

Alert

New York's Wage Theft Prevention Act Creates New Employer Obligations and Increases Penalties

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All New York employers must comply with the New York Wage Theft Prevention Act (the "Act") by April 12, 2011. The Act increases employer obligations regarding notice and recordkeeping of wage information, and penalties for nonpayment and underpayment of wages under the New York Labor Law (the "Labor Law"). Significantly, the Act will require employers to provide written notice annually to all employees as to their classification as exempt or non-exempt for overtime purposes.

Yearly and New Hire Notice Requirements

Section 195(1) of the Labor Law previously required employers to notify new employees hired after Oct. 25, 2009 in writing of their regular rate of pay, their overtime rate of pay (if eligible, and if not, the applicable exemption from overtime pay), and their regular pay day.

The Act substantially increases employer notice requirements under Section 195(1). Beginning on April 12, 2011, employers will be required to notify employees in writing at the time of their hire, and by Feb. 1 of each subsequent year of employment, of the employee's (1) regular and overtime rates of pay (if eligible, and if not, the applicable exemption from overtime pay); (2) basis of pay (whether by hour, shift, day, week, salary, piece, commission, or other); (3) allowances the employer intends to claim against the minimum wage (*i.e.*, tips, meals, lodging allowances, etc.); (4) the regular pay day; and (5) the employer's name (including "doing business as" names), main office address or principal place of business, and telephone number. All existing employees must also receive such notice by Feb. 1, 2012, and every year thereafter.

The notice must be provided in both English and the employee's primary designated language. The employer must obtain a signed and dated acknowledgement from the employee in both languages each time the written notice is issued. The acknowledgement must contain an affirmation from the employee that the employee accurately identified his or her primary language to the employer. Employers must notify employees in writing of any changes to this information at least seven days prior to the time of such changes, unless the changes are reflected on the employee's wage statement (see below). Employers must maintain these notices for a minimum of six years.

The commissioner of the New York State Department of Labor (the "commissioner") will provide forms in languages commonly spoken by populations in New York. If the commissioner has not drafted forms in a particular language, the employer is only required to provide the notice in English. In light of the Act's notice requirements, we recommend that employers consider using the official forms prepared by the Department of Labor. To avoid potential claims regarding impermissible inquiries into national origin, we recommend including a statement on the notices that makes certain that the employer's inquiry regarding the employee's primary designated language shall only be used for purposes of complying with the requirements of Section 195(1) of the Labor Law.

The Act increases employer penalties for notice violations. If an employer does not comply with the notice requirement within ten business days of the employee's first day of employment, the employee may bring a civil action for damages of \$50 for each week that the violation(s) occurred, up to \$2,500 total, plus costs and reasonable attorneys' fees, and any injunctive or declaratory relief that the court deems necessary or appropriate. If an employer fails to provide existing or new employees with notice by the deadlines set out in the Act, the commissioner, in an administrative action, may assess damages of \$50 per week for each employee that failed to receive such notice.

Pay Stub Requirements

The Act also incorporates and expands on many of the notice requirements currently set forth in the Labor Law regulations concerning wage statements (*i.e.*, pay stubs). Every pay period, employers must provide written statements to employees listing (1) the dates of work covered by the wages paid; (2) the employee's name; (3) the employer's name, address and telephone number; (4) the rate(s) and basis of pay (*i.e.*, hourly, shift, weekly, salary, piece, commission, etc.); (5) gross wages; (6) deductions; (7) allowances claimed (*i.e.*, tip, meal or lodging credits), if any; and (8) net wages. For non-exempt employees, the pay stub *also* must include (1) the regular hourly rate and number of regular hours worked; and (2) the overtime rate and number of overtime hours worked. For employees paid a piece rate, the pay stub must include the applicable piece rate and number of pieces completed at each piece rate. Upon an employee's request, an employer must provide a written explanation of how wages were computed. Employers must maintain wage records for a minimum of six years.

If an employer does not provide an employee with a statement with every payment of wages, the employee may recover in a civil action \$100 for each work week that the violation occurred, up to \$2,500 total, plus costs and reasonable attorneys' fees, and any injunctive or declaratory relief that the court deems necessary or appropriate. The Commissioner may also, in an administrative action, assess damages of \$100 for each week that the violation(s) occurred.

Increased Penalties for Wage Violations

If an employer underpays an employee wages, the employer may be liable to the employee in a civil action for the full amount of any underpayment, plus interest and reasonable attorneys' fees. The Act now also provides that an employer may also be liable for liquidated damages of up to 100 percent of the amount of the wages due (either in an action brought by the employee or by the commissioner), unless the employer can prove that it had a good faith basis for believing that the wage underpayment was in compliance with the law. Previously, liquidated damages were capped at 25 percent of the underpayment amount. If an employer fails to pay these penalties within 90 days of the final judgment, the total amount of the judgment *automatically increases* by fifteen percent.

The Act also provides for criminal penalties for employer violations. Any employer who fails to pay minimum wage or overtime pay or who fails to keep the records that the Act requires, may now be guilty of a class B misdemeanor upon a first offense or a felony upon a second offense occurring within six years of a prior offense. For first offenses, penalties include possible imprisonment for up to one year, plus \$500 to \$20,000 for failure to pay minimum wage or overtime, and \$500 to \$5,000 for failure to keep necessary records. For subsequent offenses occurring within six years of the conviction date of the prior offense, penalties are \$500 to \$20,000, and possible imprisonment for up to one year and one day.

Anti-Retaliation

The Act increases penalties against employers for retaliating against employees for complaining about conduct that the employee reasonably and in good faith believes is in violation of the Act. Employees are now also protected from retaliation in the event that an employer *believes* the employee has made a complaint. If retaliation is found, the employee is entitled to back pay, front pay, reinstatement and, at the court's or commissioner's discretion, liquidated damages of not more than \$10,000. The statute of limitations for retaliation claims is tolled from the earlier of the date (1) an employee files a complaint with the commissioner or (2) the commissioner commences an investigation, until an order to comply becomes final or the employee is notified that the investigation has concluded. Unlawful retaliation is a class B misdemeanor.

The Act also allows employees to bring complaints against employers without the need to cite the specific section of the wage payment laws that the employee believes has been violated.

Public Notice of Employer Violations

The commissioner may require an employer who violates the Act to post a notice of the violation in an area *visible to employees* for up to one year. If the violation was willful, the employer must post a notice of the violation in an area *visible to the general public* for up to 90 days. Any person who removes, alters, defaces or interferes with posted notices may be found guilty of a misdemeanor.

Wage Deductions

In light of the Act's increased penalties, employers are reminded of Section 193 of the Labor Law, which provides that no employer shall make any deduction from the wages of an employee, except deductions which are (1) made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency or (2) expressly authorized in writing by the employee and are for the benefit of the employee for the following purposes: (a) payments for insurance premiums; (b) pension or health and welfare benefits; (c) contributions to charitable organizations; (d) payments for United States bonds; (e) payments for dues or assessments to a labor organization; or (f) similar payments for the benefit of the employee.

The New York State Department of Labor has taken the position that any deduction not listed above is unlawful under the Labor Law. Under this interpretation of Section 193, many deductions that employers take from an employee's wages, such as deductions for overpayments, repayment of loans, salary advances and costs for an employee's personal use of the employer's property (e.g., phones, copiers, cafeteria purchases, etc.), and other similar deductions should be discontinued.

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New York employers should review their record-keeping and wage payment policies and practices to ensure compliance with the Act prior to April 12, 2011. Employers also should take this opportunity to revisit the wage-hour classifications of all their employees to avoid penalties under the Act and federal and state overtime laws.

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