

Labor and Employment Law Information Memo

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THE WAGE THEFT PREVENTION ACT TAKES EFFECT ON APRIL 9, 2011

On December 13, 2010, former New York Governor David Paterson signed into law the Wage Theft Prevention Act (the "Act"), which imposes new notification and recordkeeping requirements on employers, significantly expands the Department of Labor's enforcement powers, and increases employers' potential liability for violations of the Labor Law. The Act goes into effect on April 9, 2011, so employers have less than three months to ensure that they are in compliance.

Written Notice Requirements

The Labor Law has long required employers to provide employees with certain information about their pay, but the Act expands the scope of this requirement. Under the Act, each employee must be given – at time of hire and annually on or before February 1 of each year – written notice of the employee's wage rate, regular pay dates, overtime rate (if applicable), the basis of the employee's wage rate (per shift, per hour, salary, etc.), the existence of any minimum wage allowances (e.g., tip, meal or lodging), the employer's name (and any d/b/a name), telephone number, and physical and mailing address. Importantly, the statutory language gives the Agency significant latitude to add further requirements to the written notice. The Commissioner of Labor is authorized under the Act to require an employer to provide any other information that the Agency deems "material and necessary." At this point, the Agency has not issued any regulations imposing additional requirements. In addition, a new written notice must be provided to an employee at least seven days in advance of any change by an employer, unless the change is reflected on the employee's paystub. The written notice must be provided in English "and in the Employee's primary language."

Written Acknowledgment

Every time a written notice is provided to an employee, the employer must obtain the employee's signed and dated written acknowledgment, which must be maintained for at least six years. The written acknowledgment also must contain certain required information, including an affirmation by the employee that he or she accurately identified his or her primary language to the employer and that the notice provided by the employer was in the primary language identified. The acknowledgment must also adhere to any "requirements" established by the Agency as to "content and form." At this time, the Agency has not published any additional requirements. Like the written notice, the acknowledgment must be in English and the employee's primary language. The Department of Labor is required to prepare sample dual-language "templates" that may be used to satisfy the notice and acknowledgment requirements, but they have not yet been published.

Wage Statements

The Labor Law currently requires employers to provide each employee with a pay stub that includes information relating to gross wages, deductions, and net wages. The new law requires detailed information about how the wages were calculated, including any allowances, the rate and basis of the pay, and the dates of work covered

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by the payment. For employees who are eligible for overtime, additional information must be included on each pay stub, including a statement of the regular and overtime rate of pay, and the number of hours worked at each rate. Piece rate workers must be notified on the pay stub of the applicable piece rate and the number of pieces completed at the applicable rate.

Expanded Remedies

There is a significant increase in potential liability for Labor Law violations under the Act. Employees have the right under the Act to bring a civil action in court for violations of the requirements to provide an employee with written notice of wages and with a compliant pay stub. An employee may recover statutory damages, attorney's fees and costs in connection with such a claim. Additionally, the Department of Labor is authorized to bring a civil or administrative action against an employer and assess penalties of either \$50 or \$100 per week (depending on the violation), with no cap on the penalty amount that may be assessed. Employers and certain "officers and agents" may additionally face criminal liability for failing to maintain payroll records. This criminal liability is extended by the new law to include LLCs and partnerships.

The new law also greatly expands the remedies available where an employer fails to pay wages and benefits to employees. Previously, an employee who prevailed in a court action alleging a failure to pay wages received the total amount of the underpayment, costs, attorney's fees, and, in some instances, liquidated damages equal to 25% of the underpayment. Under the new law, an employee can recover, in addition to the foregoing, prejudgment interest and liquidated damages equal to the 100% of the total wages owed.

The Act also permits the Department of Labor to require an employer who has been found to have violated the law to post in the workplace (on 8 ½ x 11 inch paper) a notice of the various violations committed by the employer. Such a posting must be affixed for up to one year in an area visible to employees. Additionally, where the Agency determines that an employer willfully failed to pay wages to an employee, the employer may be required to post a notice "visible to the general public" regarding the violations.

Anti-Retaliation Protection

Several key changes to the Labor Law's anti-retaliation protections have been made, such as requiring "any person" found to have engaged in unlawful retaliation to pay liquidated damages of up to \$10,000, along with costs and attorney's fees. Additional forms of damages may now be awarded, including front pay in lieu of reinstatement to employment. An employee can also pursue a civil action in court to assert unlawful retaliation. Retaliation is now listed as a class B misdemeanor.

Although the Act does not take effect until April 9, 2011, employers should begin reviewing their payroll practices to determine what they will have to change to comply with the law's various requirements. Given the new notice requirements, enhanced penalties, and ability to recover attorney's fees, we are likely to see an increase in claims as a result of the enactment of the Act.

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