



Legal Alert: Exempt or Non-Exempt Employee? The Wrong Response Can Cost You

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Mandatory wage notice. Before February 1, 2012, all New York employers, for the first time, must provide all their employees with written wage notices required under the Wage Theft Prevention Act, and annually thereafter. These written notices, in English and the employee's primary language, must contain certain information, including the employee's rate of pay (including overtime rate of pay for non-exempt employees), the basis of the employee's wage payment (e.g. hourly, weekly, salary, commission, etc.), any allowances against the minimum wage, the employer's regular payday and other employer information, such as any "doing business as" names.

How does this affect you? Employees who receive these written notices for the first time will inevitably begin asking questions. Why am I receiving this notice? Why do I have to acknowledge it, in writing? Am I being classified differently than I was previously? Is the information in this notice correct? Am I in fact entitled to overtime even though I receive a salary? Should I show this notice to an attorney or the Department of Labor to make sure it is correct and I am not being shortchanged?

Are you in harm's way? As an employer, you may assume you know the difference between non-exempt employees who are entitled to overtime, and exempt employees who are not. For example, you may assume that an employee paid a salary and given certain supervisory authority is exempt. But this assumption is wrong. Misclassifying an employee as exempt when s/he is not, or as an independent contractor when s/he is not, will cost you. Anti-retaliation penalties, both civil and criminal protect employees who complain, in good faith, to you or file a complaint with the State Department of Labor or Attorney General's Office. Also, an employer threat is now retaliation in and of itself.

How much can this cost me? Just the failure to provide the requisite written wage notice can result in damages of up to \$2,500, plus costs and attorneys' fees, for *each* employee. Worker misclassification can expose employers to substantially higher damages and litigation costs, including a prevailing plaintiff's attorneys' fees.

What can you do now? You should view the February 1, 2012 deadline as an opportunity to take stock regarding whether your employee classifications are in order. Allow us to review any questionable cases where employees are classified as exempt or as independent contractors. Let us guide you on how to limit your exposure.

THE BOTTOM LINE: Provide the requisite notices by February 1, 2012, but **first**, ensure that you have properly classified your employees.

If you have any questions regarding this Alert, please contact the author, Stephen Zweig, szweig@fordharrison.com, Managing Partner in our New York City office or the Ford & Harrison attorney with whom you usually work.