

NEW YORK STATE ALTERS GUIDANCE TO EMPLOYERS REGARDING NEW HIRE WAGE NOTICES

As discussed in prior Alerts* regarding last year's amendment to Section 195(1) of the New York State Labor Law, employers are now required to provide written notice of certain wage information to (and receive signed acknowledgements of receipt from) employees hired on or after October 26, 2009. (Note: The requirements of Labor Law § 195(1) do not apply to governmental agencies.)

Labor Law § 195(1) previously required covered employers to notify employees at the time of hiring of their rate of pay and the regular pay date. As amended, the law now requires that such notice be made in writing and that it include both the regular hourly rate and the overtime rate of pay for employees eligible for overtime compensation (i.e., non-exempt employees). These amendments were primarily intended to increase transparency regarding overtime rates.

Since the amendment to Labor Law § 195(1) took effect, the New York State Department of Labor ("NYSDOL") has issued a series of directives to employers. The NYSDOL has not been consistent in its approach, likely creating understandable confusion among employers in trying to comply with the law. This Alert summarizes the current status of the NYSDOL's guidelines regarding the new hire wage notices. **Of particular significance is new administrative guidance requiring that employers advise any employee who an employer considers exempt from overtime of the specific exemption category applicable to the employee.**

NYSDOL's Initial Approach

In October 2009, the NYSDOL announced that employers must use notice/acknowledgment forms issued by the NYSDOL to meet the requirements of Labor Law § 195(1). At that time, the NYSDOL published two form notices—one entitled "Labor Law Section 195(1) Notice and Acknowledgement of Wage Rate Hourly Rate Plus Overtime" and one entitled "Notice and Acknowledgement of Wage Rate(s) / Temporary Help Firms Pursuant to Labor Law § 195(1)." As demonstrated by their titles, these forms were designed to address only two of the many possible scenarios under which employees work and/or are paid.

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

While indicating that additional notice and acknowledgement forms for employees paid on other bases would be issued, the NYSDOL initially suggested that employers (other than "Temporary Help Firms") had to use the "Hourly Rate Plus Overtime" form for all new hires until a more applicable form was available.

*Prior Alerts: www.jaekle.com/NYSWageOvertime & www.jaekle.com/NYSMandatoryWageForms

Additional Forms Provided, But No Longer Mandatory

The NYSDOL's initial approach to Labor Law § 195(1) raised numerous questions from employers because of the problems related to having a one size fits all form to address issues with so many complexities (especially as related to overtime computation). In addition to issuing additional forms that more appropriately pertain to various employee payment structures, the NYSDOL responded by allowing that employers could prepare their own forms to satisfy the law's notice/acknowledgment requirements.

The following model forms are currently available from the NYSDOL website:

- [Pay Notice for Hourly Rate Employees](#)
- [Pay Notice for Multiple Hourly Rates](#)
- [Pay Notice for Employees Paid a Weekly Rate or a Salary for a Fixed Number of Hours \(40 or Fewer in a Week\)](#)
- [Pay Notice for Employees Paid a Salary for Varying Hours, Day Rate, Piece Rate, Flat Rate or Other Non-Hourly Pay](#)
- [Pay Notice for Prevailing Rate and Other Jobs](#)
- [Pay Notice for Exempt Employees](#)

The NYSDOL has also issued accompanying [instructions](#) for the model notices and additional ["Guidelines for Written Notices of Rates of Pay and Regular Payday."](#)

It should be noted that the NYSDOL's model forms still do not adequately address all common compensation situations. It is recommended that employers consult their labor and employment counsel in determining the best approach to providing the required notice to their employees.

Remaining Concerns Regarding NYSDOL's Position

The promulgation of additional forms, and relaxation of the requirement that one of the NYSDOL forms be used in all cases, affords employers greater flexibility in satisfying the legal obligation imposed by Labor Law § 195(1). Nonetheless, the NYSDOL continues to suggest requirements that appear to exceed those directly set forth in the law.

For example, the model notices all contain the following "General Statement Regarding Overtime Pay in New York State":

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

Regardless of whether the NYSDOL's assertions in such statement fairly characterize the reality of overtime eligibility under applicable laws, neither Labor Law § 195(1), nor any other provision of law requires employers to provide this statement to employees. In this regard, Labor Law § 195(1) only states that employees eligible for overtime must be given a notice that states their overtime rate of pay. Especially for employees exempt from overtime requirements, including

the NYSDOL's proposed statement on the required written notices could lead to problematic confusion and may even invite employees to challenge their exempt status.

The NYSDOL's current "Guidelines for Written Notice of Rates of Pay and Regular Payday" do not expressly require employers to include the above-quoted "General Statement" on their Labor Law § 195(1) notices.

However, the NYSDOL is taking the position that the notice to any exempt employees must state the specific exemption that applies. Such purported requirement is not, however, stated in the amended law and (with limited possible exceptions) has not previously been required as a condition of establishing an exemption from state and federal overtime laws.

Although it is certainly advisable for employers to carefully determine whether a new employee is exempt from overtime requirements and to know the legal basis for such exemption, informing employees of the basis for their exemptions could prove problematic. It is conceivable that an employer facing a subsequent challenge to the basis for the exemption (either through Department of Labor enforcement or a civil lawsuit) might be effectively precluded from proposing an alternative exemption rather than, or in addition to, the one referenced in the initial notice provided to an employee. Even where the employer was correct in asserting a particular exemption at the time of hire, circumstances may change during employment resulting in an alternative exemption applying to an employee. Thus, for these reasons, among others, employers should be even more vigilant than before in determining and monitoring the exemption status of their employees. We also recommend that employees whose work satisfies more than one basis for exemption be advised of each such category in the written notices given to the employees.

It is expected that the NYSDOL will be asked to reconsider their positions on these and other aspects of their current Labor Law § 195(1) guidance. In the meantime, however, employers who fail to inform exempt new hires of the basis for their exemption risk liability.

Further Considerations for Satisfying Wage Notice Requirements

The written notice must be provided at the time of hiring, before any work is performed. Employers must obtain each recipient's signed acknowledgment of receipt and retain the signed notice for six years. (Notwithstanding the specific time period required by law, it will generally be advisable to maintain all related notices at least for the duration of respective employees' employment and an additional period thereafter.)

Employers are also reminded that Labor Law § 191(1)(c) requires that the terms of employment for commissioned salespersons be set forth in writing, signed by both the employer and the employee. Such writing must be retained for at least three years. Although not specifically required by statute, the NYSDOL's "Guidelines for Written Notice of Rates of Pay and Regular Payday" provide that a document designed to satisfy § 191(1)(c) can also satisfy § 195(1) if it indicates whether the salesperson is eligible for overtime pay and either specifies the exemption under which the salesperson falls or indicates the method of calculating the salesperson's overtime rate of pay.

Employers should also note that additional notice requirements apply to certain farm employees pursuant to existing regulations. See New York Code of Rules and Regulations § 190-6.1.

Risks of Noncompliance

In addition to civil penalties available 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. Thus, employers must determine the appropriate overtime treatment of all employees at the time of hire for purposes of the required notice and acknowledgement. Moreover, to avoid potential problems based on inevitable discrepancies between the written notice and future pay practices, any subsequent changes made to regular and overtime wage rates and exemption categories during the course of employment should also be effectively communicated to employees.

If you have any questions regarding compliance with Labor Law § 195 or related overtime compensation issues, please contact Randall Odza (716.843.3877; rodza@jaeckle.com) or Scott Horton (716.843.3949; shorton@jaeckle.com).

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