause, determining, that the employee has to reimburse the granted severance, if subsequently rehired, the employer can offset the reimbursement claim against the employee's wage entitlements.

(for details about prerequisites and limits of set-off: see above).

2. How can an employer maximize its ability to make a recovery from salary?

Employment contracts, as well as agreements on educational or sign on bonus and severance agreements, should in any case include repayment clauses in order to avoid reimbursement under the provisions on unjust enrichment.

3. Are there any defences that an employee can use to prevent recovery from his/her salary?

The employee may bring an action before the labour courts to claim his/her full salary.
As mentioned above, the employer bears the burden of proof that the set-off has been effected in compliance with the provisions on protection against seizure.
Since the earned income is not only protected against seizure up to a certain amount, but certain earnings cannot be seized at all or only partially (for details see below under 4), the provision of proof involves a considerable effort for the employer.

4. Are there any statutory considerations or other limitations, judicial or otherwise, that need to be taken into account in recovering monies from an employee's salary?

As already mentioned above, offsetting is only possible to the extent that the earned income could also be subject to seizure.

§ 805c ZPO determines up to which amount earned income is not subject to seizure.

The limits stated in the law itself are no longer up to date. The limits are adjusted in accordance with sec. 805c para. 2a ZPO on the first of July each year. Current limits are published by the Federal Ministry of Justice.

For the period up to the first of July 2019:

The basic amount that cannot be seized is 1,133.80 €/ month.

If the employee is subject to maintenance obligations, this amount increases by 426.71 €/ month for the first person to whom such maintenance is granted and by a further EUR 237.73 per month for the second to fifth person.

In addition, § 850a ZPO and § 850b ZPO stipulate that certain remuneration cannot be seized or can only be seized under certain conditions.
For instance only half of those parts of the earned income that are paid for overtime work can be subject to seizure.

5. Are there any special considerations applicable if the employer is attempting recovery of monies on termination of the employee's employment?

The employer can only offset against the net wage, the obligation to pay taxes and social security contributions remains unaffected by the offset.

The provisions on set-off are non-mandatory; therefore the possibility of set-off under individual or collective agreements may be excluded.

6. Are there any specific issues not identified above that might impact recovery from salary in respect of:	
• Erroneously overpaid salary/ bonus to an employee	NO
• Damage to company property	NO
• Corporate credit card being used for private expenditure	NO
• An educational or sign on bonus e.g. where the employee has not undertaken the course or delivered on the expectations that led to the sign on bonus	NO
• The employee has received a severance package and then is subsequently rehired	NO

Other methods of recovery for monies owed to an employer by an employee or ex-employee

7. Are there any other methods of recovery that an employer can use to recover overpayments from an existing employee/ex-employee?	The amounts against which the employer cannot offset because they are protected from seizure cannot be claimed before the court for the same reason.
8. Are there any defences that an employee can use to prevent recovery dependent on the type of process used?	Yes, he can argue that he has spent the money on luxury expenses and was acting in good faith.
9. Which Courts or Tribunals would have jurisdiction in such situations?	Labour court (according to sec. 2 para 1 no. 3 German Labour Court Law)
10. Are there any tactical issues that you might use in seeking to recover monies owed by the employee?	Set-off with salary / other benefits.

Factors to consider in seeking recovery

11. Are there any additional factors you need to consider in recovering monies from employees/ex-employees whether legal or otherwise? E.g. staff morale, ability to pay, impact on recruitment/works council of trade union issues

NO

12. Is recovery/claw-back common practice in your jurisdiction or in particular sectors?

YES

13. Give examples of any interesting cases you have had or you know of

Claw-back clauses in contracts with members of the management board of German banks.

POL AND



/ Marcin Wujczyk Ph. d.
attorney at law
+48 12 290 86 20
marcin.wujczyk@wardynski.com.pl

Overview of recovery/claw-back of monies from an employee's salary

1. Can an employer recover monies from an employee's salary in the following situations:		
<ul style="list-style-type: none"> • It has erroneously overpaid salary or bonus to an employee 	YES	An employer can demand repayment unless an employee has already spent an overpaid amount. If the employee was aware of the obligation to refund the money, the fact that the overpaid amount was spent does not affect the employer's right to demand a refund.
<ul style="list-style-type: none"> • The employee has caused damage to company property 	YES	<p>If the damage was caused unintentionally, an employer can only demand a refund of the actual value of damage, but not exceeding 3 months' pay of the employee.</p> <p>If the damage was intentional, an employer can demand payment of the full amount (including lost profit); no limits apply.</p>
<ul style="list-style-type: none"> • The employee has used a corporate credit card (e.g. AMEX etc.) for private expenditure 	YES	An employer can demand that an employee repay the whole amount.
<ul style="list-style-type: none"> • The employee has been paid an educational or sign on bonus 	YES	<p>An employee who is developing employment qualifications is to refund to the employer any costs incurred by the employer for that purpose resulting from any additional allowances paid by the employer, in proportion to the length of service after completing the employment qualifications, if the employee:</p> <ul style="list-style-type: none"> • does not take up or decides to discontinue the development of employment qualifications without justified reasons; • has the employment terminated by the employer without notice through the fault of the employee during or after the development of employment qualifications, within the period defined in the agreement between the employee and the employer, but in no situation longer than 3 years; • terminates the employment with notice in the period within the period defined in the agreement between the employee and

• The employee has received a severance package and then is subsequently rehired	NO	<p>the employer but in no situation longer than 3 years;</p> <ul style="list-style-type: none">terminates the employment without notice within the period defined in the agreement between the employee and the employer but in no situation longer than 3 years.
		<p>If the severance package is guaranteed by law, an employer cannot demand refund of such payment.</p> <p>If the severance package has been agreed between the employer and the employee, the parties can foresee an obligation to refund in a future rehiring.</p>
2. How can an employer maximize its ability to make a recovery from salary?	<p>An employer can increase chances of recovery by means of a claw-back clause in the employment agreement or agreements which grants additional benefit.</p> <p>However, a claw-back clause does not always prevent a bona fide spending by an employee of overpayments made in error.</p>	
3. Are there any defences that an employee can use to prevent recovery from his/her salary?	<p>An employee can state being that the employee was unaware of spending an amount that should had not been paid to him.</p> <p>They could also refuse to consent to the deducting the overpaid amounts from pay. In the situation, an employer would have to obtain a court judgment to be able to recover the money.</p>	
4. Are there any statutory considerations or other limitations, judicial or otherwise, that need to be taken into account in recovering monies from an employee's salary?	<p>1. Only can the following amounts be deducted from pay for work, after deduction of social security contributions and personal income tax advances:</p> <ul style="list-style-type: none">a) amounts paid under enforceable titles in relation to maintenance obligations;b) amounts paid under enforceable titles in relation to obligations other than maintenance;c) amounts of cash paid in advance to the employee;d) financial penalties referred to in article 108. <p>2. Deductions are made in the order specified in point 1.</p>	

5. Are there any special considerations applicable if the employer is attempting recovery of monies on termination of the employee's employment?	<p>3. Deductions can be made within the following limits:</p> <ul style="list-style-type: none">a) in enforcement of maintenance obligations - up to three-fifths of the pay;b) in enforcement of other obligations or deduction of cash advance payments - up to 50 per cent of the pay. <p>Obligations other than those specified above can be deducted from pay only when the employee first consents in writing.</p> <p>Deducing amounts from the equivalent for unused holiday leave is subject to the same limitations as deductions from pay.</p>	
6. Are there any specific issues not identified above that might impact recovery from salary in respect of:	<i>Yes/No</i>	<i>Comment</i>
• Erroneously overpaid salary/ bonus to an employee	NO	See comments to question 1.
• Damage to company property	YES	If the damage was caused by an employee, the employee can repair the damage (e.g. repair the damaged equipment) instead of paying the cost of the damage. An employee can choose whether to repair the damage or pay for it.
• Corporate credit card being used for private expenditure	YES	Sometimes employers permit employees to use corporate credit cards up to a specific amount for private purposes, provided that the amounts used are repaid later. In such event, an employer can demand a refund only at the time specified in the employer's internal regulations.
• An educational or sign on bonus e.g. where the employee has not undertaken the course or delivered on the expectations that led to the sign on bonus	NO	See comments to question 1.
• The employee has received a severance package and then is subsequently rehired	NO	See comments to question 1.

Other methods of recovery for monies owed to an employer by an employee or ex-employee

7.

Are there any other methods of recovery that an employer can use to recover overpayments from an existing employee/ex-employee?

Amounts paid to an employee on a previous payment date for a period of absence from work for which the employee is not entitled to any pay are to be deducted from pay for work in the full amount.
8.

Are there any defences that an employee can use to prevent recovery dependent on the type of process used?

An employee can state that the limitation period during which the employer can demand a refund of overpaid amounts (usually 3 years) has expired.
9.

Which Courts or Tribunals would have jurisdiction in such situations?

The cases are settled in labour courts.
10.

Are there any tactical issues that you might use in seeking to recover monies owed by the employee?

A common mistake of the employers is to postpone the demand to refund amounts (specifically, those spent through use of corporate credit card) until the termination of the contract of employment. In the situation, it is extremely difficult to obtain employee consent to deduct amounts from pay.

Employees are often willing to co-operate if the refunding of overpaid amounts is in instalments.

Factors to consider in seeking recovery

11.

Are there any additional factors you need to consider in recovering monies from employees/ex-employees whether legal or otherwise? E.g. staff morale, ability to pay, impact on recruitment/works council of trade union issues

Another common mistake of employers is obtaining consent to deduct unspecified amounts from pay (i.e., in blanco consent forms). Such consent is considered to be ineffective and cannot be the basis for an employer to deduct any amounts pay. A court order would be required.
12.

Is recovery/claw-back common practice in your jurisdiction or in particular sectors?

Because recovery/claw-back from employee pay is strictly limited, they are rarely used. Exceptions are financing employee education. Almost all agreements on financing training courses or studies contain claw-back clauses.
13.

Give examples of any interesting cases you have had or you know of

We were involved in the interesting case of an employee managing a work establishment who granted to himself a cash bonus and collected it. The Supreme Court decided that the principles of responsibility for damages specified in the Labour Code should be applied in this case. Such approach permitted elimination of the risk that the employee would defend himself by stating that he considered the bonus to be deserved and that he was not obliged to return it having already spent it.

SPAIN



/ Ángel Olmedo Jiménez
Partner
+34 91 514 52 00
angel.olmedo.jimenez@garrigues.com

Overview of recovery/claw-back of monies from an employee's salary

1. Can an employer recover monies from an employee's salary in the following situations:	Yes/No	Comment
• It has erroneously overpaid salary or bonus to an employee	YES	However, there is a risk that the employee could argue that this "extra-payment" would be a consolidated salary right ("acquired right"). In case this argument is challenged by the company, and accepted by a labour court, the employer would not be entitled to recover monies from an employee's salary.
• The employee has caused damage to company property	YES	However, it would be necessary for the company to initiate a judicial procedure for this purpose in which the latter will have to show evidence on the employee's misconduct (i.e. causing the damage on the company's property).
• The employee has used a corporate credit card (e.g. AMEX etc.) for private expenditure	YES	It would be necessary for the company to conduct an internal disciplinary investigation which could be ended with the relevant sanction/dismissal of the employee. It must be noted that the company would need to file a judicial claim against the employee with a view to recovering the amounts.
• The employee has been paid an educational or sign on bonus	YES	However, it would be necessary for the company to initiate a judicial procedure in order to recover the relevant bonus.
• The employee has received a severance package and then is subsequently rehired	YES	Only applicable in case the employee has been terminated within the scope of a collective dismissal. In any case, it should be agreed between the employer and the employee.

2. How can an employer maximize its ability to make a recovery from salary?	The employer could maximize its ability to make a recovery from the employee's salary by (i) foreseeing such ability in the employment contract (as a claw-back clause set forth therein) or (ii) agreeing this entitlement in the relevant collective bargaining agreement.
3. Are there any defences that an employee can use to prevent recovery from his/her salary?	<p>Within a judicial scenario (having filed a claim against the company in this respect), the employee must build up the arguments of his/her defence (e.g. on the basis of a consolidated right or the lack of claw-back clauses).</p> <p>In the event the company has not agreed any claw-back clauses with the employee, it would be questionable that the company could unilaterally detract any amounts from the employee's salary.</p>
4. Are there any statutory considerations or other limitations, judicial or otherwise, that need to be taken into account in recovering monies from an employee's salary?	No statutory provisions are envisaged in the Spanish labour regulations in this respect.
5. Are there any special considerations applicable if the employer is attempting recovery of monies on termination of the employee's employment?	<p>The recovery has to be agreed between the parties (i.e. employer and employee).</p> <p>In any case, it would be legally questionable whether the employer would be entitled to claw-back those non-salary items (i.e. a sickness public allowance the payment of which is delegated to the company).</p>

6. Are there any specific issues not identified above that might impact recovery from salary in respect of:	Yes/No	Comment
• Erroneously overpaid salary/ bonus to an employee	YES	See comments to question 1
• Damage to company property	YES	See comments to question 1
• Corporate credit card being used for private expenditure	YES	See comments to question 1
• An educational or sign on bonus e.g. where the employee has not undertaken the course or delivered on the expectations that led to the sign on bonus	YES	See comments to question 1
• The employee has received a severance package and then is subsequently rehired	YES	See comments to question 1

Other methods of recovery for monies owed to an employer by an employee or ex-employee

7. Are there any other methods of recovery that an employer can use to recover overpayments from an existing employee/ex-employee?	No.
8. Are there any defences that an employee can use to prevent recovery dependent on the type of process used?	If there is no claw-back clause agreed with the company, the employee would be in the position to claim against the recovery. In any case, for this purpose, it would be necessary for the employee to file a judicial claim against the company.
9. Which Courts or Tribunals would have jurisdiction in such situations?	The Labour Courts will be the ones which have jurisdiction to review such situations as this kind of disputes are mainly derived from a debt arising in the employment relationship.
10. Are there any tactical issues that you might use in seeking to recover monies owed by the employee?	A tactical issue would be to set forth a claw-back clause in the employment agreement (also identifying the specific cases in which the employer could claw-back certain items from the employee's salary).

Factors to consider in seeking recovery

11. Are there any additional factors you need to consider in recovering monies from employees/ex-employees whether legal or otherwise? E.g. staff morale, ability to pay, impact on recruitment/works council of trade union issues	In these cases, we would also recommend to consider/ review the company's internal policies regarding claw-back or recovery practices (if any).
12. Is recovery/claw-back common practice in your jurisdiction or in particular sectors?	In our experience, claw-back would be a common practice in certain sectors (e.g. banking and finance sector).
13. Give examples of any interesting cases you have had or you know of	On a regular basis, we see examples of employees who request a loan to the company (or an advanced salary payment) and they terminate their employment contract before paying back the entire loan. In those cases, companies usually ask us if they could detract the pending amounts from the employee's last salary payment. Our advice is that the company could not detract any amounts if no claw-back clauses have been agreed with the employees in such respect.

SWE DEN



/ Fredrik Nordlöf
Partner
+46 709 25 25 15
fredrik.nordlof@delphi.se



/ Emmy Falck
Associate
+46 709 25 25 79
emmy.falck@delphi.se

Overview of recovery/claw-back of monies from an employee’s salary

1. Can an employer recover monies from an employee’s salary in the following situations:	Yes/No	Comment
<ul style="list-style-type: none">• It has erroneously overpaid salary or bonus to an employee	YES	<p>As a general comment, the possibilities for an employer to set off claims against salary are fairly limited and regulated in mandatory law as well as in applicable collective bargaining agreements.</p> <p>According to the Employer’s Set off Rights Act (SFS 1970:215), an employer may, as a starting point, only make a deduction from an employee’s claim for wage or other remuneration arising from employment (a wage claim) to set off a counterclaim held by the employer provided that the employee has given his/her consent (a so called voluntarily set off). If no consent is possible to obtain, the employer may only set off claims against salary which have arisen in conjunction with the employment and which are either based on an agreement pursuant to which the claim may be set off against the wage claim, or related to indemnification for loss, which the employee caused intentionally in the course of his or her duties (a so called enforced set off). An employer may only (by an enforced set off) set-off claims against the part of the salary that obviously exceeds the employee’s costs for sustaining herself/himself and her/his family, as well as for performance of any maintenance obligation to which he may be subject.</p> <p>A deduction of salary is only considered as a set off if the deduction is made towards an independent claim. Hence, it is not considered as a set off if the employer for example corrects a preliminary paid salary the subsequent month due to the employee’s absence from duty.</p> <p>In case of an incorrect payment to the employee, a set off would be at hand implying that the above described circumstances must be fulfilled.</p> <p>However, in order for the employee to be obligated to repay the payment, the employee</p>

		must have been in objectively bad faith when receiving the payment (condictio indebiti). If the employee was in objectively when receiving the payment and have consumed the payment, no obligation to repay the payment is at hand.
• The employee has caused damage to company property	YES	For damages intentionally caused by employee, the employer may as described above only during certain circumstances set off such amount against salary.
• The employee has used a corporate credit card (e.g. AMEX etc.) for private expenditure	YES	<p>It is possible for the employer to in forehand agree that private expenses shall be borne by the employee and therefore require the employee to repay/pay for the private expenditure.</p> <p>The employer may set off such claim against salary if agreed upon with the employee (by voluntarily set off) or if the circumstances for an enforced set off are fulfilled.</p>
• The employee has been paid an educational or sign on bonus	YES	The employer may only conduct a set off in accordance with what has been described above, and consequently as a main rule only if agreed upon with the employee.
• The employee has received a severance package and then is subsequently rehired	YES	In the same was as described above regarding education or sign on bonus.

2. How can an employer maximize its ability to make a recovery from salary?	<p>An employer can maximize its ability to make a recovery from salary with respect to specific counterclaims by entering into a written agreement (prior to the counterclaim has arisen) stating a right to recover salary (i.e. making it possible to do an enforced set off).</p> <p>Further, some collective bargaining agreements regulate additional possibilities enabling employer to conduct set offs.</p>
3. Are there any defences that an employee can use to prevent recovery from his/her salary?	<p>An employee may withdraw his/her consent for employer to set-off claims against salary at any time prior to the wage claim fall due for payment. In such a case, only enforced set off is possible.</p> <p>Also, deduction for taxes has priority over set off under the Employer's Set off Rights Act. The foregoing also applies to garnishment of wages for certain claims that have priority pursuant to the Enforcement of Claims Act, if the garnishment has been ordered prior to the wage claim fell due for payment.</p>
4. Are there any statutory considerations or other limitations, judicial or otherwise, that need to be taken into account in recovering monies from an employee's salary?	Yes, the Employer's Set off Rights Act and also in applicable collective bargaining agreements.
5. Are there any special considerations applicable if the employer is attempting recovery of monies on termination of the employee's employment?	NO

6. Are there any specific issues not identified above that might impact recovery from salary in respect of:	Yes/No
• Erroneously overpaid salary/ bonus to an employee	NO
• Damage to company property	NO
• Corporate credit card being used for private expenditure	NO
• An educational or sign on bonus e.g. where the employee has not undertaken the course or delivered on the expectations that led to the sign on bonus	NO
• The employee has received a severance package and then is subsequently rehired	NO

Other methods of recovery for monies owed to an employer by an employee or ex-employee

7. Are there any other methods of recovery that an employer can use to recover overpayments from an existing employee/ex-employee?	Not in addition to what has been mentioned above.
8. Are there any defences that an employee can use to prevent recovery dependent on the type of process used?	NO
9. Which Courts or Tribunals would have jurisdiction in such situations?	The district courts and the labour court.
10. Are there any tactical issues that you might use in seeking to recover monies owed by the employee?	NO

Factors to consider in seeking recovery

11. Are there any additional factors you need to consider in recovering monies from employees/ex-employees whether legal or otherwise? E.g. staff morale, ability to pay, impact on recruitment/works council of trade union issues

NO
Possible for the Trade unions to initiate consultations in case of alleged non-compliance by the employer.

12. Is recovery/claw-back common practice in your jurisdiction or in particular sectors?

Yes, it is fairly common, no difference with regard to particular sectors.

13. Give examples of any interesting cases you have had or you know of

No recent cases to report, however, according to Swedish case law, there is a restrictive view as to the possibilities for an employer to conduct set offs. Within such cases, the critical questions is usually whether the employer is able to proof that the conditions for a set off were fulfilled.

THE NETHERLANDS



/ Cara Pronk
Senior associate
+31 20 6789 503
pronk@vandoorne.com



/ Els de Wind
Partner
+31651506662
wind@vandoorne.com

Overview of recovery/claw-back of monies from an employee’s salary

1. Can an employer recover monies from an employee’s salary in the following situations:	Yes/No	Comment
<ul style="list-style-type: none">• It has erroneously overpaid salary or bonus to an employee	YES	<p>If the salary and/or bonus have been paid to the employee erroneously, the employer in principle has a valid claim vis-à-vis the employee based on article 6:203 Dutch Civil Code (undue payment / onverschuldigde betaling). The employer can in such case claim back the overpaid salary/bonus from the employee.</p> <p>Furthermore, the employer may in principle unilaterally set off the claim against the payable wage of the employee under the following conditions:</p> <ul style="list-style-type: none">• Set off of claims against payable wages is not possible for the part of the wages that is equal to the minimum wage of the employee. Meaning that the employee is entitled to receive the minimum wage every month (based on article 7 of the Minimum Wage and Minimum Holiday Allowance Act).• The amount which the employer withholds from the paid out wages on account of a seizure of a third person, must be deducted from the wages first.• The employer should inform the employee when it has the intention to unilaterally set off a claim against the payable wage of the employee, so prior to the actual set off. <p>Notwithstanding the foregoing, in case the employer overpaid the salary/bonus for several months or years, the employee could take the view that he has an acquired right to the payments and that he remains entitled to the higher salary/bonus. Whether there is an acquired right of an employee depends on all</p>

		<p>the facts and circumstances of the matter such as could the employee have understood sooner that he was paid too much, what amounts are involved, what was agreed, could the employer have noticed the overpayments sooner, what is the impact on the employee of returning the amounts, etc.</p> <p>See below under question 12 for special rules on claw-back of bonuses of statutory directors of public limited companies.</p>
• The employee has caused damage to company property	YES AND NO	<p>Whether damage to company property must be paid by the employer or the employee depends on the moment on which the damages were caused / occurred. Under article 7:661 Dutch Civil Code the employee is in principle not liable for damages to company property that have arisen during working hours unless the damage is a consequence of intent or conscious recklessness of the employee, which is not easily deemed present.</p> <p>If the employee has caused damage to company properties outside working hours, it is a bit more nuanced. If the damage does not arise during the execution of the work, the main rule of article 7: 661 of the Dutch Civil Code will in principle not apply. In that case, the employer can have a valid claim (by reason of a wrongful act, breach of contract (this will depend on what is agreed upon between parties) or based on article 7:611 of the Dutch Civil Code (diligent employeeship / goed werknemerschap))against the employee and the employer may unilaterally set off the claim against the payable wage under the conditions as set out under the aforementioned bullet point.</p>
• The employee has used a corporate credit card (e.g. AMEX etc.) for private expenditure	YES	<p>Assuming private expenditure of a corporate credit card is not allowed for, in case the employee uses such credit card for private purposes, the employee is acting unlawfully against the employer. The employer can claim the amounts involved back from the employee. Furthermore, the employer may unilaterally set off the claim against the payable wage of the employee under the conditions as set out under the first bullet point of question 1.</p>

• The employee has been paid an educational or sign on bonus	YES	<p>It can under circumstances be possible to claim back from an employee an educational or sign on bonus. Repayment of these bonuses will have to be set out in writing very clearly and agreed on with the employee on beforehand. For repayment of educational bonuses there are certain particular conditions which follow from case law. In short: the repayment amount and timing has to be reasonable and proportionate in relation to the education followed. Usually the repayment amount decreases proportionally over time (months or years).</p>
• The employee has received a severance package and then is subsequently rehired	NO	<p>If the employer has a valid claim vis-à-vis an employee for repayment of an educational or sign on bonus, these can be set off against the payable wage of the employee under the conditions as set out under question 1 first bullet point.</p> <p>Assuming the employee does not agree to repay the severance amount at the start of the new employment relationship, the employer will most likely only have a valid claim vis-à-vis the employee for the amount of the severance payment in case repayment of the severance amount was agreed in the settlement agreement between parties (if any settlement agreement was agreed). In all other circumstances in our view repayment will probably be difficult.</p> <p>Furthermore, it is not possible to set off the claim against the payable wage of the employee, unless the employee consents.</p>

2. How can an employer maximize its ability to make a recovery from salary?

Any provision granting the employer a more extensive right of set off than stipulated by Dutch law is voidable, which means that there is no use in putting a right of set off in writing.

3. Are there any defences that an employee can use to prevent recovery from his/her salary?

The employee can (i) take the view that there is no valid claim on the side of the employer (these reasons depend on the claim involved) and/or (ii) take the point of view that one or more of the conditions for set off (see above under question 1 first bullet point) are not met.

4. Are there any statutory considerations or other limitations, judicial or otherwise, that need to be taken into account in recovering monies from an employee's salary?

Under Dutch law an employer can set off a claim against an employee's salary based on article 7:632 of the Dutch Civil Code.

At the end of the employment agreement the employer is entitled to set off his obligation to pay wages against all claims he has against the employee. During the employment agreement the employer may only set off his debts resulting from the obligation to pay wages against the following claims against the employee: (i) claims for damages that the employee has to pay to the employer; (ii) claims for fines which the employee is indebted to the employer provided that the employer hands over written evidence indicating the amount of each fine as well as the moment on which it was imposed and the reason for imposing it, mentioning in addition the contractual provision that has been violated; (iii) claims resulting from advance payments of wages, paid by the employer to the employee in money, provided these payments were confirmed in writing; (iv) claims for amounts the employee has received without being entitled to such amounts; (v) claims related to the rent of a house or another space, of a parcel of land or of equipment, machines or tools which have been used by the employee and which have been leased out by the employer to the employee under a written agreement. For all other situations the employer wishes to set off claims against the payable wage of the employee, the employer should have the permission of the employee.

As stated under question 1 first bullet point the set off of claims against payable wages is not possible for the part of the wages that is equal to the minimum wage of the employee. Meaning, that the employee is entitled to the minimum wage every month (based on article 7 of the

Minimum Wage and Minimum Holiday Allowance Act). The amount which the employer withholds from the paid out wages on account of a seizure of a third person, must be deducted from the wages first.

The employer should inform the employee when it has the intention to unilaterally set off a claim against the payable wage of the employee, so prior to the actual set off.

Any provision granting the employer a more extensive right of set off than stipulated by Dutch law is voidable, which means that there is no use in putting a right of set off in writing.

At the end of the employment agreement the employer is entitled to set off his obligation to pay wages against all claims he has against the employee considering the conditions as set out under question 4.

5. Are there any special considerations applicable if the employer is attempting recovery of monies on termination of the employee's employment?

6. Are there any specific issues not identified above that might impact recovery from salary in respect of:

- Erroneously overpaid salary/ bonus to an employee
- Damage to company property
- Corporate credit card being used for private expenditure
- An educational or sign on bonus e.g. where the employee has not undertaken the course or delivered on the expectations that led to the sign on bonus
- The employee has received a severance package and then is subsequently rehired

Yes/No Comment

NO N/A

NO N/A

NO N/A

NO N/A

NO N/A

Other methods of recovery for monies owed to an employer by an employee or ex-employee

7. Are there any other methods of recovery that an employer can use to recover overpayments from an existing employee/ex-employee?

The (ex)employer should summon the (ex)employee to pay back the overpayment. In case the (ex)employee does not respond to that request, the (ex)employer could start legal proceedings to recover the overpayments and statutory interest over the amount involved.

If the (ex)employer wishes to collect a claim, but does not yet have a court ruling, there is a possibility to secure opportunities to recover a claim without having to wait for a judgement in proceedings on the merit of a case. The (ex) employer can freeze certain assets of the (ex)employee before going through a lengthy and costly debt collection procedure. Especially if there is a reasonable fear that the debt may be irrecoverable as soon as the debtor has been served with a summons, it can be wise to take such provisional measures first. As soon as a court has ruled in the main proceedings on the merit, the provisional seizure will automatically become an executory seizure (executoriaal beslag). This means that with the court judgment in favour of the (ex)employer, regardless of whether or not the (ex)employee has appealed, the attachment can be enforced and for example seized bank assets will have to be paid out to the sum of the allocated claim including costs and statutory interest.

8. Are there any defences that an employee can use to prevent recovery dependent on the type of process used?

The employee may ask the court who gave the permission to seize, to lift the seizure on the grounds that the claim is prima facie invalid. This can lead to liability of the attaching party (the (ex)employer). However, it is not often concluded by the court that a claim is evidently invalid, especially not if the claim was substantiated by sufficient evidence.

9. Which Courts or Tribunals would have jurisdiction in such situations?

In principle, the County Court (kantonrechter) is competent to hear a claim of an employer or an employee involving overpayment/repayment of salary.

In case of proceedings regarding the provisional seizure and executory seizure, the Court of first instance (rechtbank) is competent to hear the matter.

10. Are there any tactical issues that you might use in seeking to recover monies owed by the employee?

In case the employer has a claim that he can unilaterally set off against the salary of the employee on the bases of article 7:631 DCC, the employer does not need the permission of the employee. The employer can therefore set off parts of the claim against the salary spread out over a couple of months, making the set off more reasonable and better enforceable.

Factors to consider in seeking recovery

11. Are there any additional factors you need to consider in recovering monies from employees/ex-employees whether legal or otherwise? E.g. staff morale, ability to pay, impact on recruitment/works council of trade union issues

The recovery of monies can have a negative effect on the relationship with the employee/employees. While employees are usually bound by a confidentiality obligation, this does usually not prevent employees from talking about this type of issue. Therefore recovering monies can have a negative impact on staff morale and eventually on recruitment. The risk is not greater than in any other case where measures are taken by an employer which negatively impact an employee, such as dismissal.

12. Is recovery/claw-back common practice in your jurisdiction or in particular sectors?

Recovery of overpayments as described in the above is reasonably common in The Netherlands.

Based on article 2:135 (8) Dutch Civil Code, a public limited company (NV) is furthermore entitled to recover a variable payment paid after 1 January 2014 from its statutory director(s) in full or in part if payment thereof was made on the basis of incorrect information on the realization of the underlying goals or incorrect information on the circumstances under which the bonus was paid.

Special rules regarding bonuses and claw-back provisions apply for financial institutions, which we will not cover in this questionnaire.

13. Give examples of any interesting cases you have had or you know of

Our firm dealt with a case where an employee had been overpaid a small amount for years. The employee at first took the position that in all reasonableness it could not be expected of her that she noticed the overpayments. She took the view that she was entitled to keep the already paid payments and that she had a right to continuation of these amounts. We were able to gather evidence from which it became clear that she had explicitly asked for this overpayment a couple of years earlier and that this request was turned down by the employer. The employee had to return part of the amounts paid following a settlement.

UK



/ Kevin McCavish
Partner
+44 (0) 118 965 8802
kevin.mccavish@shoosmiths.co.uk

Overview of recovery/claw-back of monies from an employee’s salary

1. Can an employer recover monies from an employee’s salary in the following situations:	Yes/No	Comment
<ul style="list-style-type: none">• It has erroneously overpaid salary or bonus to an employee	YES	<p>If there is a clear contractual provision in the employee’s contract of employment then an employer is generally able to recover any monies from an employee’s salary that have been overpaid to an employee for example as a consequence of an administrative error, a payroll processing delay, or fraud by the worker.</p> <p>Without a contractual provision or other agreement by the worker allowing the deduction, any deduction from a worker’s wages will be in breach of contract. Employees will be able to bring breach of contract claims in the civil courts in respect of that breach and in the employment tribunal (i.e. the UK Labour Courts) if their employment has terminated.</p> <p>In many cases, however, the easiest option for an employer would be to recover an overpayment by making deductions from future payments of wages or salary over a period of time. Where the purpose of a deduction is to recover an overpayment of wages or an overpayment in respect of expenses, the unlawful deductions from wages regime in the Employment Rights Act 1996 (ERA 1996) does not apply – see further below. This regime is the one that most employees would use to recover monies deducted from salary as there is generally no charge for such a claim.</p> <p>Alternatively, the employer can bring legal proceedings relying on the common law remedy of restitution based on a mistake of law or fact to recover the overpayment in the civil courts (which would be particularly useful where the employee is no longer with the employer). In overpayment cases, restitution prevents the unjust enrichment of the worker at the expense of the employer.</p>

The employer should act as quickly as possible once the overpayment is discovered. This is because the worker can rely on the “change of position” defence. The longer the delay between the overpayment and the discovery of the mistake, the less likely the employer will be able to recover the money.

Recovery by way of counterclaim or set-off

Where an employee brings a claim against the employer, and an overpayment is still outstanding, the employer should be able to recover the overpayment by way of counterclaim or set-off.

Counterclaim

Counterclaims can be used to recover overpayments where an employee brings a claim for breach of contract against their employer.

A breach of contract claim can only be brought by an employee (not worker) in the employment tribunal where it arises or exists on the termination of employment.

An employer cannot bring a free-standing breach of contract claim against a worker in the employment tribunal (as the rules do not allow it to do so) but has to pursue its claim in the County or High Court. Where an employee brings a breach of contract claim, the employer can counterclaim against the employee in the Employment Tribunal. (Article 4, Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623).)

Where a worker brings any other tribunal claim (for example, an unfair dismissal claim) the employer is only able to defend that claim; the employer cannot counterclaim for breach of contract.

A counterclaim in the employment tribunal must be brought within 28 days of the day on which the employer receives a copy of the employee’s breach of contract claim. However, once presented, the claim can proceed even if the employee’s claim fails, settles or is withdrawn. It can also be effective to recover the full amount of the overpayment, regardless of the amount of the employee’s claim. This is not the case with the defence of set-off.

Set-off

Employers can rely on the defence of legal set-off to an individual’s breach of contract claim to effectively recover an overpayment of wages in both the employment tribunal and the civil courts. Set-off either eliminates an employer’s liability to the worker in respect of the worker’s claim, or reduces it by the amount of the overpayment.

Unlawful deductions from Wages

The unlawful deductions from wages regime is a statutory regime which aims to protect the sanctity of a workers wages.

An unlawful deduction from wages would occur where an employer makes a deduction from a worker’s wages to recover money owed to it unless either of the following apply:

- The deduction is required or authorised by statute or a provision in the worker’s contract;
- The worker has given their prior written consent to the deduction (S13 of the ERA 1996).

The Exception

The unlawful deductions regime does not apply to any deduction by an employer from a worker’s wages where the purpose of the deduction is the reimbursement of:

- An overpayment of wages;
- An overpayment in respect of expenses incurred by the worker.
(Section 14(1), ERA 1996.)

The exception under section 14(1) allows an employer to make a deduction from a future payment of wages to a worker where the purpose is to recover an overpayment, without it being an unlawful deduction under section 13 of the ERA 1996. It applies regardless of the reason why the employer overpaid the worker. If the deduction falls within the exception, an employment tribunal does not have jurisdiction to hear any unlawful deduction from wages claim from the worker.

However, the error must be the overpayment in order to rely on the Exception. If there was a mistake in an employment contract and the employee is paid in accordance with that contract then the Exception rule will not apply. Under those circumstances, if the employee knew that the mistake had been made in their contract then the employer may be able to recover the monies by a civil claim for restitution.

What are “Wages”?

The term “wages” is defined widely and includes any sum payable to the worker in connection with their employment, including:

- Any fee, bonus, commission, holiday pay or other emolument referable to the worker’s employment, whether payable under their contract or otherwise.
- The following statutory payments:
 - statutory sick pay;
 - statutory maternity pay;
 - statutory paternity pay;
 - statutory adoption pay; and
 - statutory shared parental pay.
- Certain statutory payments paid in lieu of wages. These are:
 - guarantee payments;
 - payments for time off to look for work or to arrange training;
 - payments for time off for antenatal care and to accompany someone to antenatal care; and
 - payments for time off for trade union duties.
- Sums paid during suspension on medical grounds or maternity grounds.

The following payments are specifically excluded from the definition of wages:

- Advances of wages or payments under a loan agreement between the worker and employer. However section 13 of the ERA 1996 will apply to any deduction made from the worker’s wages in respect of any such advance.
- Payments in respect of expenses incurred by the worker in carrying out their employment.
- Payments by way of a pension, allowance or gratuity in connection with the worker’s retirement or as compensation for loss of office.
- Payments in relation to the worker’s redundancy.
- Any payment to a worker other than in their capacity as a worker.

What are expenses?

Expenses are not defined in the ERA 1996. However, Section 14(1)(b) provides that the expense must be incurred by the worker in carrying out their employment. Therefore reimbursement of a payment incurred outside of a worker’s employment would not be covered.

Effect of deduction

Once an employment tribunal orders an employer to repay an amount that has been deducted unlawfully, the employer cannot attempt to recover the money later in another way, for example as recovery of an overpayment to the worker. This is because the purpose of the statutory provisions is to protect the sanctity of wages, regardless of what debts may separately be owed by the worker.

Effect of the Exception

If it is shown that an overpayment has been made, the deduction falls outside the unlawful deduction from wages regime and an employment tribunal has no jurisdiction to decide a claim, even if the deduction is unlawful i.e. in breach of contract.

If the employment tribunal has no jurisdiction to hear the claim under the unlawful deductions regime because an overpayment has been made and the worker disputes that overpayment, the worker has to claim for breach of contract. The claim must be brought in the civil courts if their employment is continuing or in the employment tribunal if the claim arises or is outstanding on the termination of their employment.

• The employee has caused damage to company property	YES	<p>If the employees contract includes a specific contractual provision that allows for the recovery in such situation or if the employee agrees to the deduction then yes.</p> <p>If there is no contractual provision and the employee does not agree to the deduction then the unlawful deductions from wages provisions would take effect meaning that a deduction by the employer from salary would allow the worker to make a claim for an unlawful deduction from wages claim. If there was a finding that an unlawful deduction from wages had been made then the employer would not be able to bring a breach of contract claim. Rather the employer would be better advised to pay the deducted money back and bring a county/high court claim for recovery of the same.</p>
• The employee has used a corporate credit card (e.g. AMEX etc.) for private expenditure	YES	<p>Same as above. If the employees contract includes a specific contractual provision that allows for the recovery in such situation or the employee agrees or the employee agrees then yes. Also in some cases companies when allocating a corporate credit card would attach specific terms to its use e.g. not for personal use and recovery of sums from salary for personal use. If there were no such contractual provisions then the position would be the same as above regarding damage to property.</p>
• The employee has been paid an educational or sign on bonus		<p>Same as above. In most cases the educational or sign on bonus would be subject to specific contractual terms e.g. if the employee left the employer before a certain specified period of time.</p>

• The employee has received a severance package and then is subsequently rehired	YES	<p>Some organisations (particularly in the public sector) in the UK specifically provide in their termination agreements (i.e. Severance Agreements) that any enhanced/ex-gratia packages (i.e. above strict contractual and statutory entitlements) are re-payable if the employee is re-hired within a specified time frame e.g. 12 months. If the settlement agreement specifically makes provision to that effect then it should be enforceable. In the absence of such a provision then it is unlikely that the employer will be able to recover that money either from salary or in a claim for damages. In all cases, the employer would not be able to recover the employees contractual or statutory payments (e.g. notice or a statutory redundancy payment) made at the time that the employee was made redundant or terminated.</p>
2. How can an employer maximize its ability to make a recovery from salary?		<p>The main way to ensure that an employer is fully protected is to have express contractual provisions in its employment contracts giving it the ability to deduct monies from salary in certain circumstances. If it is not in the contract then if e.g. a loan is granted or an employee is given a corporate credit card then the accompanying terms of that loan etc should make it clear in what circumstances monies can be repayable either from salary or otherwise e.g. if the employee has left the organisation.</p>
3. Are there any defences that an employee can use to prevent recovery from his/her salary?		<p>Yes; see above but these include:-</p> <ul style="list-style-type: none">• The unlawful deduction from wages provisions;• The change of position defence i.e. the employee has spent all the money.

<p>4. Are there any statutory considerations or other limitations, judicial or otherwise, that need to be taken into account in recovering monies from an employee's salary?</p>	<p>YES</p>	<p>The unlawful deductions from wages provisions and change of position defence.</p> <p>Consistency – it is important to follow procedures consistently so as to avoid claims of e.g. discrimination.</p> <p>Tax issues – there may need to be a balancing requirement to take into effect the overpayment and subsequent recovery.</p>
<p>5. Are there any special considerations applicable if the employer is attempting recovery of monies on termination of the employee's employment?</p>		<p>The same provisions would apply but you could insert into the settlement agreement the fact that the employer will be able to deduct from the settlement sum any monies owed to it by the employer. This would provide a lawful basis for recovering any monies owed.</p>

<p>6. Are there any specific issues not identified above that might impact recovery from salary in respect of:</p>	<p>Yes/No</p>	<p>Comment</p>
<ul style="list-style-type: none"> • Erroneously overpaid salary/ bonus to an employee 		<p>See above</p>
<ul style="list-style-type: none"> • Damage to company property 		<p>See above. If the damage is not accidental i.e. wilful destruction of property then the employer might want to consider reporting matters to the police.</p>
<ul style="list-style-type: none"> • Corporate credit card being used for private expenditure 		<p>See above. If there is fraud then the matter may be reported to the police.</p>
<ul style="list-style-type: none"> • An educational or sign on bonus e.g. where the employee has not undertaken the course or delivered on the expectations that led to the sign on bonus 		<p>See above. It also depends very much on the terms on which the educational or sign on bonus was granted. If an employer wishes to attach terms to the bonus etc. then any breach of those terms would allow for recovery if the terms allow for that. If there are no terms attached that the employee was in breach of then the employer would have no lawful reason for recovery of the same. Likewise, with an educational payment it is common to include terms that it becomes re-payable if the employee leaves the organisation within a specified period of time or if the employee does not complete or pass the course.</p>
<ul style="list-style-type: none"> • The employee has received a severance package and then is subsequently rehired 		<p>Employees may argue that clawback of bonuses is a penalty or a restraint of trade depending on the reasons for the clawback. E.g. if an employee's right to receive post-termination commission or bonus was subject to a term that payments would cease immediately if the employee moved to another employer in the same industry then that could be an unlawful restraint of trade.</p>
		<p>See above.</p>

Other methods of recovery for monies owed to an employer by an employee or ex-employee

7.

Are there any other methods of recovery that an employer can use to recover overpayments from an existing employee/ex-employee?

Yes, see above. These would include use of the civil courts and potentially the criminal courts.
8.

Are there any defences that an employee can use to prevent recovery dependent on the type of process used?

Yes, see above.
9.

Which Courts or Tribunals would have jurisdiction in such situations?

Employment tribunals and the civil courts e.g. County and High Courts. Also the Criminal courts can order restitution/compensation in certain circumstances.
10.

Are there any tactical issues that you might use in seeking to recover monies owed by the employee?

If there is an issue of theft or criminal damage then the fear of a criminal prosecution might be a powerful incentive to repay any monies owed. Depending on the private use in question some types of personal expenditure the organisation or the individual might not want aired in public.

Factors to consider in seeking recovery

11.

Are there any additional factors you need to consider in recovering monies from employees/ex-employees whether legal or otherwise? E.g. staff morale, ability to pay, impact on recruitment/works council of trade union issues

Yes, all of these. Also tax issues might come into play where there has been an unintentional overpayment of salary.
12.

Is recovery/claw-back common practice in your jurisdiction or in particular sectors?

Yes , although organisations tend to weigh up the cost of recovery especially if the employee is no longer with the organisation. Some sectors are more interested in claw back e.g. financial services sector where they are subject to remuneration codes or board members generally where reputational issues are at stake.
13.

Give examples of any interesting cases you have had or you know of

An employee of a client was contractually entitled to a guaranteed minimum annual bonus of £150,000 for the first year of his employment. When the bonus was due he was accidentally sent a letter stating that his bonus would be £155,000. However, the client actually paid him £150,000 and then, mistakenly, a further £155,000. The client successfully sought to reclaim the £155,000 as an error. The employee attempted to argue that the letter was a further payment to his existing contractual entitlement and that he continued to work for them when he could have joined a competitor. That was held not to be a significant change of position.

NOTES

[illegible]

