

New Jersey Enacts Sweeping “Wage Theft” Law

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By [Maxine Neuhauser](#) and [Michael D. Thompson](#)

On August 6, 2019, Acting Governor Sheila Oliver signed [S1790](#) into law (“Law”), toughening the penalties for failure to pay wages, benefits, and overtime (collectively “wages”) owed to workers and extending the statute of limitations from two years to six for all wage claims, including failure to pay minimum wage and overtime. Under the Law, which became effective immediately,¹ employees are eligible to receive triple damages for unpaid wages (i.e., the unpaid wages, plus liquidated damages of 200%). The Law also adds protections against retaliation, increases potential fines, provides for jail time for repeat offenders, and of particular note, allows for recovery of attorneys’ fees and costs.

The Law permits employees to bring collective actions on behalf of similarly situated employees. It also reduces the threshold for determining when an entity is a successor employer.

The Law applies both to traditional wage and hour violations, i.e., failure to pay minimum wage and failure to pay overtime, and to other forms of compensation, including any “benefits arising out of any employment agreement.” Thus, private claims alleging failure to pay amounts or to provide benefits due under commission plans, bonus plans, and other benefits included in an employment agreement, such as an automobile allowance or equity plan participation promised in an executive’s employment agreement²) — previously, breach of contract claims — now carry potential liability for triple damages and attorneys’ fees and costs, as well as criminal penalties, including incarceration.

¹ The criminal provisions of the Law become effective “the first day of the third month following enactment,” i.e., December 1, 2019.

² An earlier version of S1790 sought to add an expansive definition of the term, “compensation and benefits,” which would have covered all remuneration received in return for services rendered, including but not limited to, “health benefits, pensions, medical treatment, disability compensation and workers’ compensation, including death benefits to dependents of workers who have died as a result of employment.” This definition was deleted from the Law, and it remains to be seen how broadly the term “benefits arising out of an employment contract” will be applied.

Increased Damages, Entitlement to Attorneys' Fees and Lowered Burden of Proof

Of greatest significance, the Law requires an assessment of liquidated damages of up to 200 percent (i.e., triple damages) for an employer's "knowing" failure to pay an employee the full amount of wages "agreed to" or "required" by law. The Law states that the payment of liquidated damages in a civil lawsuit is not required for an employer's first violation, provided the employer (i) shows that the act or omission constituting the violation was an inadvertent error made in good faith based on reasonable grounds, (ii) acknowledges it violated the law (thereby [potentially] admitting to a disorderly persons offense), and (iii) pays the amount owed within 30 days of notice of the violation. Plaintiffs can be expected to argue that, after a single violation of the Law, *any* future violation—regardless of whether it was inadvertent, made in good faith or based on reasonable grounds, and regardless of when the first violation occurred or what it involved—will result in the assessment of liquidated damages up to triple the employee's claimed unpaid wages.

In addition, the Law allows employees who prevail in civil actions to recover unpaid wages also to recover attorneys' fees and costs.

The Law also eliminates the requirement to show that a violation was "willful" for imposition of penalties and damages. Further, for wage claims investigated by the New Jersey Commissioner of Labor and Workforce Development ("NJDOL"), the law creates a presumption that a violation occurred if an employer fails to produce employee records it was required by law to keep.

Expanded Prohibition against Retaliation

The Law broadens protection to employees who complain about unpaid wages and legislatively overturns New Jersey common law, which had upheld an employer's right to fire an employee for bringing an action over non-statutory salary disputes, such as alleged unpaid commissions.³ Previously, employers were prohibited from retaliating against employees who filed administrative claims or legal actions for minimum wage violations or for unpaid overtime. The Law expands this protection by prohibiting retaliatory action against an employee because the employee has (i) complained to their employer, to the NJDOL commissioner or to the employee's authorized representative about any alleged nonpayment of wages, (ii) instituted (or is about to institute) proceedings to recover any such unpaid wages, (iii) testified (or is about to testify) in a wage proceeding, or (iv) informed co-workers about their rights under the state's wage laws.

The Law establishes a presumption of retaliation if an employer has taken an adverse employment action against an employee within 90 days of the employee filing a complaint with the NJDOL or filing a lawsuit for unpaid wages. *That presumption may be rebutted only by "clear and convincing" evidence that the action was taken for other reasons.* An employee who proves they were terminated in retaliation for such complaints must be offered reinstatement.

³ See *Alexander v. Kay Finlay Jewelers, Inc.*, 208 N.J. Super. 503, 507 (App. Div. 1986).

Longer Statute of Limitations

Previously, claims for unpaid minimum wages or unpaid overtime compensation had a two year statute of limitations. The Law establishes a six year statute of limitations for all wage claims, including for claims alleging retaliation under the Law.

Increased Fines and Criminal Penalties

The Law substantially increases the potential fines for violating the state's wage payment laws, including raising the minimum fine for a first offense to \$500 (from \$100) or imprisonment for up to 90 days, or both. Penalties get steeper for repeat violations and for violations (such as the failure to pay overtime) that occur in multiple weeks. In addition, the Law amends the state's criminal code to establish a third degree criminal offense for "pattern of wage nonpayment," which is established after an employer's third conviction for violation of the provisions of any of the state's wage laws. Conviction could lead to imprisonment for a term of three to five years and a fine of up to \$15,000, or both.

Collective Actions by Similarly-Situated Employees

The Law extends the availability of collective actions to any form of unpaid wages. Previously, New Jersey provided for such lawsuits only in the case of minimum wage violations. Of note, the standard for collective actions—which requires only that employees be "similarly situated"⁴—is easier to satisfy than the more stringent requirements of a class action certified under New Jersey Court Rule 4:32 or Rule 23 of the Federal Rules of Civil Procedure. Thus, as long as they are similarly situated, large groups of New Jersey employees will now be able to join in collective actions in New Jersey state court seeking lost wages and liquidated damages, and attorneys' fees and costs, for unpaid wages going back six years.

Successor Employer Threshold Lowered

New Jersey has long held successor employers liable for unpaid wages and established a rebuttable presumption that an employer was a successor if the two entities shared three characteristics from a statutory list. The Law lowers the threshold for creating the presumption of successorship to just two shared characteristics from the list:

- 1) perform similar work within the same geographical area;
- 2) occupy the same premises;
- 3) have the same telephone or fax number;
- 4) have the same email address or Internet website;
- 5) employ substantially the same workforces or administrative employees, or both

⁴ N.J.S.A. 43:11-56a25.

- 6) utilize the same tools, facilities, or equipment;
- 7) employ or engage the services of any person or persons involved in the direction or control of the other; or
- 8) list substantially the same work experience.

The Law is another in a string of worker-friendly legislation enacted and measures taken since January 2018 under Governor Phil Murphy's administration, which include laws (i) increasing the state's [minimum wage](#), (ii) broadening its [Equal Pay Act](#), (iii) mandating [Earned Sick Leave](#), (iv) requiring employers to provide a [pre-tax transportation benefit program](#), and (v) expanding protections for employees who are [registered users of medical cannabis](#), as well as an Executive Order establishing a [task force targeting employer misclassification](#) of employees as independent contractors. While the Law does not create new compliance obligations, the greatly increased exposure arising from unpaid wages, benefits, and other compensation has made compliance more important.

What Employers Should Do Now

- To avoid claims of unpaid overtime, consider conducting an audit to ensure that nonexempt employees have not been misclassified as exempt and that non-exempt employees have not been misclassified as independent contractors.
- Ensure all nonexempt employees record all time worked, and maintain time and attendance records for at least six years.
- Review employment, non-ERISA benefit, commission and bonus plans and similar agreements to eliminate any ambiguities with respect to compensation and benefits, including as to vesting/when a benefit is deemed earned, formulas for determining amount of payment, timing of payment, and the like.
- In bonus/benefits agreements, where possible, included provisions expressly (i) reserving the employer's right to modify and terminate the bonus/benefit program, and (ii) making such bonuses and benefits subject to employer discretion.
- Establish, or review, a policy and procedure through which employees may complain about potential wage or benefits underpayments, and consider adding a specific acknowledgement to your on-boarding packet for new hires to sign.
- In severance and termination agreements, include an acknowledgement that the employee agrees they have been paid all compensation *and benefits* to which they may have been entitled for work performed.
- Review employment handbooks (i) to ensure they contain strong contract disclaimers that prevent handbook provisions from creating contracts for particular forms of compensation or benefits, and (ii) to eliminate ambiguities relating to

compensation and benefits, for example, with respect to whether (and when) employees may receive payment for accrued, unused vacation.

For more information about this Advisory, please contact:

Maxine Neuhauser
Newark
973-639-8269
mneuhauser@ebqlaw.com

Michael D. Thompson
Newark
973-639-8282
mdthompson@ebqlaw.com

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