

195.1 UPDATE: New York Issues Guidelines, Instructions and Additional Model Notices of Pay Rates and Pay Days

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The New York State Department of Labor (“DOL”) has recently made available important new information for employers regarding their obligations under Section 195.1 of the Labor Law including notice of pay rates, pay dates and other information.

As we previously reported (see our Client Alerts of [December 11](#), and [October 30, 2009](#)), pursuant to Section 195.1 of the Labor Law (the “Statute”), as of October 26, 2009, employers must provide newly hired New York employees with written notice of their: (1) pay rate; (2) overtime pay rate (if they qualify for overtime pay); and (3) regular paydays.

Such notice must be given at the time of hiring, before the employee performs any work. The employer must keep the original notice for at least six years, and the employee must be provided with a copy.

The DOL initially did not provide guidance on what type of form an employer was required to utilize for this purpose. Then, late last year, it decided that employers must use the “official” form issued by the DOL on its Web site. Next, as we advised in December 2009, the DOL determined that no particular form is required; rather, employers are permitted to create their own forms (or simply include the requisite information in an offer letter), or use any “official” form published by the DOL.

Model Notices, Guidance and Instructions on the DOL’s Web site

The DOL recently made available on its Web site: (1) additional forms for employers’ use (the “Model Notices”); (2) guidelines (the “Guidelines”) for complying with the Statute; and (3) instructions (the “Instructions”) for completing the Model Notices. Model Notices for the following categories of employees have been published on the DOL’s Web site at <http://www.labor.state.ny.us/workerprotection/laborstandards/workprot/lshmpg.shtm>:

- Hourly Rate Employees
- Employees with Multiple Hourly Rates (if employee is paid more than one rate for different types of work or different shifts)
- Employees Paid a Weekly Rate or Salary for a Fixed Number of Hours (if employee

works 40 or fewer hours in a week)

- Employees Paid a Salary for Varying Hours, Day Rate, Piece Rate, Flat Rate or Other Non-Hourly Pay
- Prevailing Rate and Other Jobs
- Exempt Employees

Important Information Regarding Notice to Exempt Employees

As stated above, employers need not use the Model Notices published by the DOL. However, if employers create their own forms, or simply include the required information in the text of an offer letter, they must be aware of certain additional requirements, aside from those set forth in the Statute. This is because the text of the Statute includes a statement that the required notices “shall conform to any requirements established by the [Commissioner of Labor] with regard to content and form.” While neither the Guidelines nor the Instructions referenced above have the force of an order or a legal opinion issued by the DOL, both can be interpreted as requirements “established by the [Commissioner of Labor] with regard to content and form” of the required notice.

The Guidelines and Instructions both include certain requirements that are not found anywhere within the text of the Statute. For example, and most significantly, the Guidelines and Instructions provide that employers are to include the specific overtime exemption(s) under which an exempt employee falls (*e.g.*, executive, administrative and/or professional). While currently, the Guidelines state that employers “should” include this information, and the Instructions state that employers “must” include this information, we have been informed by the DOL that the Instructions will be changed such that specifying the applicable exemption(s) will be required by both documents (*i.e.*, not merely suggested). Other requirements found in the Guidelines and/or Instructions but that do not appear in the Statute include a requirement that notice must be provided “before any work is performed” and that the employer must maintain the form for at least six years.

No Model Notices for Commissioned Salespersons

As of this date, no Model Notice has been made available by the DOL for commissioned salespersons. The Guidelines, however, provide that employers may include the required information from the Statute within the text of a commission agreement between the employer and the employee, so long as that agreement satisfies the requirements of both Section 191.1(c) of the Labor Law (*e.g.*, the terms of employment must be in writing and include how wages, salary, drawing account, commissions and all other monies earned and payable shall be calculated, and must be signed by both the employer and the employee and kept on file by the employer) and Section 195.1.

Should Employers use the Model Notices?

Employers who elect to use the Model Notices should be aware that those models contain information that is not required in the Statute, the Instructions or the Guidelines, such as the name, title and signature of the employer’s representative who prepared the form, as well as a general statement regarding overtime pay in New York State (*i.e.*, the Model Notices state that “[m]ost 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.”). Although it is

unclear whether the DOL will deem an employer to be in compliance with the law if this information is omitted from forms prepared by the employer, as discussed above, inclusion of this information could be deemed to be a “requirement[] established by the [Commissioner of Labor] with regard to content and form.”

Finally, although the DOL permits employers to use their own forms to satisfy the requirements of the Statute, if they opt to do so, employers must ensure that those forms meet all of the requirements of the Statute (including the requirements set forth in the recently published Guidelines and Instructions). It should be noted that the DOL advised that employers should review the Guidelines and Instructions online from time to time, as the contents of those documents are subject to change. Finally, regardless of whether employers choose to comply with the requirements of the Statute by using the Model Notices (or a modified form of the Model Notices), their own forms, or by simply including the applicable information in offer letters or commission agreements, it is prudent to include an at-will statement, confirming the employer’s right to change an employee’s pay rate, pay day or other terms and conditions of employment in the future.

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