



Labor and Employment Law Information Memo

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NYSDEL: EMPLOYERS CAN USE THEIR OWN FORMS TO COMPLY WITH NEW YORK LABOR LAW § 195(1)

As we previously reported on BS&K's blog – the New York Labor & Employment Law Report – the New York State Department of Labor (“NYSDEL”) had recently issued a mandatory form for employers to use when complying with the new-hire notice and acknowledgment requirements of New York Labor Law § 195(1). Only weeks later, however, the NYSDEL **reversed** its prior position that use of the form is mandatory, and, instead, has now indicated that employers are free to use their own forms to satisfy the statute.

Effective October 26, 2009, Section 195(1) was amended to require that all new hires be provided with written notice of their wage rates, pay dates, and, if applicable, overtime rates. The statute also requires employers to obtain written acknowledgments from new employees confirming receipt of this information. Shortly after the statute's effective date, the NYSDEL published a “Notice and Acknowledgment Form” (the “NYSDEL Form”), along with the statement that use of the form for all individuals hired after October 26, 2009 was mandatory. The NYSDEL also published an accompanying “Fact Sheet” that specifically directed employers to give employees written notice of their rates of pay and regular pay dates “on an official form from the New York State Department of Labor.”

For numerous reasons, however, use of the NYSDEL Form is not appropriate in all situations and, thus, its mandatory use for all employees would be problematic. The NYSDEL Form, among other things, contemplates that new employees will be paid only on an hourly basis and will be eligible for overtime. (On this latter point, the NYSDEL Form requires disclosure of an employee's specific overtime rate.) However, the federal and state wage and hour laws permit alternative forms of wage payment and recognize several exemptions to the general overtime requirements.

For example, these laws permit employers to compensate employees under certain circumstances on a “salary” or “piece-rate” basis, or through commissions, trip rates, or other alternative means. Further, while the NYSDEL Form states: “Almost all employees in New York must be paid overtime wages of 1½ times their regular rate of pay for all hours worked over 40 per workweek,” the wage and hour laws specifically recognize that certain classes of employees are exempt from these overtime requirements. Pursuant to the “white collar” exemptions, for example, employees who are paid on a “salaried” basis and who meet the applicable “duties” test need not be compensated for hours worked in excess of 40 in a week (e.g., executives, administrators, and

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professionals). Additional partial or complete exemptions from the overtime requirements exist for several other classes of employees, such as computer employees, outside salespersons, domestic workers, and employees covered by the Federal Motor Carrier Act.

Because of these and other issues, BS&K and other management representatives contacted the NYSDOL to obtain clarification regarding the agency's expectations and requirements for employers under Labor Law § 195(1). Although the NYSDOL has not explained the reasons for the change in its position, the agency recently confirmed that employers **need not** use the NYSDOL Form. Rather, the NYSDOL's position now is that "no particular form is required" and that employers may create their own forms or adapt the NYSDOL Form in order to comply with Labor Law § 195(1). The NYSDOL has also stated that employers may continue to use the NYSDOL Form if they choose, and that the agency will be publishing additional sample forms covering other classes of employees, including a form for exempt employees, in the future.

The NYSDOL's recent acknowledgment that employers may develop their own forms to comply with Section 195(1) is welcome news. Nevertheless, offer letters and other communications with new hires should be reviewed to ensure compliance with the new statutory requirements. Employers may also find it appropriate at this time to review their employee classifications and compensation

policies to ensure compliance with the "salary" and "duties" tests necessary to qualify for exempt status under state and federal law.

For advice and guidance on the legal requirements discussed in this memorandum, please contact:

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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:

- ***Is Your Organization Required to Have an Affirmative Action Plan?***
- ***New York State Department of Labor Changes Position on Mandatory Use of Its Wage Rate Form***
- ***Genetic Information Nondiscrimination Act Takes Effect on November 21***
- ***Supreme Court Lets Stand Second Circuit and NLRB Decisions Undermining an Employer's Right to Effectively Replace Strikers***

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