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Legal Alert: Wage Theft Prevention Act Enacted into New York Law

On December 10, 2010 New York Governor David Paterson signed the Wage Theft Prevention Act (the “Act”) into New York law. The Act, which takes effect on April 9, 2011 (the “Effective Date”) ¹, will increase penalties and strengthen enforcement of laws protecting workers from nonpayment of wages. Since the Act takes effect next month, all employers should review their hiring and payroll practices to determine what changes their organization will have to make to comply with the Act. Note that as a consequence of the Effective Date, certain employers, i.e., those with a weekly pay period running from Sunday to Saturday, may need to prepare for the change one week earlier than they would if the Act became effective on a weekday.

In general, the Act:

- enacts more stringent and transparent record-keeping and employee notification requirements;
- increases the amount of wages that can be recovered as damages in a suit for non-payment over and above the lost wages themselves - from 25 percent to 100 percent;
- creates stronger collection tools;
- raises criminal penalties for failure to pay minimum wage to up to a year in prison and \$5,000 fine; and
- strengthens protections for whistleblowers in cases involving wage violations.

Notice and Language Requirements

The Act amends Section 195 of the New York Labor Law (“Labor Law”) to require employers to give employees specific information about their compensation in writing at certain times: at the time of hiring; on or before February 1 of each year; and within seven days of any change in the required information that is not reflected in the employee’s wage statement.

¹ Governor Paterson first signed the bill on December 10, 2010, three days before he signed the bill again at a public ceremony on December 13, 2010. The bill takes effect 120 days from signing. The New York Department of Labor (“NYDOL”) has clarified that the actual effective date for the Act is April 9, 2011 and not April 12, 2011.

Currently, the required information is:

- (i) regular pay rate,
- (ii) for nonexempt employees, the overtime rate and
- (iii) scheduled payday.

The new Act requires that employers give new hires the following additional information:

- (iv) the basis (i.e. hourly, weekly, etc) for the rate of pay;
- (v) any allowances such as lodging or meal;
- (vi) the employer's legal name as well as any "doing business as" names;
- (vii) the physical address of the employer's main office and a mailing address if different; and
- (viii) the employer's telephone number.

All documentation provided to the employee must be both in English and the employee's identified primary language if it is not English.² The employee must (x) sign and date a written acknowledgement of receipt of each notice received, (y) affirm that he/she has identified his/her primary language to the employer, and (z) affirm that he/she has received a copy in her/his primary language (or that no template is available in that language). NOTE: In order to avoid potential violations of other laws, employers should not inquire about an applicant's primary language until after a job offer has been made and accepted. Such written acknowledgements must be retained by employers for six years.

If an employer fails to provide the aforementioned documentation within ten business days of the employee's first day of employment, the employee may recover in a civil action \$50 a week until the violation is remedied, not to exceed \$2,500 for employee-initiated legal action. The employee may also be awarded attorneys' fees. Further, the Commissioner may also bring an action to enforce the notice requirement on behalf of the employee and there appears to be no cap on damages for actions brought by the Commissioner.

No particular form is required to be used by employers. Employers may create their own forms, or use and/or adapt one of the NYDOL model notice forms located online at: <http://www.labor.state.ny.us/workerprotection/laborstandards/workprot/lshmpg.shtm>.

Recordkeeping Requirements

Under the Act, employers will be required to maintain contemporaneous, true and accurate payroll records of employee pay rate information, overtime rate and scheduled payday for at least six years. Currently, the six year retention requirement appears in the regulations, but the Act incorporates this requirement into the Labor Law statute.

² Until the NYS Commissioner of Labor has developed the notice template in a particular language, employers may give notice in English only.

Wage Statements

The Act further amends Section 195 of the Labor Law to require the following information to be provided in employee wage statements:

- the dates of work covered by the wage payment;
- the employee's name;
- the employer's name, address and telephone number;
- the rate or rates of pay and the basis (i.e. whether the employee was paid by the hour, shift, day, week, salary, piece, commission or other);
- gross wages;
- deductions;
- allowances (if any claimed as part of the minimum wage); and
- net wages.

The Act imposes additional requirements for the wage statements of non-exempt employees:

- the regular hourly rate(s) of pay;
- the overtime rate(s) of pay;
- the number of hours worked; and
- the number of overtime hours worked.

Under the Act, both employees and the Commissioner may bring legal action against employers for failure to provide such information. Damages include \$100 per week for each week the violation occurs, not to exceed \$2,500 for suits brought by employees, plus costs and attorneys' fees.

Retaliation Claims

The Act amends Section 215 of the Labor Law to protect employees from retaliation in the event that an employee complains about employer conduct allegedly in violation of Labor Law. The Commissioner may assess civil penalties of up to \$10,000.00, plus costs and attorneys' fees, to employers that are found to have engaged in retaliation.

Liquidated Damages

Previously, employees prevailing in a legal action were able to receive only the total amount of the underpayment, costs, attorneys' fees, and in some instances liquidated damages equal to 25% of the underpayment. The Act amends Section 198 of Labor Law to allow a prevailing employee to recover the aforementioned list, among other things, and liquidated damages equal to 100% of the total wages due. (This is the same amount allowable for violations of Federal wage and hour law.)

This alert is meant to provide general information only, not legal advice. Please contact Judith Moldover at Lawyers Alliance for New York at (212) 219-1800 x 250 or visit our website www.lawyersalliance.org for further information.

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