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NEW NOTICE AND RECORD KEEPING REQUIREMENTS UNDER THE NEW YORK WAGE THEFT PREVENTION ACT TAKE EFFECT ON APRIL 9, 2011

March 2011

On December 10, 2010, Governor David Paterson signed into law the New York State Wage Theft Prevention Act (the "WTPA" or the "Act"). The WTPA imposes on employers additional notice and record-keeping requirements under the wage and hour provisions of the New York Labor Law and significantly stiffens the civil and criminal penalties on employers for certain Labor Law violations. The Act will take effect on April 9, 2011, and all employers should review and update their employment practices to comply with the law on or before the April 9 deadline. Additionally, the WTPA authorizes the New York Department of Labor to adopt new regulations under the WTPA, which may impose additional requirements on employers.

Among other things, the WTPA amends the Labor Law by:

- modifying the content of the statutory notice now required for all new hires, and mandating that all existing employees receive such notice annually;
- requiring employers to include additional information in each payroll statement;
- strengthening existing retaliation provisions by prohibiting "threats" of retaliation for engaging in protected activity;
- imposing new civil and criminal penalties for certain Labor Law violations and allowing employees to enforce the new notice requirements in a private action; and
- giving the New York State Commissioner of Labor more power to enforce the wage and hour provisions of the Labor Law.



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I. New Hire and Annual Notice Requirements

In [October](#) and [November](#) 2009 client alerts, we reported that New York Labor Law Section 195.1 requires employers to provide all new hires, at the time of hiring, written notice stating the employee's rate of pay, the employer's regular pay day, and, for non-exempt employees, their hourly rates and overtime pay rates. The WTPA significantly expands the notice requirements under Section 195.1.

A. Recipients and Timing of the Notice

Under the new Section 195.1, employers are required to provide the statutory notice to:

- all new hires, at the time of hiring, before the new hire begins working; and
- all existing employees, every year, on or before February 1 of each year.

B. Content of the Notice

The Act will also require employers to include substantially more information in the statutory notice. The notice must now include the following (new requirements are marked with an asterisk):

- the employee's rate or rates of pay, including the employee's overtime rate of pay (for all non-exempt employees);
- the basis for the employee's rate of pay (e.g., by the hour, shift, day, week, salary, piece, commission, or other)*;
- the statutory exemption that applies, if any;



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- any allowances claimed as part of the minimum wage (e.g., tips, meals, lodging)*;
- the regular pay day designated by the employer;
- the employer's name, including any "doing business as" names used by the employer*;
- the physical address of the employer's main office or principal place of business, and a mailing address, if different*;
- the employer's telephone number*; and
- such other information as the commissioner deems material and necessary.

If the employer makes any changes to the information contained in the notice and such changes are not reflected in the employee's payroll statements, the WTPA will require the employer to give the employee written notice of the change at least seven (7) days before the change becomes effective.

C. Language of the Notice and Acknowledgement

The Act will also require employers to provide the notice to an employee in both

- English; *and*
- the employee's "primary language" (if other than English).

The Commissioner of Labor will prepare new notice templates in different languages. If the employee's primary language is one for which the Commissioner has not prepared a template, the employer need only provide that employee notice in English. As of March 25, 2011, no new foreign



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language notice has been released. We will provide an update when such notices become available.

Under existing law, the employer must also have the employee sign and date a written acknowledgement of receipt of each statutory notice. The WTPA continues to require such acknowledgement for each notice and imposes the following two additional requirements:

- the acknowledgement must be provided to the employee in both English and the employee's primary language; and
- the acknowledgement must include an affirmation by the employee that the employee has identified his or her primary language to the employer.

II. Payroll Statement Requirements

The WTPA also amends Section 195.3 of the Labor Law, which requires that employees be provided with regular payroll statements. After April 9, each payroll statement must include the following (new requirements are marked with an asterisk):

- the employee's name;
- the employer's name, address and telephone number*;
- the dates of work covered by the payment of wages*;
- the employee's rate or rates of pay;
- the basis for the employee's rate of pay (e.g., by the hour, shift, day, week, salary, piece, commission, or other)*;



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- gross wages;
- any allowances claimed as part of the minimum wage (e.g., tips, meals, lodging);
- deductions;
- net wages;
- for non-exempt employees, the employee's:
 - regular rate of pay and regular hours worked;
 - overtime rate of pay and overtime hours worked; and
- for employees paid by piece, the number of pieces completed and the piece rate therefor.

III. Record Keeping Requirements

The WTPA also requires (what used to be a regulatory requirement only) that employers maintain the following records for six years:

- all acknowledgements obtained by the employer under WTPA's new notice provisions; and
- all payroll records.

IV. Retaliation Now Includes Threats

Employers are currently prohibited from discharging, penalizing, or discriminating or retaliating against an employee who exercises his or her rights or engages in certain protected activity under the Labor Law, including without limitation, complaining that his or her employer has violated the



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wage and hour provisions of the Labor Law The WTPA further prohibits the “threatening” of any such employee.

V. Penalties

A. Notice Violations Under Section 195.1

Failure to provide the required new hire notice within ten days of an employee’s hire date and the required yearly notice under Section 195.1 will subject the employer to the following damages and/or penalties:

- damages to a new hire of \$50 per week of the violation, up to a maximum of \$2,500;
- damages to the Commissioner of \$50 per week of the violation, with no cap;
- attorney’s fees and costs; and
- other relief, including injunctive and declaratory relief against the employer.

B. Payroll Statement Violations Under Section 195.3

Failure to provide the required payroll statements under Section 195.3 will subject an employer to the following damages and/or penalties:

- damages to the employee of \$100 per week of the violation, up to a maximum of \$2,500;
- damages to the Commissioner of \$100 per week of the violation, with no cap;
- attorney’s fees and costs; and



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- other relief, including injunctive and declaratory relief against the employer.

C. Underpayment of Wages

An employer that fails to pay wages to which the employee is entitled under the Labor Law may be liable to the employee for the amount of the underpayment, plus:

- pre-judgment interest;
- attorney's fees and costs;
- liquidated damages equal to 100% (or, in an administrative action, up to 100%) of the underpaid wages (an increase from 25%), unless the employer proves a good faith basis for believing that the underpayment was in compliance with the law; and
- other relief, including injunctive and declaratory relief against the employer.

D. Retaliation

The WTPA also increases the penalties for retaliating against an employee for engaging in protected activity under the Labor Law, which now include the following in proceedings by the Commissioner of Labor and in private actions by an employee:

- lost compensation;
- reinstatement or front pay in lieu of reinstatement;
- liquidated damages up to \$10,000 for each aggrieved employee;



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- attorney's fees and costs (in a private action only);
- a civil penalty from \$1,000 to \$10,000 (in a proceeding by the Commissioner of Labor only); and
- other relief, including injunctive and declaratory relief.

E. Collection Costs and Fees

Under the WTPA, once the employee or the Commissioner has obtained an order or judgment against the employer, the employee or the Commissioner is entitled to collect from the employer:

- any attorney's fees and costs incurred in enforcing the judgment or order; and
- if the judgment or order is not satisfied within ninety (90) days and no appeal is pending, an additional amount equal to 15% of the entire judgment.

The Commissioner may also require an employer that has violated certain wage and hour provisions of the Labor Law to perform certain remedial acts. If an employer fails to comply with an order or judgment after all appeals have been exhausted, the Commissioner may require the employer to post a bond guaranteeing that the employer will comply with the Labor Laws and pay all amounts due pursuant to the order or judgment. The Commissioner may also order accountings of the employer's assets. If the employer refuses to post a bond, a court may enjoin the employer from conducting business. Should the employer fail to provide an accounting, the court may compel such accounting and impose a civil penalty of up to \$10,000.



F. Criminal Penalties

The Labor Law continues to provide for criminal sanctions against employers found guilty of certain Labor Law violations, which, under the WTPA, now include unlawful retaliation and violations of the new record keeping requirements. First time violators may be found guilty of a misdemeanor, which carries a criminal penalty of up to \$20,000 or a term of imprisonment of up to one year. Second time violators may be found guilty of a felony. While existing law provided for criminal liability for officers and agents who knowingly permit a corporation to commit such violations, the WTPA now extends these criminal sanctions to partnerships and limited liability companies, and their officers and agents.

VI. Recommendations

As we have previously noted, the WTPA takes effect on April 9, 2011. Failure to comply with the new rules may result in severe civil and criminal penalties for employers who violate such rules, even where the violations are unintentional. The new civil penalties also provide plaintiffs' lawyers with additional incentives to commence litigation against non-compliant employers. Accordingly, employers should prepare for the additional notice and record-keeping requirements by, among other things, taking the following measures:

- update all new hire forms in accordance with the WTPA and Commissioner's guidelines;
- train and familiarize payroll and human resources employees with the Commissioner's new notice and acknowledgement templates;



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- develop practices and procedures for distributing the annual notice to employees before February 1 of each year and for tracking receipt of acknowledgements;
- review payroll statement forms to ensure that they contain all of the required information;
- review and revise record-keeping requirements to ensure that payroll records for each employee are maintained for at least six years;
- develop practices and procedures for ascertaining the primary language of all new hires and existing employees for the purpose of the statutory notice without offending or suggesting any discriminatory intent to the candidate;
- audit employee wage and hour classifications to ensure that all workers are properly classified as either exempt or non-exempt (salaried employees are not necessarily exempt); and
- train managers, supervisors and officers regarding the broader scope of the Labor Law's new anti-retaliation provisions to avoid any claims that the employer improperly threatened a protected employee.

Loeb & Loeb's employment and labor attorneys have extensive experience in assisting employers to comply with wage and hour laws, including preparation of notices required by the WTPA, performing wage and hour classification and compliance audits and conducting workplace training regarding such matters, as well as laws against discrimination, harassment



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and retaliation. Proactively identifying wage and hour issues before the Department of Labor or a plaintiff's lawyer does so can often avoid, or at least significantly reduce, the substantial costs and business disruption that accompany Department of Labor audits and wage and hour litigation.

If you have any questions about this client alert, please contact [Mark J. Goldberg](#) or any other member of Loeb & Loeb's [Employment and Labor](#) practice group.

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