



Labor and Employment Law Information Memo

September 2009

Bond, Schoeneck & King, PLLC

New York

Albany ■ 518-533-3000
Buffalo ■ 716-566-2800
Ithaca ■ 607-330-4000
Long Island ■ 516-267-6300
New York City ■ 646-253-2300
Oswego ■ 315-343-9116
Rochester ■ 585-362-4700
Syracuse ■ 315-218-8000
Utica ■ 315-738-1223

Florida

Bonita Springs ■ 239-390-5000
Naples ■ 239-659-3800

Kansas

Overland Park ■ 913-234-4400

NEW YORK EMPLOYERS CONFRONT A HOST OF NEW LEGISLATIVE REQUIREMENTS

While the terms “stalemate” and “dysfunction” were most often used to describe the recent legislative session in Albany, several important pieces of employment legislation were passed. These new laws, which include amendments to the Labor Law and the Human Rights Law, will have an impact on virtually all New York employers.

NY Labor Law Amendments

1. *Advanced Written Notice of Pay Rates*

Section 195 of the New York Labor Law has been amended to require employers to provide written notice of the employee’s rate of pay, overtime rate (for non-exempt employees), and regular pay date. These new requirements apply to employees hired on or after October 26, 2009, which is the effective date of the amendment. The stated purpose of the new law is to assist employees in determining their overtime pay and to ensure that employees understand the basis for, and timing of, the payment of their wages.

The new law also requires employers to obtain a written acknowledgement from each newly-hired employee that he or she has received the required pay information. The acknowledgement must conform to standards established by the New York Commissioner of Labor. The Commissioner has not yet issued those standards.

In addition to this new notice requirement, the New York Labor Law already imposes various notification requirements on New York employers, including:

- Prior to this statutory amendment, New York employers were required to provide all employees, at the time of hire, with notice of their regular wage rates and pay date. No individual written acknowledgement from the employee was required.
- The Department of Labor has consistently required employers to provide notice of any change in pay rates or pay dates in advance of the start of the payroll period in which the change would be effective.

BS&K publications are for clients and friends of the firm and are not a substitute for professional counseling or advice. For information about our firm, practice areas and attorneys, visit our interactive web site, www.bsk.com.

Attorney Advertising
© 2009 Bond, Schoeneck & King, PLLC
All Rights Reserved

Printed on recycled paper

BOND, SCHOENECK & KING, PLLC
ATTORNEYS AT LAW ■ NEW YORK FLORIDA KANSAS



- The terms of employment between an employer and a commissioned salesperson must be in writing and signed by both parties. The agreement must include a description of how wages, salary, drawing accounts, commissions, and all other monies earned and payable will be calculated and paid.
- Employees must be notified in writing or by public posting of the employer's policy on sick leave, vacation, personal leave, holidays, and work hours.
- In the event of employment termination, the employer must notify the employee of the date of termination and the exact date on which the employee's benefits end. This notice must be in writing and provided within 5 working days after termination.

2. *More Vigorous Enforcement Provisions*

On August 26, 2009, Governor Paterson signed another amendment to the New York Labor Law, which is designed to deter employers from violating the law.

First, Sections 198 and 663 of the Labor Law were amended to authorize the Commissioner of Labor, in court actions and administrative proceedings to collect wage underpayments, to assess, against an employer, liquidated damages equal to 25% of the amount of the underpayments, unless the employer can demonstrate that it had a "good faith" belief that it was complying with the law. Similarly, in a court action commenced by an employee, liquidated damages are available, unless the employer establishes its good faith defense. Prior to the amendment, the employee had the burden to prove that the underpayment was "willful" in order to collect liquidated damages. By shifting the burden of proof from the employee to the employer, the amendment is designed to make it easier for the Commissioner to impose, and the employees to recover, liquidated damages. The statute already authorizes a court to award attorneys' fees to a prevailing employee.

Second, the new legislation expands the protections against retaliation. Section 215 of the Labor Law, which

prohibits discrimination or retaliation against employees who complain about wage underpayments and other labor law violations, was amended to increase minimum civil penalties for illegal retaliation from \$200 to \$1,000, and maximum penalties from \$2,000 to \$10,000. Further, the Commissioner has new authority to order reimbursement for lost compensation and to impose liability for retaliation on partnerships and limited liability companies.

The amendment also expands the scope of prohibited retaliation to protect employees who: (a) provide information to the Commissioner or his or her representative; (b) exercise rights afforded under the labor laws; and (c) receive a favorable determination from the Commissioner against their employer. It should be noted that state employees and employees of any municipal subdivisions or departments of the State are now specifically excluded from protection under this section of the Labor Law.

The amendments to Labor Law Sections 198, 215, and 663 take effect on November 24, 2009 and apply to violations occurring on or after that date.

New York Human Rights Law Amendments

1. *Civil Penalties in Employment Discrimination Matters*

Effective July 6, 2009, the New York Human Rights Law was amended to provide for civil fines and penalties, payable to the State, of up to \$50,000 for unlawful acts of employment discrimination, and up to \$100,000 for willful, wanton, or malicious discrimination. Previously, the imposition of civil fines was limited to cases of housing discrimination. With the enactment of the new law, these penalties may now be assessed in all cases of employment discrimination, which account for approximately 80% of the cases adjudicated by the New York Division of Human Rights (the "Division"). Under the legislation, an employer with fewer than 50 employees may be allowed to pay the civil fines and penalties in installments.

The Division has described the purpose of the amendment as follows:

[This amendment will] greatly advance the Division's mission to exercise the police power of the State for the protection of the public welfare, health and peace of the people of this State, and in fulfillment of the provision of the constitution of this State concerning civil rights. N.Y. Exec. Law § 290.1. The fines imposed will further the goal of equal opportunity in New York State by acting to deter and reduce discrimination on the basis of race, color, creed, national origin, sex, age, disability, sexual orientation, marital status, military status, and other protected categories.

The new civil fines do not replace or limit the other relief that may be awarded to a prevailing complainant in a Division proceeding. The statute already provides for affirmative relief from the employer (*e.g.*, an order that the individual be hired, promoted or reinstated by the employer), backpay, and other compensatory damages (*e.g.*, emotional distress damages). Punitive damages and attorneys' fees are not currently payable to a prevailing complainant in a Division administrative proceeding. These remedies, however, may be available to a prevailing plaintiff in a court action. Further, there is pending legislation in New York that would also allow individuals to recover punitive damages and reasonable attorneys' fees in a Division proceeding.

There is presently little guidance on how the new civil penalties would be applied by the Division. The Division promises future guidelines. It may be that the existing standards applied in housing discrimination cases will be considered relevant. In housing discrimination cases, the factors that determine if civil fines and penalties are appropriate are: 1) whether the respondent previously committed unlawful housing discrimination; 2) the respondent's financial resources; 3) the degree of respondent's culpability; and 4) the goal of deterrence.

To avoid the risk of potential civil fines, employers should renew their efforts to:

- maintain and enforce a comprehensive anti-discrimination policy;
- distribute the policy to all employees;
- provide an effective complaint procedure; and
- train all employees in the law and the employer's policies.

2. *Victims of Domestic Abuse*

Finally, effective July 7, 2009, the Human Rights Law was expanded to prohibit employers from discriminating against an individual because he or she is an actual, or perceived, victim of domestic violence or stalking. As a result, the New York Human Rights Law now prohibits employers from discriminating in any aspect of employment against individuals on the basis of "age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status."

According to the sponsor of the legislation, this amendment was necessary because many women who are abused lack financial resources for themselves and their children. Escaping an abusive relationship often depends on financial independence, which means finding and keeping a job. Further, according to the legislative sponsors, it is not unusual for a victim of domestic violence to be terminated from her job or demoted because she needs time off or flexible hours as a protective measure. By making it unlawful for an employer to discriminate against victims of domestic violence, the goal of the legislation is to help ensure the safety and the economic viability of these victims.

Employers should also be aware that another existing New York law provides additional protection to victims of domestic violence and other crimes. Section 215.14 of the New York Penal Law requires employers to provide employees with an unpaid leave to appear as a witness, consult with the district attorney, or exercise the employee's statutory rights as the victim of, or witness to, a crime. Obviously, a victim of domestic violence may need one or more of these types of leave. To use this leave, the employee may provide notice of the need for leave at any time prior to the actual day of leave. Employers are permitted to ask the party who sought the attendance or testimony of the employee to provide verification of the employee's service. Penalizing or discharging an employee for absences by reason of a required appearance as a witness in a criminal proceeding, or consultation with the district attorney, or exercise of his or her rights as provided under the law constitutes a class B misdemeanor.

If you have questions about this Information Memo, please contact:

In Buffalo / Niagara Falls, call 716-566-2800 or e-mail:

Robert A. Doren	rdoren@bsk.com
Daniel P. Forsyth	dforsyth@bsk.com
James J. Rooney	jrooney@bsk.com

In the Capital District, call 518-533-3000 or e-mail:

John M. Bagyi	jbagyi@bsk.com
Nicholas J. D'Ambrosio	ndambrosio@bsk.com

In Central New York, call 315-218-8000 or e-mail:

R. Daniel Bordoni	dbordoni@bsk.com
Louis P. DiLorenzo	ldilorenzo@bsk.com

On Long Island, call 516-267-6300 or e-mail:

Terry O'Neil	toneil@bsk.com
--------------	----------------

In New York City, call 646-253-2300 or e-mail:

Louis P. DiLorenzo	ldilorenzo@bsk.com
Ernest R. Stolzer	estolzer@bsk.com

In the Rochester Region, call 585-362-4700 or e-mail:

James Holahan	jholahan@bsk.com
Peter A. Jones	pjones@bsk.com

Announcing Our New Labor and Employment Law Blog

Bond, Schoeneck & King's Labor and Employment Law, Employee Benefits and Executive Compensation, and Immigration Law Practice recently launched the first management-focused online blog dedicated to labor and employment law issues in New York State. The blog is at www.nylaborandemploymentlawreport.com. The New York Labor and Employment Law Report is dedicated to current issues affecting both large and small employers with operations in New York State.

Current blog postings include:

- ***Mandatory E-Verify Participation for Certain Federal Contractors is Effective September 8, 2009***
- ***Yet Another Amendment to the New York Labor Law***
- ***New York Insurance Law Changes Extend Continuation Coverage and Dependent Coverage Under Insured Medical Plans***
- ***What Impact on Municipal Labor and Employment Issues? New York's Government Reorganization and Citizen Empowerment Act***

BS&K invites you to visit our New York Labor and Employment Law Report. You may also subscribe via RSS feed/email alert at www.nylaborandemploymentlawreport.com.