



LABOR & EMPLOYMENT DEPARTMENT

ALERT

NEW YORK ENACTS LAW INCREASING PENALTIES FOR WAGE AND HOUR VIOLATIONS

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On December 13, 2010, in one of his last acts, Governor David Patterson signed into law the Wage Theft Prevention Act (WTPA) that amends the New York Labor Law (NYLL) to increase the penalties on employers that violate New York's wage and hour statutes and expands the powers of the New York Commissioner of Labor (Commissioner). The WTPA becomes effective on April 12, 2011. Below is a summary of the WTPA's key provisions.

An Increase in Liquidated Damages

The most significant impact of the WTPA is the increase in the amount of liquidated damage a prevailing plaintiff can obtain for violations of the NYLL. Under the WTPA, if an employer unlawfully withholds wages from an employee or fails to properly pay the statutorily required wages, the aggrieved employee can now file suit for not only his or her unpaid wages, but also an additional 100 percent of his or her unpaid wages in liquidated damages as a penalty. Previously, the prevailing plaintiff could only obtain liquidated damages in an amount equal to 25 percent of the wages owed. The WTPA further provides that any such judgment unpaid for more than 90 days will automatically increase by 15 percent as an additional penalty.

Additional Requirements in Rate of Pay and Pay Stub Statements

Under the NYLL, at the time of hire, employers are required to notify employees in writing of their rate of

pay, overtime rate of pay (if applicable) and the regular pay day. The WTPA now further requires employers to:

- (1) Provide the required information in writing in English **and** the language identified by the employee as his or her primary language;
- (2) Send to each employee, no later than February 1 of each year, in both English and the employee's primary language (if not English), information about the employee's current rate of pay, overtime rate of pay (if applicable), any allowances taken by the employer (e.g., meal allowances, tip credits), the employee's regular pay day and the employer's legal name (including any "doing business as" name), address and telephone number;
- (3) Obtain a signed and dated written acknowledgement from the employee (in English and in the employee's primary language) each time the employer provides a required written notice; and
- (4) Notify an employee in writing (in English and the employee's primary language) at least seven days in advance of any changes to the employee's rate of pay, overtime rate of pay, allowances taken by the employer or the regular pay day.

The WTPA further requires employers to furnish a statement to each employee, on each pay day, that contains the dates of work covered by the payment; the names of the employee and the employer; the address and

telephone number of the employer; and the employee's rate of pay, method of payment (i.e., salary, hourly rate, commission, piece rate, etc.), overtime rate of pay, number of regular hours worked, number of overtime hours worked, gross wages, wage deductions, allowances (if any) and net pay.

The employer must maintain all of these notices and records for at least six years. If an employer fails to comply with these requirements, its employees may file suit against the employer and obtain civil penalties of up to \$2,500, plus attorneys' fees.

Additional Anti-Retaliation Remedies

The WTPA amends the retaliation prohibitions in the NYLL by permitting the Commissioner to obtain additional remedies in the event an employer retaliates against an employee for exercising his or her rights under the statute, including civil penalties of up to \$10,000 and reinstatement with back pay (or front pay instead of reinstatement).

Accounting of Assets for Failure To Comply

If an employer fails to comply with the Commissioner's back pay order within 10 days, the Commissioner can require the employer to provide an accounting of its assets. If an accounting is required, the employer must provide the Commissioner with a list of all bank accounts, accounts receivable, personal property, real property, automobiles and other vehicles and any other assets of the employer. If the employer fails to provide such an accounting after receiving a written demand for same from the Commissioner, the Commissioner can file suit to compel the employer to provide the requested accounting and obtain a civil penalty of up to \$10,000.

Additional Penalties for Failing To Timely Pay a Commissioner's Order

In the event a complaint is filed with the Commissioner and the employer is found to have violated the NYLL — in addition to obtaining back pay for the aggrieved employees, interest and liquidated damages equal to 100 percent of the back pay — the Commissioner can also assess an additional 15 percent penalty on employers that fail to make the required payments within 90 days after being ordered to do so by the Commissioner. Furthermore, the Commissioner can order employers that have violated the NYLL to post notices in the workplace informing employees about the employer's violations.

Additional Criminal Penalties

The WTPA provides any employer that fails to properly maintain wage and hour records, refuses to provide records to the Commissioner upon request, hinders the Commissioner in an investigation or falsifies any payroll records will be guilty of a misdemeanor that, for a first offense, carries a penalty of up to \$20,000 in criminal fines, imprisonment of up to one year and one day, or both. In addition, the WTPA reiterates an employer's individual officers and agents may also be held criminally as well as civilly liable for any violations of the NYLL.

New Tolling Provision

The WTPA amends the NYLL to include a new tolling provision. Under this provision, when an employee files a complaint with the Commissioner, the statute of limitations for the employee's claim is tolled from the date the employee files the complaint until the date the Commissioner issues an order requiring the employer to comply with the law or issues a notice to the complaining employee the investigation has concluded. The tolling provision also applies to investigations initiated by the Commissioner without a complaining employee. In such cases, the statute of limitations is tolled from the date the Commissioner commences the investigation until the date the Commissioner issues an order requiring the employer to comply with the law or issues a notice the investigation has concluded.

Additional Attorneys' Fees Remedy

In the event an employee or the Commissioner obtains a judgment against an employer for violating the NYLL, the WTPA expressly permits the employee and the Commissioner to obtain their attorneys' fees incurred in enforcing the judgment.

These changes to the NYLL are likely to embolden plaintiffs' attorneys. In the event an employer fails to properly pay its employees, employees will be able to obtain double damages (i.e., the wages owed plus an equal amount as liquidated damages). Further, employers should expect to see lawsuits for "technical" violations regarding, among other things, failure to include all the required information on a pay stub or pay rate notification form. Accordingly, in order to minimize the likelihood of additional wage and hour lawsuits, employers should:

- Review pay stubs to ensure they comply with the WTPA's new requirements (as well as the previous requirements under the NYLL);

- Ensure new hires are given the proper written notification concerning their rate of pay, overtime rate of pay and regular pay date on a form approved by the New York Department of Labor;
- Provide notifications to all employees each January concerning their rates of pay, overtime rates of pay, allowances and regular pay days on forms approved by the New York Department of Labor;
- Provide notifications to employees in writing about any changes to their compensation at least one week before the changes take effect;
- Provide the required notifications in English and the employee's primary language (if applicable); and
- Ensure all wage and hour records are contemporaneous, accurate and maintained for at least six years.

Finally, to minimize liability, employers should also train all managers and other employees who handle their payroll practices on the importance of keeping accurate payroll records in accordance with the requirements of the WTPA. Failure to do so could lead not only to an expensive and time-consuming lawsuit and/or governmental investigation, but civil and/or criminal liability for the responsible managers as well.

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