

# Client Alert.

March 2, 2011

## New N.Y. Wage Theft Prevention Act Requires Employers to Provide More Detailed Notices to Employees and Includes Enhanced Penalty Provisions

By Miriam Wugmeister and Marian Waldmann

At the end of his term in December 2010, New York Governor David A. Paterson signed the Wage Theft Prevention Act (“WTPA”) (Senate Bill 8380/Assembly Bill 11726) into law thereby revising portions of Articles 6 (Payment of Wages), 7 (General Provisions), and 19 (Minimum Wage Act).<sup>1</sup> The WTPA was drafted to protect workers from employers who sought to pay less than minimum wage, misclassify employees, fail to pay overtime earned, and force employees to work off the clock.<sup>2</sup> While the Senate may have been seeking to stop egregious employment practices, the changes that will be required of all employers — violators of the law or not — will be extensive. The WTPA goes into effect on April 9, 2011, and applies to all employees in New York, not just to employees identified as non-exempt.<sup>3</sup> It will require employers to make new disclosures to employees, provide those notices at the inception of employment, and then annually thereafter, and obtain an acknowledgement from every employee, every year. The notice requirement expands the state’s previous requirement to notify employees of their pay rate, pay days, overtime eligibility, and rate. There are no exceptions for small employers although employer size is one of the factors to be taken into consideration when penalties are imposed under certain sections of the law. Failure to comply with WTPA provisions will result in higher penalties; thus, all New York employers should prepare to implement these changes.

### UPDATED NOTIFICATION REQUIREMENTS

Under New York law, employers are currently required to inform employees about their rate of pay, the day on which they are typically paid, and the overtime rate to which employees are entitled if they work overtime. A New York employer is also obligated to collect an employee’s acknowledgement of receiving the notice regarding those issues when the employee begins working.<sup>4</sup> The WTPA will require that an employer also inform employees about the following:

- Rate or rates of pay and the basis for the rate (for example, whether pay is hourly, by shift, day, week, salary, piece, commission, etc.);
- Any allowances claimed as part of minimum wage, including tip, meal, or lodging allowances;
- The regular pay day;

<sup>1</sup> The text and legislative history of the bill is available at <http://open.nysenate.gov/legislation/bill/S8380>.

<sup>2</sup> New York State Senate, Legislature Passes Historic Wage Theft Protection Act, <http://www.nysenate.gov/press-release/legislature-passes-historic-wage-theft-protection-act> (Nov. 30, 2010).

<sup>3</sup> “Employee” is broadly defined for purposes of Article 6 of the labor law as “any person employed for hire by an employer in any employment.” N.Y. Lab. Law § 190.2.

<sup>4</sup> N.Y. Lab. Law § 195.1.

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- Names used by the employer other than the legal name, such as names under which the employer is “doing business as”;
- The physical address of the employer’s main office or principal place of business and, if different, a mailing address;
- Employer’s telephone number; and
- Any other information the Commissioner of the N.Y. Department of Labor (the “Commissioner”) “deems material and necessary”

This information is required to be set forth in a notice to employees that must:

- Be in English and in the employee’s primary language (if the Commissioner has provided an appropriate translation);
- Be issued at the time the employee is hired and annually on or before February 1 of each subsequent year;
- Be signed and dated by the employee in English and in the employee’s primary language;
- Be maintained by the employer for six years; and
- Conform to any additional requirements that the Commissioner establishes.

The Commissioner is charged with providing dual-language template notices in English and at least one additional language. The employer will not be held responsible for errors in the Commissioner’s translated notices. If the Commissioner does not provide a notice in an employee’s primary language, the employer may satisfy the requirement by only providing the notice in English.

If the employer decides to change any of its practices that are reflected in the notice, the employer must provide written notice of any changes at least seven calendar days prior to the changes taking effect. If those changes are otherwise reflected in the employee’s wage statement, the employer does not need to provide a separate notice. The law does not address whether the employer must obtain an acknowledgement for these changes. It also is silent on what actions an employer may take if an employee refuses to sign the acknowledgement.

### WAGE STATEMENT CHANGES

The WTPA imposes new requirements for information that must be included in the statement that is required to be provided with every payment of wages. Wage statements must include: dates worked covered by the payment of wages; employee’s name; employer’s name; employer’s address and phone number; pay rate(s) and pay basis; gross wages; deductions; allowances, if any are claimed as part of minimum wages; and net wages. If the employee is not exempt from receiving overtime compensation, the wage statement must also include regular hourly rate(s); overtime rate(s); number of regular hours worked; and the number of overtime hours worked. If the employee is paid on a piece-rate basis, the statement must include the applicable piece rate(s) and number of pieces completed at each rate. An employee may also request that the employer provide a written explanation of how wages were computed.

### RECORDS RETENTION REQUIREMENTS

The WTPA requires that the notice and acknowledgement and payroll records be maintained for six years.<sup>5</sup> The term “payroll records” includes all the details that must be included in a wage statement required to be issued under the WTPA and listed in the section above.

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<sup>5</sup> N.Y. Lab. Law §§ 195(1), 195(4) (effective Apr. 9, 2011).

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## PENALTIES & VIOLATIONS

The WTPA includes significant increases in the Commissioner's enforcement powers and in the civil and criminal penalties available under New York Labor Law. The revised law allows the Commissioner to remedy a situation by directly assessing damages or ordering reinstatement (where applicable) and to impose an additional 15% damage on employers who default on a damage payment for more than 90 days. The Commissioner also shall have the power to require an employer found in violation of Articles 6, 19, or 19A to post a notice of its violation in an area visible to employees for up to one year. Where the violation is for a willful failure to pay required wages, the Commissioner may require that the employer post a notice of its violations in a place visible to the general public for up to 90 days. The six year statute of limitations for claims under Article 6 will be tolled from the earlier of the date the employee files a complaint with the Commissioner or the date the Commissioner begins an investigation.

### Civil Penalties.

The WTPA increases the costs and remedies available under the law. The Commissioner can assess damages for violations equal to the underpayment *plus* liquidated damages up to 100% of the wages due. Previously, liquidated damages were capped at 25% of wages due. In court, the employee may recover the same, plus reasonable attorneys' fees and prejudgment interest. Willful and egregious violations or subsequent violations will expose the employer to damages equal to up to three times the amount of wages due the employee — up to double the total amount of wages, benefits, or wage supplements due, plus liquidated damages equal to 100% of the unpaid wages.

Failure to provide the notice within 10 days of an employee's hire date will subject the employer to an action for damages of \$50 per week that the violation continues, up to \$2,500, plus costs and reasonable attorneys' fees. Similarly, failure to provide an appropriate wage statement will subject the employer to an action for damages of \$100 per week that the violation continues, up to \$2,500, plus costs and reasonable attorneys' fees. Employers may assert the following affirmative defenses: (a) the employer made complete and timely payments of wages due to the employee under N.Y. law; and (b) the employer reasonably believed in good faith that it was not required to provide the employee with notice.

### Criminal Penalties.

Under the WTPA, criminal penalties were expanded to explicitly apply to officers and agents of any partnership or limited liability company, in addition to those of corporations. The criminal penalties for violations otherwise remain the same. A first offense is a misdemeanor punishable by a fine of between \$500 and \$20,000 and/or up to one year in prison. Any second or subsequent offense occurring within six years of conviction for a prior offense is a felony also punishable by a fine of between \$500 and \$20,000 and/or up to one year in prison. These penalties also explicitly apply to violations of the payroll records retention requirements.

## ANTI-RETALIATION

Finally, the WTPA expands the anti-retaliation provisions available under the law. It prohibits retaliation against any employee who has filed or is believed to have filed a complaint for violations in addition to earlier protections, including those for employees who have filed a complaint, testified, instituted or are about to institute a proceeding. The law is also expanded to apply to actions by "any other person" — not just the employer. If retaliation is found, the court may enjoin the conduct, order reinstatement of the employee or front pay, and award lost compensation, damages, costs, and reasonable attorneys' fees. In addition, the employee may recover up to \$10,000 in liquidated damages and the court is required to order liquidated damages paid to "every employee aggrieved under this section."<sup>6</sup> There is no requirement

<sup>6</sup> N.Y. Lab. Law § 215(2)(a) (effective Apr. 9, 2011).

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that an employee must first seek administrative remedies, but if an employee files a complaint with the Commissioner, the statute of limitations for his or her civil complaint is tolled until the earlier of the following: the employee is notified that the investigation has concluded or an order to comply that is issued by the Commissioner becomes final. Anyone who violates the anti-retaliation provisions is guilty of a class B misdemeanor.<sup>7</sup>

## PRACTICE POINTERS

In light of these new requirements, employers should consider taking the following actions:

- Review and revise current new hire notices in time to comply with the provisions of the WTPA in April, while waiting for the Department of Labor to issue revised and translated notices;
- Because all existing employees will need to receive a notice by February 1, 2012, implement a standard process for the annual delivery notices and tracking of signed acknowledgements; and
- Review and update records retention practices to be in line with the new legal requirements.
- Update training programs to reflect the new legal requirements, including the anti-retaliation provisions.

## Contact:

**Miriam Wugmeister**  
(212) 506-7213  
[mwugmeister@mofo.com](mailto:mwugmeister@mofo.com)

**Marian Waldmann**  
(212) 336-4230  
[mwaldmann@mofo.com](mailto:mwaldmann@mofo.com)

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*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.*

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<sup>7</sup> N.Y. Lab. Law § 215(3) (effective Apr. 9, 2011).