

# EMPLOYMENT LAW ALERT

October 2009

## Ruskin Moscou Faltischek's Employment Law Capabilities

- Sexual Harassment Prevention
- Discrimination Avoidance
- Restrictive Covenants (non-compete, non-solicitation) and Unfair Competition
- Protection of Trade Secrets, Proprietary Information and Business Opportunities
- Employment At Will, Breach of Contract and Termination for Cause
- Employee Policy Manuals
- Family and Medical Leave
- Wage and Hour Requirements
- Employee vs. Independent Contractor
- Executive Employment Agreements and Severance Packages
- Comprehensive Litigation Services

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## Increased Penalties for Wage and Hour Violations

By: Jeffrey M. Schlossberg



The New York State Labor Law has been amended to increase the penalties that can be assessed against employers in cases of wage and hour violations. The new law, effective November 24, 2009, will make the state law consistent with the federal Fair Labor Standards Act by permitting an employee to automatically recover "liquidated damages" upon proving a violation, unless the employer provides a "good faith basis" to show that it believed its wage underpayment was in compliance with the law. Under New York law, liquidated damages equal 25% of the amount recovered. In light of the six-year New York statute of limitations, a 25% premium on monies due could be considerable.

In addition, the new law increases the penalties in cases of retaliation against employees for exercising their rights under the Labor Law. The new penalties range from \$1,000 to \$10,000 (previously, the range of penalties was \$200 to \$2,000).

Further, the amendment permits the Commissioner of Labor to bring an administrative action to collect unpaid wages. Previously, the Commissioner was limited to bringing an action in court.

Finally, the definition of "employer" in a claim of retaliation has been expanded to include officers and agents of limited liability companies and partnerships.

In light of these developments, employers are encouraged to consider conducting a wage and hour audit to ensure compliance with the numerous laws and regulations governing the payment of wages.

## Employer May Be Liable for Acts of Independent Contractors

## ***Previous Alerts***

**September 2009**

**August 2009**

**July 2009**

**June 2009**

According to a recent federal appeals court decision, employers may be held liable for discrimination by third parties, including independent contractors. In this case, the employer had retained an independent contractor to screen applicants for employment. When the contractor told an applicant he was "too old" for the job, the applicant sued. The court concluded that an employer could be liable for discrimination by an independent contractor who acts on behalf of the employer. The law's prohibitions apply regardless of whether the employer uses employees or contractors to interview applicants.

Therefore, while an independent contractor may not be considered an employee -- and is therefore prohibited from suing -- that same contractor's actions can result in the employer being liable for the contractor's conduct. Employers are advised to take steps, including providing training, to any person -- employee or contractor -- who is acting on the company's behalf vis-a-vis its employees.

### **Workplace Harassment Standard Lowered in New York City**

A New York appellate court has held that the standard for proving workplace harassment under the New York City Human Rights Law is lower than under either federal or state law. Until now, the general standard for establishing a claim of workplace harassment has been that the conduct is "severe or pervasive." In interpreting the New York City Human Rights Law, the court found that while the "severe or pervasive" standard could be relevant toward damages, the standard for determining liability would be whether the plaintiff was "treated less well than other employees" because of inclusion in a protected classification. The decision reminds all employers that the New York City Human Rights Law continues to be far broader in coverage than either the federal or state anti-discrimination laws.

#### **REMINDER:**

As mentioned in our [August 2009](#) Alert, effective October 26, 2009, employers must provide new hires with written notice at the time of hire regarding their rate of pay and the official payday designated by the employer, and, for non-exempt employees, their overtime rate. In addition, the law now requires employers to obtain a written acknowledgement of such notice.

If we can be of assistance on these or any employment law issue, please do not hesitate to contact us.

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