

Governor Paterson Signs Overhaul of New York State Labor Law

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On December 13, 2010, New York Governor David Paterson signed into law the Wage Theft Prevention Act (“WTPA” or the “Act”). The WTPA, which will become effective on April 12, 2011, overhauls the New York State Labor Law (the “Labor Law”) by strengthening several aspects of that law. Of particular interest to employers will be additional written notice requirements and added penalties for noncompliance with various aspects of the Labor Law.

In sum, the WTPA amends the Labor Law so as to (among other things): (i) clarify and add new requirements to notice of pay rates and days; (ii) amend statutory payroll and wage statement (pay stub) requirements; (iii) increase liquidated damages for violations of the Labor Law; (iv) provide statutory damages and a private right of action in cases where an employer fails to properly notify employees of wage payment information; (v) facilitate the collection of wages ordered to be paid; (vi) explicitly prohibit threats of retaliation and provide authority to remedy retaliation by increasing the damages available to employees; (vii) close a loophole in criminal penalties applicable to wage theft by extending the same penalties that cover recordkeeping violations and non-payment of wages to also cover minimum wage non-payment; and (8) generally provide the New York State Commissioner of Labor (the “Commissioner”) with greater latitude to enforce wage and hour laws. Details of the requirements of the WTPA follow.

Notice of Pay Rates and Pay Dates

As we previously reported in several client alerts ([“Summer 2009 New York State Employment Law Update: Recent Amendments to the State Human Rights and Labor Laws”](#); [“NY State Department of Labor Publishes Notice and Acknowledgement of Wage Rate Forms and Fact Sheets”](#); [“NYS DOL Changes Its Tune on 195\(1\) Notice Requirement”](#); and [“195.1 UPDATE: New York Issues Guidelines, Instructions and Additional Model Notices of Pay Rates and Paydays”](#)), Section 195.1 of the Labor Law requires employers to provide written notice to all employees hired on or after October 26, 2009, of their rate of pay, regular paydays and, for non-exempt employees, their hourly rates and overtime pay rates. Employees must acknowledge receipt, in writing, and that information must be maintained by the employer. The Commissioner has provided some additional requirements in the form of guidelines and instructions.

The WTPA significantly expands the scope of Section 195.1. With the passage of the Act, employers will now be required to provide written notice of certain items pertaining to pay rates and paydays, not only to all new employees, but also to *all employees on or before February 1 of each year*. Employers need not worry about providing such annual notice in 2011, however, since the Act will not become effective until April 12, 2011.

Another requirement is that such notice must be provided in English, as well as the language identified by each employee as his or her “primary language” (if other than English). Forms in several languages will be provided by the Commissioner on the [website](#) of the New York State Department of Labor (“DOL”). To the extent the DOL has not prepared a form in the employee’s “primary language,” the employer may provide such a form in English only. Per the WTPA, the following items must be included in the written notice:

- The rate or rates of pay and the basis thereof (whether paid by the hour, shift, day, week, salary, piece, commission, etc.);
- For non-exempt employees, the regular rate and overtime rate of pay;
- Allowances, if any, claimed as part of the minimum wage (such as tip, meal, or lodging allowances);
- The regular payday designated by the employer;
- The name of the employer;
- Any “doing business as” names used by the employer;
- The physical address of the employer’s main office or physical place of business, and a mailing address, if different;
- The telephone number of the employer; and
- “Such other information as the Commissioner deems material and necessary.”

The provision for material and necessary information is not new, and confirms that the additional requirements included in the Commissioner’s [“Guidelines for Written Notice of Pay Rates and Regular Payday”](#) and instructions will still be applicable. Thus, for exempt employees, the notice should specify which exemption(s) are applicable to the employee.

The employer must obtain, and maintain for six years, a signed and dated written acknowledgment each time such written notice is provided. The acknowledgment must be both in English and the primary language designated by the employee. The acknowledgment must affirm that the employee accurately identified his or her primary language to the employer, and that the notice was in the language so identified (unless the language is not one of those languages identified by the DOL, in which case, English is sufficient). The Act also states that this acknowledgment must conform to any additional requirements established by the Commissioner with regard to its content and form.

Finally, if proper notices are not provided within 10 business days of an employee’s first day of employment, the *employee* may bring a civil action in which the employer may be liable for \$50 per workweek of noncompliance, up to a maximum of \$2,500, plus costs, attorneys’ fees and other relief (such as injunctive and declaratory relief), as the court may deem appropriate. Further, on behalf of any employee who is not provided notice as required by Section 195.1 (including pre-employment notices and annual notices), the *Commissioner* may bring any legal action necessary, including an administrative action, in which available remedies include costs, attorneys’ fees, and other relief (such as injunctive and declaratory relief), as well as \$50 per workweek of noncompliance (without limitation).

Payroll and Pay Stub Requirements

The WTPA amends Section 195.3 of the Labor Law to include additional payroll and wage statement (pay stub) requirements, previously required only pursuant to regulation. Each pay statement must list the following:

- The dates of work covered by the applicable payment of wages;
- The name of the employee;
- The name of the employer;
- The address and phone number of the employer;
- The rate or rates of pay and basis thereof (whether paid by the hour, shift, day, week, salary, piece, commission, etc.);
- Gross wages;
- Deductions;
- Allowances, if any, claimed as part of the minimum wage; and
- Net wages.

Additionally, for non-exempt employees, the overtime rate(s) of pay, number of regular hours worked, and number of overtime hours worked must be included on the pay stub. For employees paid on a piece rate, the statement must include the applicable piece rate or rates of pay and the number of pieces completed at each piece rate. Upon request, the employer must furnish an explanation, in writing, of how such wages were computed. The Act confirms that such payroll records must be kept for six years (previously, only a regulatory requirement).

The WTPA also requires employers to provide employees with written Section 195.1 notices (Notices of Pay Rates and Pay Dates) if any of the information included in the prior paragraph changes. The only exception to this additional written notice requirement is if the applicable change(s) are reflected in pay stubs that comply with each and every requirement set forth in the prior paragraph.

Employees who are not provided proper wage statements may recover damages in a civil action against their employers. They can recover damages of \$100 for each workweek that the violations occur or continue to occur, up to a maximum of \$2,500, together with costs and reasonable attorneys' fees. A defense, however, is available to an employer that pays all wages due the applicable employee.

Damages and Penalties

In addition to the specific damages and penalties discussed above, the WTPA generally stiffens the penalties available for violations of the Labor Law. Pursuant to the Act, employees may recover the full amount of any underpayment of wages and prejudgment interest in addition to attorneys' fees in any court action. The Act increases liquidated damages on unpaid wage violations from 25 percent to 100 percent in both court and administrative actions. The Act also

provides penalties when an employer defaults on paying judgment for more than 90 days after the judgment is final.

Additionally, the WTPA allows the Commissioner in his or her discretion to require an employer to provide an accounting of assets in the event the employer defaults on an administrative order. If the employer refuses, the Labor Law now provides for a civil penalty in an amount up to \$10,000.

Criminal Penalties

While the Labor Law previously provided criminal penalties for the failure to pay wages and the failure to keep records, the WTPA additionally provides criminal penalties for the failure to pay minimum wages and overtime compensation. The Act also includes criminal penalties for employers that fail to properly keep records, and provides for criminal penalties for violations of the Labor Law's retaliation provisions. Finally, the Act expands the reach of the Labor Law's criminal penalties so as to include the officers and agents of partnerships and limited liability companies, not only corporations.

Retaliation Provisions

The WTPA strengthens the Labor Law's anti-retaliation protections by clarifying that "threatening" an employee who engages in protected activity constitutes prohibited retaliation. Additionally, the law clarifies that the two-year statute of limitation to file a retaliation claim runs from the date of the retaliation itself, not from the dates of the worker's employment. Employers found to have violated the retaliation provisions of the statute will be ordered to pay liquidated damages up to \$10,000 for every employee aggrieved, in addition to existing remedies. The Act also authorizes the Commissioner to remedy retaliation by ordering appropriate relief—such as enjoining the conduct of the employer, ordering payment of liquidated damages, including costs and reasonable attorneys' fees, and ordering reinstatement (or an award of front pay in lieu of reinstatement).

Investigations and Enforcement Mechanisms

The WTPA enhances the Commissioner's authority in connection with investigating wage and hour violations. Employers must now permit the Commissioner, or his or her representative, to question employees about the terms or conditions of employment without interference in a private location at the place of employment and during working hours. Previously, the Labor Law made no reference to employer interference or the location of such interviews. Further, the Act provides the Commissioner with the authority to post notices of violations at the worksite for wage violations. Employee-visible notices will be allowed to be posted for a maximum of one year. For willful violations, notices can be visible to the general public for up to 90 days.

What Employers Should Do Now

As stated above, the WTPA becomes effective on April 12, 2011. In order to be in compliance, by that date, New York employers should do the following:

With respect to additional Section 195.1 notice requirements:

- Either modify their own 195.1 notices to include each and every item previously listed, or utilize forms provided by the Commissioner (we will advise when the templates are released);
- Use these notices/acknowledgments for all new employees;
- Notify all employees of the applicable information on an annual basis on or before February 1 of each year, and obtain written acknowledgment of same;
- Keep all acknowledgments for at least six years; and
- If unionized, comply with the WTPA, even if the collective bargaining agreement includes all applicable information, because the WTPA is silent regarding preemption where a collective bargaining agreement exists.

With respect to additional Section 195.3 requirements:

- Make changes to wage statements or contact their payroll providers to ensure that their wage statements (pay stubs) include the required information, as previously detailed.

With respect to the retaliation provisions:

- Be aware that they are prohibited from retaliating against or threatening to retaliate against an employee who engages in a protected activity. These protections apply to any employee:
 - who makes a complaint to (i) his or her employer, (ii) the Commissioner, or his or her authorized representative, (iii) the Attorney General, or (iv) any other person, that the employer has engaged in conduct that the employee reasonably and in good faith believes violates any provision of the applicable chapter of the Labor Law or any order issued by the Commissioner; or
 - whom the employer believes to have made such a complaint; or
 - who caused to be instituted, or is about to institute, a proceeding under or related to the applicable chapter of the Labor Law; or
 - who provided information to the Commissioner, or his or her authorized representative, or to the Attorney General; or
 - who has testified, or is about to testify, in an investigation or proceeding under the applicable chapter of the Labor Law; or
 - who has otherwise exercised rights protected under this applicable chapter of the Labor Law; or
 - who caused the employer to receive an adverse determination from the Commissioner.

As you can see, there is a lot of information included in the WTPA. However, because penalties have increased and enforcement mechanisms have become stricter, compliance is essential.

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