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LEGAL ALERT

New York Wage Theft Prevention Act Now In Effect

The New York Wage Theft Prevention Act (WTPA), signed into law last December, became effective April 9. The new law imposes on New York employers a variety of more stringent pay notice requirements and increases penalties for violations of wage payment as well as notice and recordkeeping violations. All New York employers will need to ensure that their practices are in compliance.

Just over a week before the law's effective date, the New York Department of Labor (NY DOL) finally issued sample notices, guidelines, and a set of FAQs on the law's application. The NY DOL's Guidelines can be found on its website www.labor.ny.gov or you may visit here and here. Instructions have also been posted. There are templates for providing notice to new hires and employees. And the NY DOL has provided a set of FAQS.

Here is a prioritized list of actions. Some should be taken now; others can be addressed in due course.

1. Confirm That All Necessary Information Is Being Distributed With Each Paycheck

Most employers utilize a payroll services company to process their employees' paychecks. These companies, such as Paychex and ADP, will almost certainly have been preparing for the effective date of the WTPA and will know what is required. It would nevertheless be prudent to confirm with your vendor that the information on paycheck stubs that will be distributed in the first pay period after April 9 will include:

- applicable dates covered;
- the employers' main address and telephone number;
- employee's pay rate;
- the basis for the pay rate (whether paid by the hour, shift, day, week, salary, piece, commission);
- any allowances claimed as part of the minimum wage (tips, meal allowances);
- amount of gross wages;
- any wage deductions;
- net wages paid; and
- for non-exempt employees, the regular and overtime pay rates and the number of regular and overtime hours worked.

For employers who handle their own payrolls, this is definitely a top priority because pay stubs are delivered regularly and may be the first occasion when compliance with WTPA could be tested.

2. Review Procedures And Forms Used To Notify New Hires

The requirement to give a notice to new hires containing information about their wages is not new; it has been required since 2009 under the provisions of New York Labor Law (NYLL). But the WTPA adds a requirement to give existing employees similar notices on an annual basis, although that does not go into effect until 2012.

WTPA adds significantly to the requirements, and the following issues should be considered and addressed:

Information To Be Conveyed

Under the WTPA, notices must include the following information:

- the new hire's regular rate of pay, regular payday, and overtime rate of pay (if eligible for overtime);
- the basis of the wage payment (e.g., whether the employee will be paid by the hour, shift, day, week, salary, piece, or commission, or on some other basis);
- whether the employer will be claiming some type of allowance, such as for tips or a meal allowance, as part of the minimum wage;
- the employer's main address and phone number; and
- additional information about the employer, including any d/b/a names.

Separate Notice

Until the most recent pronouncements by NY DOL, it had not been clear whether an employer could comply with the law by inserting the information that must be given new hires in an offer letter, employment contract or some other type of communication, thereby avoiding the use of a "form." The NY DOL has now stated that such a practice is *not* sufficient. A "separate form" must be used. An employer may use either the NY DOL's template forms or develop a notice of its own.

The notices may be delivered electronically, but the NY DOL has said that in order for electronic notices to comply with WTPA 1) the employee must have access to a computer with printing capabilities and there is no charge for printing a copy of the notice; 2) the notice must be in a format that can be reviewed at the computer to which the employee has access; and 3) the form of any electronic acknowledgement must be sufficient to prove the employee received and reviewed the notice and is aware that acknowledging it will have significant consequences.

For all those requirements, the NY DOL has indicated that an electronic response that affirmatively states the employee acknowledges receipt of the notice would pass muster. The law requires that employers keep a copy of the acknowledged form for six years. Any employer contemplating using electronic notification should plan ahead for implementing electronic signatures and ensuring that the electronic files created are reliably and securely stored for the six-year retention period.

Language Requirements

The WTPA adds a requirement that notices to employees must be distributed in both English and the employee's "primary language." How is an employer to know if employees consider their "primary language" to be something other than English? You will have to ask, and that could create a problem.

While it's generally the case that an employer can't get in trouble under one law for doing something required by another, the act of asking an individual whether he considers his primary language to be something other than English will necessarily give the employer knowledge of the person's ethnicity or national origin. And if that inquiry is made before a job offer is extended, it could be claimed that a subsequent decision not to hire was motivated by the knowledge the employer gained through the inquiry. Our advice? Defer asking new employees whether their primary language is other than English until after the job offer has been extended.

The NY DOL has issued form notices in three languages, (Spanish, Korean, and Chinese) and is promising to issue them in three more (Haitian-Creole, Russian, and Polish). There are significant advantages in using the NY DOL's non-English form notices rather than trying to develop and translate your own. Moreover, the NY DOL has stated that an employer may give the notification solely in English if an individual's "primary language" is not one of the six for which it has issued or will be issuing a template. So, despite the language of the Act appearing to require it, the NY DOL has opined that there is no need for employers to translate the notice into languages for which it is not issuing a template, such as French, German or Arabic.

Form Notices Versus Customized

The NY DOL has expressly stated that employers may design their own notice forms provided they convey the required information. But should you?

Notices addressed to exempt employees are the first issue. When NY DOL first developed model notices, it included language on the notice that did not appear to be mandated by the statute: its form advised employees that exemptions are rare, because "most" employees must be paid time-and-a-half for all hours worked over 40. And, it required employers to identify the specific exemption they believed applied to make the employee exempt.

Although NY DOL has backed away from its position, and now says that telling an employee which exemption applies to his job is "optional," its new template notice continues to include the former language despite the supposed change in position. The language in question in the NY DOL notice template for exempt employees is:

> *Overtime Pay Rate:*
>
> *Most workers in NYS must receive at least 1 ½ times their regular rate of pay for all hours worked over 40 in a work week, with few exceptions. A limited number of employees must only be paid overtime at 1 ½ times the minimum wage rate, or not at all.*
>
> *This employee is exempt from overtime under the following exemption (optional) _____.*

In light of this action by NY DOL, for most employers, it is at least worth considering developing a custom form for exempt employees – unless you are highly confident that none of your exempt employees are, or might consider themselves to be, misclassified and entitled to overtime. Since the NY DOL has stated that designating a particular exemption is "optional," a form that does not include any of the language set out above should be compliant with the WTPA. And for foreign language notices, a version of the NY DOL template notice with the unjustified language redacted could be one solution.

Retaining Signed Copies Of The Notice

The WTPA requires that employers obtain new hires' (and, as of January 2012, all employees') signatures on the wage information notices and retain them for six years. The issue of electronic delivery, signature and storage was addressed above. Ensure that your personnel or payroll systems have this capability or will be modified to do so.

3. Notify All Existing Employees Beginning January 2012

Starting in January 2012, the WTPA requires employers to give the same type of notice provided to new hires to all employees (not just new hires) on an annual basis. The notice must be given between January 1 and February 1 each year. Notice must also be given every time an employee's compensation changes, unless the change is specifically noted on a pay stub or equivalent document as discussed in Paragraph 2 above. Employers in the hospitality industry must give the notice whenever an employee's pay changes, regardless of whether the information will appear on a pay stub. Further, employees must receive advance notice of any reduction in their pay.

The annual notice must be given even if an employee's pay has not changed since the previous notice. And a separate section of the law already requires that salespersons whose wages are based in whole or part on commissions must receive and sign for a copy of their commission agreement. The NY DOL has stated that the signed commission

agreement should be attached to the annual pay notice that is to be distributed in January.

As with notice to new hires, employers are permitted to provide the notices electronically, but they will have to obtain adequate electronic signatures as discussed above, and be confident that files containing copies of those e-signed documents are retained for six years.

4. Increased Penalties And Damages

In addition to imposing a variety of new obligations on employers, WTPA also increased the penalties that the Commissioner of Labor may impose and the damages private litigants may recover.

Notice Violations

First, the penalties for failing to give the notices required by Section 195(1), as modified by WTPA, have increased. Newly-hired employees who don't receive the notice of wages within 10 days of their day of employment may sue and recover $50 for each workweek in which a violation occurred, up to a maximum of $2,500.

Existing employees who don't get the required notice may sue and recover $100 per week for each week a violation occurred, again up to a maximum of $2,500.

In both instances, a violation will be found unless the notice that is given complies with the WTPA's requirements. And, new hires and existing employees who successfully sue their employer for non-compliance may recover their "costs" and require a losing employer to pay their attorneys' fees.

The new law thus sets up a possible lucrative opportunity for plaintiff attorneys to file class actions against employers who fail to give compliant notices to existing employees, in a manner that has been experienced lately by California employers, who have seen a proliferation of class-action claims alleging violations that yield small individual judgments, but which can aggregate to large sums, with the prospect of a lucrative award of attorneys' fees.

NY Labor Law Violations

Prior to the WTPA, an employer who violated a provision of the NYLL by failing to pay employees as required would be liable for 1) all unpaid wages due; 2) interest at a rate prescribed by the banking law, which could be as high as 16%; 3) the plaintiff's attorneys' fees; plus 4) "liquidated damages" of up to 25% of the total wages due, if the violation was "willful" – which meant that the employer did not have a good faith and reasonable basis for its actions. The violation period, or statute of limitations, for a NYLL violation is twice as long as under federal law – six years vs. the federal maximum of three.

Under the provisions of the WTPA, all of these continue, except that the potential liquidated damages award is now four times as large – 100% of the wages owed, rather than 25%.

If the enforcement action is taken by the NY DOL rather than a private party, the agency is now authorized to use administrative proceedings, as opposed to a civil lawsuit, to recoup wages for employees. And in actions brought by the Labor Commissioner, if an employer's actions are found to be "willful or egregious," the NY DOL may assess an amount equal to double the total amount due. That penalty is to be paid to the NY DOL. This could result in quadruple damages for a wage violation.

Finally, an employer that has been found liable for NYLL violations but fails to pay a judgment against it within 90 days may be ordered to pay an additional 15% to its employee(s).

Anti-Retaliation Remedies

The WTPA adds additional remedies that may be recovered by employees who suffer retaliation after they complain of conduct they reasonably and in good faith believe constitutes a violation of the NYLL. The NY Labor Commissioner is authorized to impose penalties similar to those available in a private civil action. These include:

- civil penalties up to $10,000;
- compensatory damages;
- an injunction against the offending conduct;
- payment of up to $10,000 liquidated damages;
- reinstatement or rehiring if the employee was fired; and
- an award of front pay if reinstatement is deemed inadvisable.

Notice-Posting Requirement

When the enforcement action is brought by the NY DOL, an employer may be ordered to post a notice of the violation in the workplace, in a location that will be visible to employees, for one year. And if the violation is found to be willful, the employer must also post a notice for 90 days in a location where it will be visible to the general public.

Criminal Penalties

Previously, corporations and their officers and agents who failed to pay minimum wage and overtime pay were subject to be prosecuted for a Class B misdemeanor, which can be penalized by a fine of $500-$20,000, and possible incarceration for up to one year. And in the event the employer were to be found guilty of a second violation within six years of the first, the employer could be charged with a felony.

The WTPA does not change the severity of the criminal penalties but expands them to apply to partnerships and limited liability corporations as well as corporations and their officers and agents.

Conclusion

This new law contains several important provisions, coupled with potentially severe penalties. For more information, or for help in reviewing your policies, contact any attorney in the New Jersey office of Fisher & Phillips New Jersey office at 908.516.1050.

This Legal Alert provides an overview of a specific new state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.