



LABOR & EMPLOYMENT DEPARTMENT

ALERT

NYSDOL RELEASES GUIDANCE FOR COMPLIANCE WITH NOTICE AND RECORD-KEEPING REQUIREMENT LAW

By Carolyn D. Richmond

Effective October 26, 2009, New York Labor Law § 195 was amended to include a provision mandating that: (1) employers provide all new employees with a written notice of their regular rate of pay, their regular payday and (if eligible for overtime) their overtime rate of pay; and (2) employers obtain a written acknowledgement form from any such new employees indicating their receipt of such notice. The Commissioner of the New York State Department of Labor (NYSDOL), M. Patricia Smith, has just released guidance regarding employer compliance with these new requirements, including a fact sheet providing further information for employers and employees available at http://www.labor.state.ny.us/workerprotection/laborstandards/PDFs/P705_E.pdf. The NYSDOL has also issued a model notice and acknowledgment form that all employers must use to comply with the law, which is available on the NYSDOL's web site at http://www.labor.state.ny.us/workerprotection/laborstandards/PDFs/LS_52_Hourly_Rate_Plus_Overtime.pdf.

The NYSDOL's guidance states that the aforementioned model form is "required" to be used by employers, and the new statutory provision does authorize the Commissioner of the NYSDOL to establish the "content and form" of any such forms. Employers should be aware, however, that the NYSDOL model form contains an extremely ambiguous, if not inaccurate, summary of New York's overtime exemptions:

Almost all employees in New York must be paid overtime wages of 1 ½ times their regular rate of pay for all hours worked over 40 per workweek. A very limited number of specific categories are covered by overtime at a lower overtime rate or not at all.

While many employees are generally eligible for overtime pay, this statement seems to ignore the fact that many employees may be exempt from overtime requirements, by qualifying for one of the overtime exemptions, such as the executive, administrative, professional, computer professional and outside sales exemptions. Nevertheless, since this form is "required" to be used in the form posted on the NYSDOL web site, it is not advisable to delete this statement from the form.

It should also be noted that, depending on the industry and the employer, the form provided by the NYSDOL – which contemplates every employee having a single hourly rate – does not properly account for variations in the different types of payments that may be applicable to employees within the state (e.g., blended rates, premium rates, etc.). Thus, employers may need to either include additional entries on, or addendums to, the form provided by the NYSDOL. However, it should be noted that making any false statements on the form qualifies as a criminal misdemeanor pursuant to New York Penal Law § 210.45.

The same form applies to exempt as well as nonexempt employees (except, of course, that there should be no listing of an overtime rate for the exempt employees). Employers must keep these executed forms on file for at least **six (6)** years.

If you have any questions regarding compliance with this new law, please contact Carolyn D. Richmond at 212.878.7983 or crichmond@foxrothschild.com or another member of the New York Labor and Employment Department of Fox Rothschild LLP, or visit us on the web at www.foxrothschild.com.



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