

## MANDATORY WAGE ACKNOWLEDGEMENT FORMS ISSUED BY NEW YORK STATE

As discussed in a prior [Alert](#), Governor Paterson signed a law on July 28, 2009, amending § 195(1) of the New York State Labor Law. Effective October 26, 2009, § 195(1) now requires employers (other than governmental agencies) to have newly hired employees sign acknowledgements that they have received written notice of their wage rates, including overtime rates for non-exempt employees. This Alert provides critical new information regarding employers' compliance with § 195(1).

Many New York employers have sought to comply with the new requirements of § 195(1) by revising their existing offer letters and/or preparing new forms to state the information required by the amended law. However, the New York State Department of Labor ("NYSDOL") has announced that employers must instead use notice/acknowledgment forms issued by the NYSDOL.

### EMPLOYERS MUST PROVIDE NYSDOL FORM NOTICE TO NEWLY HIRED EMPLOYEES

On October 28, 2009, the NYSDOL issued a "Fact Sheet" regarding § 195(1), with separate pages respectively aimed at "Workers" and "Employers." The "Fact Sheet" plainly informs employers that the required notice of wage rates "**must be given on an official form from the New York State Department of Labor.**"

The NYSDOL has also published a one-page form entitled "Labor Law Section 195(1) Notice and Acknowledgement of Wage Rate Hourly Rate Plus Overtime." A copy of this form is available on page 5 of this Alert. The one-page form drafted by the NYSDOL is relatively succinct, but likely to pose problems for many employers.

The top section of the form provides space for general information about both the employer and employee, including name, address, and telephone number of each. It also requires the employer to provide its federal employer identification number and the name of the person preparing the notice and that person's title.

The next section pertains to the wage information. With single lines each for the preparer to indicate the employee's rate of pay "per hour," overtime rate of pay "per hour," and designated pay day.

The form next requires the preparer to sign and date a statement certifying the accuracy of the above-provided information with an express acknowledgement that false statements made knowingly are punishable as a class A misdemeanor.

The notice also contains the following "General Statement Regarding Overtime Pay in New York": "**Almost all employees in New York must be paid overtime wages of 1½ times their regular rate of pay for all hours worked over 40 per workweek. A very limited number of**

**specific categories of employees are covered by overtime at a lower overtime rate or not at all.”**

The last section provides for the employee’s signature to acknowledge receipt of the wage rate and pay day information.

### **SPECIAL RULES FOR “TEMPORARY HELP FIRMS”**

Just prior to the October 26, 2009 effective date, the NYSDOL published “Guidelines Regarding Notice and Acknowledgment of Wage Rate/Temporary Help Firms,” with an accompanying “Notice and Acknowledgement of Wage Rate(s) / Temporary Help Firms Pursuant to Labor Law § 195(1).” These guidelines borrow the following preexisting statutory definition (Labor Law § 916(5)) in determining whether an employer qualifies as a “temporary help firm” for § 195(1) purposes: **“a business which recruits and hires its own employees, and assigns those employees to perform work at or services for other organizations, to support or supplement the other organization’s workforce, or to provide assistance in special work situations such as, but not limited to, employee absences, skill shortages, seasonal workloads, or to perform special assignments or projects.”**

The special guidelines for Temporary Help Firms expressly apply only to employers meeting the above definition and not to other employers hiring employees on a temporary basis.

The notice form for Temporary Help Firms requires an employee to be provided, at time of hire, the expected ranges of pay the employee will likely receive based on a good faith estimate of the typical wages earned by similarly qualified workers in assignments similar to those which the employee will likely be assigned. However, the NYSDOL guidelines further require Temporary Help Firms to notify employees, either verbally or in writing, of the particular rates of pay for each assignment prior to commencing work on each assignment.

### **ADDITIONAL FORMS AND GUIDANCE ANTICIPATED**

As suggested by its name, the “Labor Law Section 195(1) Notice and Acknowledgement of Wage Rate Hourly Rate Plus Overtime” appears to assume that the recipient employee is paid solely based on a single hourly wage rate. The NYSDOL has indicated that it likely will be issuing additional notice and acknowledgement forms for employees paid on other bases. Nonetheless, the NYSDOL has further suggested that employers must use the “Hourly Rate Plus Overtime” form for all new hires until a more applicable form is available.

The NYSDOL is also expected to issue additional written guidance regarding employers’ obligations under the amended § 195(1). In the meantime, a NYSDOL press release asserts that it is the NYSDOL’s position that the mandatory form must be provided to every newly hired employee before the employee does any work for the employer.

## **FURTHER CONSIDERATIONS FOR SATISFYING THE NOTICE REQUIREMENT**

Existing payroll practices, though consistent with applicable laws, may be more complex than readily anticipated by the NYSDOL forms. Employers must ensure that, in addition to providing the form required by the NYSDOL, they are also fully and accurately notifying new hires of their pay rates. Such advance notice will not always be an easy task, especially with respect to overtime pay and employees who have variable pay rates.

Under the New York State and federal overtime laws and regulations, the overtime rate for many hourly employees is one and a half times the regular hourly rate. However, the calculation of overtime compensation for non-exempt salaried employees (and some hourly employees) often depends on a number of factors. In fact, overtime rates for many employees vary from week to week based on the number of hours worked, the nature of the compensation paid, and other considerations. In addition, many employers pay premiums for such things as night shifts, special work, "Sunday" work, etc. These should be noted on the form as well.

Even if the NYSDOL does publish alternative forms for different categories of employees, many employers will be unable to determine at the time of hire exact future overtime rates for certain individuals. In some cases, it will presumably have to be sufficient to inform the employee of the method by which overtime will be calculated. To that end, employers apparently must consider, at time of hire, all forms of compensation that a particular employee may receive and the way in which such forms of compensation will factor into overtime pay, if at all. It is recommended that employers prepare separate forms regarding the specific overtime pay (and, in some cases, non-overtime pay) issues that may arise in their particular workplace. Where the mandatory NYSDOL form does not afford a full opportunity to inform the employee of his or her pay rates, such employer-created form could also be provided to employees and acknowledged by reference on, and attached to, the NYSDOL form. Employer-specific forms could, for example, include a list of supplemental payments in a checklist fashion that could be readily completed by a member of human resources or other manager at the time of hire (or as appropriate in the event of changing pay practices during employment).

Although not specifically covered by Labor Law § 195's written notice and acknowledgement requirements, any changes to regular and overtime wage rates during the course of employment should also be effectively communicated to employees. Because of the evidentiary weight that will likely be afforded to the written notice signed by both the employer and the employee, it is recommended that a new NYSDOL form be provided to and acknowledged by employees whenever their wage rates, including overtime compensation, change.

The law requires that the signed notice and acknowledgment must be retained by employers for at least six years. We suggest that such documents should be retained in employees' personnel files throughout the course of their employment and for at least six years after their employment ends.

## RISKS OF NONCOMPLIANCE

In addition to civil penalties provided under the New York State Labor Law, any inaccurate wage rate representations made in the required notices could be used against the employer by employees seeking unpaid wages. Moreover, the NYSDOL forms subject preparers to criminal prosecution in the event of inaccurate notice. Thus, employers must carefully determine and describe the appropriate pay treatment for all employees at the time of hire and throughout employment.

If you have any questions regarding the new NYSDOL forms or the impact of amended Labor Law § 195, please contact Randall Odza (716.843.3877; rodza@jaeckle.com) or Scott Horton (716.843.3949; shorton@jaeckle.com).

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**Labor Law Section 195(1)**  
**Notice and Acknowledgement of Wage Rate and Designated Payday**  
**Hourly Rate Plus Overtime**

<u>Employer</u>	<u>Employee</u>
Company Name _____	Name _____
FEIN _____	Street address _____
Street address _____	Apt. _____ City _____
City _____ State _____	State _____ Zip: _____
Zip _____	Phone (_____) _____ - _____
Phone (_____) _____ - _____	
Preparer's Name _____	
Preparer's Title _____	

Your rate of pay: \_\_\_\_\_ per hour.

Your overtime rate of pay: \_\_\_\_\_ per hour.

Designated pay day: \_\_\_\_\_

I hereby certify that I have read the above and the information contained in this form is true and accurate to the best of my knowledge and belief. Any false statements knowingly made are punishable as a class A misdemeanor (Section 210.45 of the New York State Penal Law).

Date: \_\_\_\_\_ \_\_\_\_\_  
**[Preparer's Signature]**

**General Statement Regarding Overtime Pay in New York:**

Almost all employees in New York must be paid overtime wages of 1½ times their regular rate of pay for all hours worked over 40 per workweek. A very limited number of specific categories of employees are covered by overtime at a lower overtime rate or not at all.

I hereby acknowledge that I have been notified of my wage rate, overtime rate, and designated pay day on the date set forth below.

Date: \_\_\_\_\_ \_\_\_\_\_  
**[Employee's Signature]**

*A duplicate signed copy of this form is to be provided to the employee. Original must be kept by the employer.*