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New York Wage Theft Prevention Act Increases Obligations and Penalties for Employers Effective April 9, 2011

Signed into law by Governor David Paterson in his last days in office, the Wage Theft Prevention Act enacts more stringent recordkeeping and employee notification requirements on employers and increases penalties for violations of New York's wage payment laws, among other things. The Act is effective April 9, 2011 and it is anticipated that it will lead to increased activity by plaintiffs' attorneys and the New York State Department of Labor.

Additional Information Required in Pay Notices

Currently, New York Labor Law requires employers to provide all newly hired employees with written notice of their rate of pay, regular pay date, and, if applicable, regular and overtime hourly rates of pay and to obtain signed and dated acknowledgement from employees of receipt of this notice. Under the Act, pay notices must not only include this information, but must now also include:

- the basis for an employee's rate of pay (that is, hourly, by the shift, daily, weekly, salary, piece rate, commission, or other);
- allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances;
- the employer's name and 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; and
- the telephone number of the employer.

As under current law, employers must obtain a signed and dated acknowledgement from employees for receipt of this notice.

Language of Pay Notices

Under the Act, pay notices must be provided in English and in the language identified by each employee as his/her primary language, but only so long as the New York State Commissioner of Labor has developed a notice template in the particular language. In the absence of such a template, employers will be deemed compliant with the Act by providing the notice in English.

In addition, the written acknowledgement must now include an affirmation by the employee that he/she has accurately identified his/her primary language to the employer, and that either the notice provided was in the language the employee identified or, if the Commissioner of Labor has not made a template notice available in that language, in English.

Annual Distribution of Pay Notices and Notification of Changes Now Required

Currently, New York employers are required to provide pay notices to employees only at the time of hire. The Act now requires employers to provide pay notices not only to employees at the time hiring, but annually to all employees on or before February 1st. In addition, employers must notify employees in writing of any changes to any of the information in the pay notice at least 7 calendar days prior to the change, unless such changes are contained in a detailed statement (typically, set forth in a pay stub) that must accompany every wage payment. Under current law, employers only need to provide employees with advance notice of change in pay day.

Additional Information Required in Wage Statements/Pay Stubs

The Act also increases the amount of information employers are required to provide in employee pay stubs. By April 9, employers must provide a statement with every payment of wages listing the following information:

- the name of the employee;

- the name of the employer;
- the address and telephone number of the employer;
- the dates of work covered by that payment of wages;
- rate or rates of pay and basis thereof, whether 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.

For any employees who are not exempt from the overtime wage requirements, the statement must also identify the regular hourly rate or rates of pay, the overtime rate or rates of pay, the number of regular hours worked, and the number of overtime hours worked. Also, for any employees paid a piece rate, the statement must include the applicable piece rate or rates of pay and number of pieces completed at each piece rate.

Under current law, employers need only provide a statement identifying gross wages, deductions and net wages with each payment of wages.

Additional Recordkeeping Requirements

The Act requires employers to maintain pay notices for 6 years. In addition, the Act requires employers to establish, maintain and preserve for at least 6 years payroll records that show the following for each work worked:

- the hours worked;
- the rate or rates of pay and basis thereof, whether 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 for each employee.

For any employees who are not exempt from the overtime wage requirements, the payroll records must also include the regular hourly rate or rates of pay, the overtime rate or rates of pay, the number of regular hours worked, and the number of overtime hours worked. Also, for any employees paid a piece rate, the payroll records must include the applicable piece rate or rates of pay and number of pieces completed at each piece rate.

Additional and Increased Penalties for Noncompliance

Pay Notices - If an employer does not provide a pay notice to an employee within 10 business days of the employee's date of hire, the Act permits both the employee and the Commissioner of Labor to bring an action against the employer. In an action brought by the employee, the employee will be able to recover \$50 for each workweek that he/she did not receive a pay notice, to a maximum of \$2500, plus costs and reasonable attorneys' fees. Courts will also be able to award an employee injunctive and declaratory relief.

In an action brought by the Commissioner of Labor, the Commissioner will also be able to recover \$50 for each work week for each employee who did not receive a pay notice. There are no damage caps in actions brought by the Commissioner.

Wage Statements/Pay Stubs - The Act permits both employees and the Commissioner of Labor to bring an action against employers for failure to provide the required pay stubs. In an action brought by an employee, the employee will be able to recover \$100 for each work week that he/she did not receive a wage statement, to a maximum of \$2500, plus costs and reasonable attorneys' fees. Courts will also be able to award an employee injunctive and declaratory relief.

In an action brought by the Commissioner, the Commissioner will also be able to recover \$100 for each work week for each employee who did not receive a wage statement. There are no damage caps in actions brought by the Commissioner.

Increased Damages for Failure to Pay Wages – Under the Act, the amount of liquidated damages available in cases involving successful claims for unpaid wages increases from 25%, to 100%, of unpaid wages. The Act also clarifies that employees may recover prejudgment interest on unpaid wages.

Additional Penalties for Failure to Comply with Final Judgments or Court Orders – The Act also sets additional penalties for employers who fail to comply with final judgments or court orders within 90 days in an amount equal to 15% of any damages due and owing.

Criminal Liability for Officers and Agents of Partnerships and LLCs – Currently, the New York Labor Law provides for criminal liability for employers and officers and agents of corporations, but not partnerships and LLCs, for failure to pay wages or otherwise comply with related recordkeeping obligations. The Act expands criminal liability to officers and agents of partnerships and LLCs.

The Wage Theft Prevention Act also includes a number of other changes, such as strengthened protections for whistleblowers, the posting of employer wage violations in the workplace and/or in public view, and the addition of a tolling provision. Under the tolling provision, the statute of limitations (6 years) is tolled from the earlier of either the date an employee files a complaint with the Commissioner of Labor or the date the Commissioner commences an investigation, to the date an order to comply issued by the Commissioner becomes final, or where the Commissioner does not issue an order, until the date on which the Commissioner notifies the complaining employee that the investigation has concluded.

Implications for Employers

It is anticipated that the heightened penalties under the Wage Theft Prevention Act will lead to increased activity by the plaintiffs' bar and the New York State Department of Labor. In advance of April 9th, employers should review their payroll practices to ensure that the wage statements they provide to employees contain all required information, and review and modify, to the extent necessary, their pay notice and recordkeeping practices to comply with the additional requirements under the Act.

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