

New York's "Wage Theft Prevention Act" Imposes Sweeping Changes on State Labor Law

In December 2010, then-New York Governor David Paterson signed into law the "Wage Theft Prevention Act" (the "Act"), which amended significant provisions of the New York Labor Law. The Act operates as a double-edged sword to private sector employers in New York, both adding new affirmative obligations and increasing the costs of non-compliance.

Among other things, the Act requires employers to comply with more stringent notice and recordkeeping requirements. All New York employers (except governmental agencies, which are not subject to the requirements of the applicable Labor Law provisions) will have to modify their recordkeeping and notice practices to comply with the Act. Moreover, both civil and criminal penalties have been significantly increased across an array of Labor Law provisions, not limited to notice and recordkeeping issues. Thus, the amendments may require attention in additional areas as well.

The Act goes into effect on April 9, 2011. Covered employers should, however, take immediate action to avoid future violations and expensive litigation.

New Hire and Annual Notices

Under the current Labor Law (based on a prior amendment in 2009), employers have to give new employees certain information regarding their wages in writing when they are hired. The Act amends Labor Law Section 195 by requiring employers to (1) include additional information in a written notice and (2) provide employees written notice of this information both at the time the employee is hired and annually on or before February 1 of each year.

Prior to the effective date of the Act, employers have been statutorily required to include (in notices to new hires) the employees' regular and overtime rate of pay and regular pay day. In addition, the New York State Department had issued guidelines requiring that employers include the basis for the exemption from overtime payment for all employees deemed exempt from overtime requirements. Beginning April 9, 2011, the Act will now require that all of the following information must be provided in the new hire and annual notices:

- The employee's rate(s) of pay (including both regular hourly rate(s) and the overtime rate(s) for employees subject to overtime payment under New York law);
- Basis of pay (whether by the hour, shift, day, week, salary, piece, commission, or other);
- Allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances;
- The regular pay day;
- The employer's name and any "doing business as" names;
- The physical address of the employer's main office or principal place of business;
- The employer's mailing address if different from the physical address;

- The employer's telephone number; and
- All other information that the Commissioner of Labor "deems material and necessary."

Based on current guidelines, it is anticipated that the Commissioner of Labor ("Commissioner") may require, potentially among other things, that the employer also identify any bases for exemptions from overtime pay, if any is deemed applicable by the employer to apply with respect to a particular employee.

In addition to the above requirements, the Act states that the written notices must be in English and the primary language of the employee if other than English.

Each time such a notice is provided to an employee, the employer must obtain from the employee a signed and dated written acknowledgment of receipt of the notice. The acknowledgment must also be in English and the primary language of the employee. The acknowledgment must include an affirmation by the employee that the employee accurately identified his or her primary language to the employer and that the notice provided by the employer to such employee was in the language so identified. The acknowledgment must also conform with any additional requirements established by the Commissioner with regard to content and form.

The Act does not expressly require employers to use any specific form document to satisfy the above notice and acknowledgment requirements. However, the Commissioner is tasked with preparing templates for the required notification, including dual-language notices, and could potentially direct employers to use the templates. Employers will not be penalized for any errors or omissions in the non-English portion of any templates created by the Commissioner. If an employee identifies a primary language for which no template is available from the Commissioner, the employer need only provide the employee with an English notice and accompanying acknowledgment.

The Act grants the Commissioner the power to waive or alter any of the above requirements for "temporary help firms," a statutory term that generally includes temporary staffing agencies. It remains to be seen what the Commissioner's future approach will be regarding such employers. However, existing guidance from the New York State Department of Labor predating the Act suggests that the Commissioner will likely address issues raised by the fact that employees placed by temporary help firms are apt to have terms and conditions of employment that vary based on their assignments.

In addition to the new hire and annual notices, employers must notify employees in writing of any changes to the information required in such notices at least seven days prior to the time of such changes, unless the changes are reflected on the employees' regular wage statements, which are discussed below. Given the post-February effective date of the Act, it is not expected that employers will be required to provide the first annual notices until early 2012. Nonetheless, the new requirements must be satisfied beginning April 9, 2011 for any new hires and for any changes regarding the applicable terms of employment that occur on or after that date.

Wage Statements

The Act also amends the requirement that employers provide their employees with wage statements. Under currently applicable law, employers have been required to include a statement with every payment of wages (e.g., a "pay stub") that includes the gross wages, deductions, and net wages. The Act significantly expands the scope of information that must be included each pay period to include all of the following:

- The dates of work covered by the payment of wages;
- The employee's name;
- The employer's name;
- The employer's address and phone number;
- The rate(s) and basis of pay;
- Gross wages;
- Deductions;
- Allowances, if any, claimed as part of the minimum wage;
- Net wages;
- For employees who are not exempt from overtime compensation, the employee's regular hourly rate, the overtime rate, the number of regular hours worked and the number of overtime hours worked; and
- For employees who are paid a piece rate, the applicable piece rate or rates of pay and the number of pieces completed at each piece rate.

In addition to the above default requirements, the employer must provide the employee with a written explanation of how the employee's wages were computed if the employee so requests.

Penalties for Failure to Provide Required Notices

If an employer does not provide a new employee with the required written notification and acknowledgment within the first 10 days of his/her employment, the employee may be entitled to recover damages of \$50 per week for each work week the violation occurred up to a total of \$2,500, plus costs and attorney's fees. Similarly, if an employer fails to provide wage statements containing the required information with each payment of wages, the employee may be entitled to recover damages of \$100 per week for each work week the violation occurred up to a total of \$2,500, plus costs and attorney's fees. The court may also award such other relief, including injunctive and declaratory relief, as it deems necessary or appropriate. In addition, the Commissioner can bring legal action on behalf of any employee not provided the required written new hire or annual notice or wage statement and assess further damages of \$50 per week (new hire/annual notices) or \$100 per week (wage statements) for each work week that the violations occurred or continue to occur, with no maximum penalty.

The Act also provides that employees and the Commissioner each have the right to recover attorney's fees and costs incurred in enforcing any court judgment awarding remedies based on an employer's failure to provide the applicable notices discussed above. In addition, the unpaid amount of any such judgment shall automatically increase by 15% if it remains unpaid 90 days after expiration of the time to appeal from the judgment.

The Act does further provide two potential affirmative defenses to liability for failure to provide the required notices. The first requires the employer to prove that it made complete and timely payment of all wages due under applicable New York Labor Law provisions, including the wage

payment laws and the State minimum wage and overtime laws and regulations. The second defense requires the employer to prove that it reasonably believed in good faith that it was not required to provide the notices. It would likely be burdensome for an employer to prove either defense in a civil court action or administrative proceeding.

Recordkeeping

In addition to tracking the information necessary to complete the required wage statements, employers must also maintain "contemporaneous, true, and accurate" payroll records for each employee, including former employees, for at least **six** years. Such records must reflect, for each week worked:

- The hours worked;
- The rate(s) and basis of pay;
- Gross wages;
- Deductions;
- Allowances, if any, claimed as part of the minimum wage;
- Net wages;
- For employees who are not exempt from overtime compensation, the employee's regular hourly rate, the overtime rate, the number of regular hours worked and the number of overtime hours worked; and
- For employees who are paid a piece rate, the applicable piece rate or rates of pay and the number of pieces completed at each piece rate.

The first six items above must be recorded for all employees, **even if they are deemed exempt from State and/or federal overtime requirements**. This includes hours worked, which must further be broken down into regular and overtime hours for non-exempt employees

Civil and Criminal Penalties

The Act significantly increases the criminal and civil penalties for certain violations of the New York Labor Law, including, but not limited to, those regarding the payment of wages.

Under the Act, an employer is now potentially liable for: (1) the full amount of underpayment; (2) liquidated damages, which are increased to 100% of the underpayment amount (from 25% under current State law); (3) reasonable attorney fees; and (4) prejudgment interest. In addition, either the employee or the Commissioner is entitled to recover attorney's fees, costs, and prejudgment interest that may be incurred while enforcing a judgment. The Commissioner may also add additional damages in the amount of 15% of any judgment amount unpaid 90 days after the order becomes final.

Employers that knowingly fail to pay any minimum wages or overtime wages due to an employee may be found guilty of a misdemeanor, subject to a fine of \$500 to \$20,000 or imprisonment for up to one year. Subsequent violations within six years of the first violation/conviction may constitute felonies. Although these penalties themselves are not new, the Act broadens the types of businesses and individuals who are subject to criminal liability for underpayment of wages and overtime. Under the Act, limited liability corporations and partnerships, including officers and agents of these businesses, will now also be potentially subject to the criminal penalties listed above in addition to corporations and their agents and officers.

The Act also gives the Commissioner the new authority, under certain circumstances, to post notices at the employer's premises summarizing the violations found and other information deemed pertinent by the Commissioner. The Commissioner may require such posting in an area visible to employees and/or the general public.

Enforcement Power of the Commissioner of Labor

Under the Act, the Commissioner of Labor's powers are broadened. The Commissioner has the authority to investigate and attempt to resolve controversies between employees and employers. The Commissioner may institute proceedings on account of any alleged criminal violation of an expanded number of wage-related provisions of the New York Labor Law. The Commissioner also has the authority to commence administrative actions to recover penalties and collect wage claims from employers. If an employer defaults on a judgment, the Commissioner may require a bond and/or an accounting of all of the employer's assets from the employer. The Commissioner also has the authority to impose additional payments against an employer as a civil penalty for any willful or egregious violations.

Anti-Retaliation Provisions

The Act expands the activities for which employees are granted protection against retaliation by their employers. Employers will now be expressly prohibited from discharging, threatening, penalizing, or discriminating or retaliating in any other manner against any employee for any of the following reasons:

- Because the employee made a complaint to his or her employer, the Commissioner, the Attorney General, or any other person, that the employer engaged in conduct that the employee reasonably and in good faith believes violates any provision of the Labor law or any order issued by the Commissioner;
- Because the employer believes that such employee has made a complaint to his or her employer, the Commissioner, the Attorney General, or any other person, that the employer has violated any provision of the Labor Law or any order issued by the Commissioner;
- Because the employee has caused to be instituted or is about to institute a proceeding under or related to the Labor Law;
- Because the employee has provided information to the Commissioner, his or her authorized representative, or the Attorney General;
- Because the employee has testified or is about to testify in an investigation or proceeding under the Labor Law;
- Because the employee has otherwise exercised rights protected under the Labor Law; or
- Because the employer has received an adverse determination from the Commissioner involving the employee.

The Act further clarifies that "[a]n employee complaint or other communication need not make explicit reference to any section or provision of [the New York Labor Law] to trigger the protections of" the Labor Law's anti-retaliation provisions.

The Act also increased the penalties that may be assessed by either the Commissioner or a court against employers for retaliation against employees who complain of conduct that they believe violates the New York State wage payment laws. If the employer retaliates against the employee, the employee may be entitled to compensatory damages, injunctive relief including reinstatement to his or her former position or an equivalent position, back pay and front pay, and

civil penalties of up to \$10,000. The employee may also be entitled to liquidated damages of up to \$10,000. Those who engage in such retaliation may also be found guilty of a misdemeanor.

The two-year statute of limitations for retaliation actions is tolled once the employee files a complaint with the Commissioner or an investigation commences, whichever is earlier, until the employee is notified that the investigation has concluded or an order to comply has been issued by the Commissioner and is final. Moreover, investigation by the Commissioner is neither a prerequisite, nor a bar, to civil action through the courts.

Need for Employer Action

Although the new notice requirements impose the most tangible new burden on employers, the broad changes to the penalty and enforcement provisions of the New York Labor Law are potentially the more significant aspect of the Act. To be sure, employers should modify their notice and recordkeeping procedures in the coming months to comply with the enhanced requirements of the Act. The expanded penalties could lead to extensive and costly litigation if employers do not comply with the revised notice and recordkeeping requirements. However, employers should also take this opportunity to audit all pay practices to ensure compliance with the broad array of wage and hour and wage payment laws.

The increased availability of attorneys fees and the enactment of 100% liquidated damages now make class action litigation an even more attractive possibility for employees and their attorneys. Given the new notice requirements, litigation could be lucrative for employees and plaintiff-side attorneys even if there has been no actual failure to pay wages. Moreover, once attorneys get involved on behalf of employees, they are likely to further investigate and seize on any perceived errors or omissions in compliance with wage and hour laws, including the complex and increasingly litigated field of overtime compensation.

The issues in play here implicate numerous intricate sources of law that impose a host of technical requirements that can easily be unintentionally violated by employers with devastating consequences to the business. Thus, it is critical to seek the advise of legal counsel experienced in this area in pursuit of full compliance.

If you have any questions regarding this Alert, please contact Scott P. Horton (716-843-3949; shorton@jaeckle.com) or any of the other attorneys in our Labor and Employment practice group.

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