

*Under the WTPA the
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Labor laws are designed to create safe working environments and guarantee employees a minimum wage, the right to take meal breaks, workers compensation when injured, and the right to address violations of the law and seek redress. "Broken Laws, Unprotected Workers" reports the findings of a 2008 study of low wage workers in Los Angeles, Chicago, and New York City. This study found rampant violations of minimum wage, overtime, meal break, pay stub, and other labor protections.

The rates of wage theft and other labor law violations are staggering. Of the 4,387 workers in the study, 68 percent experienced at least one pay-related violation in the previous week. The average worker lost \$51, out of average weekly earnings of \$339, to labor law violations. This amounts to 15 percent of weekly earnings. The average worker in this study put in 11 hours of overtime that were underpaid or not paid at all. Eighty six percent of study participants worked enough hours to require a meal break. However, 69 percent of these individuals did not receive their break, had it shortened, or had to work through it.

The Wage Theft Prevention Act (WTPA) seeks to address these problems by clarifying New York State law regarding wage protections and expand the rights of employees to seek civil and criminal avenues of remedy for their employer's violation of labor law. The WTPA was introduced by Senator Diane Savino and Assembly Member Carl Heastie during the 2010 legislative session. The bill was passed by both houses and signed into law by Governor Paterson on December 10, 2010 as Chapter 564 of the laws of 2010. The WTPA takes effect on April 9, 2011. Below is a summary of the changes to the New York State Labor law under the WTPA by section of law.

Pre-Employment Notice of Wage Rates (Labor Law Section 195, Subdivisions 1, 2, 3 and 4)

Labor Law Section 195 governs notice and record keeping requirements that employers must engage in. The WTPA clarifies that an employer must disclose the intent

to claim allowance (i.e. tip or meal allowances) as part of the minimum wage and the basis for payment (i.e. by hour, shift, day, week, piece). WTPA adds a requirement that the employer must disclose their "doing business as" name and contact information of the employer's principal place of business. This information must be provided at the time of hire, annually, and within 7 days of any change if the employers address is not listed on pay stubs. The information must be provided in English and the primary language of the employee as designated by the employee. The New York State Department of Labor (DOL) is authorized to provide templates of these forms in English and those other languages as the Commission deems necessary. Employees are required to affirm that they have accurately told their employer of their primary language.

The WTPA also codifies requirements of information that must be included in pay stubs. This includes: dates of work covered by payment, name of employee and employer, address and phone number of employer, rate of pay and basis of pay (i.e. hourly, shift, piece, etc), and any allowances claimed as part of the minimum wage. Employers are required to keep payroll records for six years

Powers of the Commissioner (Labor Law Section 196)

Labor Law Section 196 outlines powers of the Commissioner of DOL to investigate violations of the Labor Law and enforce penalties. The Commissioner now has the discretion to demand an employer to provide an accounting of assets of the employer including bank accounts, accounts receivable, personal property, real property, etc. If the employer does not comply with this demand in a timely manner the Commissioner is empowered to bring an action in Supreme Court to compel the employer to furnish the accounting. A civil penalty of no more than \$10,000 is authorized if the Commissioner must go to court to compel compliance. The Commissioner may also require an employer to post bond after default on an order to comply.



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Complaints by Employee to Commissioner (Labor Law Section 196-a)

Labor Law Section 196-a allows the Commissioner to discuss a complaint by an employee with a representative of their collective bargaining unit. The WTPA codifies the DOL policy of maintaining the identity of an employee involved in an investigation as confidential.

Civil Penalty (Labor Law Section 197)

Labor Law Section 197 allows the Commissioner to recover a fine from an employer who differentiates rates of pay on the basis of sex. Prior to the WTPA the Commissioner could only recover this fine in a court proceeding. Under the WTPA the Commissioner can recover the fine during an administrative proceeding.

Costs, Remedies (Labor Law Section 198)

Labor Law Section 198 outlines costs and remedies that an employee or the Commissioner can receive when they prevail in a wage claim. The WTPA increases the amount of liquidated damages from 25% of unpaid wages to 100% of unpaid wages. The Commissioner is also provided the discretion to assess up to 100% of liquidated damages in early investigation stages, prior to issuance of an order to comply.

Where an employer has violated the pay stub and notice requirements the WTPA provides statutory damages and a private right of action for an employee. The statutory damages are capped at \$2,500. An employer has an affirmative defense when they demonstrate that (1) they paid all wages legally required, or (2) they had a good faith, reasonable basis for not providing notice or wage stubs.

When an employer defaults on paying a judgment for 90 days after the judgment is final, the employer must pay an additional 15% in damages to defray the cost to the employee of collecting the judgment. Additionally, the statute of limitations is tolled during investigations by the Commissioner.

Criminal Penalties for Nonpayment of Wages (Labor Law Section 198-a)

Labor Law Section 198-a outlines the criminal penalties for violations of the Labor Law in relation to wages. The WTPA adds new business types that are subject to these criminal penalties. These include partnerships and limited liability corporations.

Notification of DOL Process (Labor Law Section 199-a)

Labor Law Section 199-a outlines when an employee and their designated representative will receive notification from DOL. The WTPA codifies the current DOL practice of accepting for investigation complaints of violation of meal breaks, days of rest, and retaliation. It requires that a representative of the employee be authorized by the employee to receive communications from the DOL.

Penalties and Civil Action; Employer who Penalizes Employees Because of Complaints of Employer Violations (Labor Law Section 215)

Labor Law section 215 imposes penalties on employers who retaliate against employees who have filed complaints relating to violations of labor law. The WTPA closes certain loopholes on what actions constitute prohibited retaliation, including:

- explicitly prohibits threats of retaliation
- protects an employee who makes a complaint about actions of the employer that the employee reasonably and in good faith believes violated the labor law
- prohibits retaliatory actions by a person who does not technically meet the definition of “employer” but the employee can prove that person retaliated against them
- clarifies that the two year statute of limitations runs from the date of retaliatory action and not the date of employee’s employment

Under the WTPA the Commissioner of the DOL will have powers commensurate with that of courts in remedying retaliation. Relief that the Commissioner may use include: enjoining the conduct of any person or employer, ordering payment of liquidated damages to the employee by the person or entity in violation, and reinstatement. Any liquidated damages under this section may not be in excess of \$10,000.

A civil action may be brought within two years of the retaliatory action. All appropriate relief may be ordered with liquidated damages not to exceed \$10,000. Investigation by the Commissioner shall not be a requirement to bringing a civil action under this section.

Violations of Certain Provisions; Civil Penalties, Interest, Filing of Order as Judgment (Labor Law Section 218 and 219)

Labor law sections 218 and 219 provide for penalties the Commissioner may issue if it is determined that an employer violated provisions of the Labor Law. Under the WTPA the full 100% liquidated damages amount may be assessed if an employer refuses to settle a claim and forces the Commissioner to issue an order to comply. If an employer defaults on an order to comply for more than 90 days the Commissioner has the discretion to add an additional 15% of the damages. The Commissioner is required to provide a copy of an order to comply issued against an employer to the complaining employee. This requirement only applies to the employee who submitted the complaint form with DOL and not all employees involved in an investigation.

In an effort to facilitate collections the Commissioner is given the discretion to assign to an employee the amount of wages, wage supplements, interest and liquidated damages due to that employee under an order to comply and file in the name of the employee with the county clerk of the county where the employer resides or has a place of business.

Public Notice of Employer Violations (Labor Law Section 219-c)

Labor Law section 219-c provides the Commissioner the power to post information regarding employer violations under the Labor Law. Under the WTPA the Commissioner may post, in their discretion, notices of violations at the worksite. Posting visible to employees may be posted for a maximum of 1 year. If an employer has been found to have willfully violated provisions a posting visible to the public is permitted for a maximum of 90 days. Any person who defaces or removes this posting without authorization is guilty of a misdemeanor.

Records of Employers (Labor Law Section 661)

Labor Law section 661 requires employers to keep various records associated with wages paid. Under the WTPA the regulations under the Minimum Wage Act are made statutory. Employers are required under statute, to keep records for six years, as they were, under the regulation. Employers are also required to allow DOL investigators to interview employees at a private location.

Criminal Penalties Under Minimum Wage Act (Labor Law Section 662)

Labor Law section 662 provides penalties for various violations of the Labor Law. Under the WTPA the same penalties that apply to record keeping violations and non-payment of wages will also apply to non-payment of minimum wage violations.

Civil Action for Minimum Wage Violations (Labor Law Section 663)

Labor Law section 663 provides an employee with the right to file a civil action for violation of minimum wage requirements. Under the WTPA an employee may recover 100% of liquidated damages in an action brought by the Commissioner or by the employee. A six year statute of limitations is imposed on such actions. This statute of limitations is tolled from the date an employee files a complaint with the Commissioner, until an order to comply, becomes final or the Commissioner does not issue an order to comply but notifies the employee that the investigation is over. An employee or the Commissioner are entitled to attorneys fees associated with enforcing any court judgment.



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