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New York Wage Theft Prevention Act

As one of his last acts in office, New York Governor David Patterson signed the New York Wage Theft Prevention Act (the “Act”) into law, effective April 9, 2011. This comprehensive legislation amends various provisions of New York labor law and places additional notice and recordkeeping requirements on New York employers. In addition, it adds harsher penalty provisions for non-compliance and grants the Commissioner of Labor expansive authority to remedy any violations of the Act. A summary of the Act’s key provisions follows.

I. New Hire and Annual Notice Requirements

In late 2009, New York amended Labor Law Section 195, requiring employers to inform new hires in writing of certain pay information. The Act expands these requirements by requiring employers to: (1) include additional information in the notices; and (2) provide notice upon hire and to **all** existing employees by February 1 of each subsequent year. The required information includes:

- Rate of pay (including both regular hourly rate and the overtime rate for employees subject to overtime payment under New York law)
- Basis of pay (*e.g.*, hourly, weekly, salary, commission)
- Allowances, if any, claimed as part of the minimum wage (*i.e.*, tips, meal, or lodging allowances)
- The regular payday
- The name of the employer
- Any “doing business as” names used by the employer
- The physical address of the employer’s main office or principal place of business and a mailing address (if different from the physical address)
- The telephone number of the employer
- Any other information that the Commissioner of Labor deems material and necessary

Employers must also notify an employee in writing of any changes to the information provided in the notice at least seven calendar days prior to the change, **unless** the change is noted on the wage statement discussed in Section II below.

Employers must obtain a signed and dated written acknowledgement from each employee confirming receipt of the notice each time it is received. In addition, the notice must be provided in English and in the language identified by the employee as his or her primary language. The Commissioner of Labor will provide dual-language templates that comply with the requirements listed above. An employer is relieved of the primary language obligation if it is a language for which the Commissioner has not created a template.

Finally, the notices must be retained for **six years**.

II. Wage Statement Requirements

Employers must furnish to every employee with every wage payment a statement (pay stub) including:

- Dates of work covered by the payment of wages
- Name of the employee
- Name of the employer
- Address and phone number of the employer
- Rate of pay and basis thereof (e.g., hourly, weekly, salary, commission)
- Gross wages, deductions, and net wages
- Allowances, if any, claimed as part of the minimum wage (i.e., tip, meal, or lodging allowances)
- For non-exempt employees, the employee's regular hourly rate, the overtime rate, the number of regular hours worked, and the number of overtime hours worked

Finally, the statements must be retained for **six years**. Employers should review their recordkeeping policy and ensure that they have a protocol in place to maintain these statements for at least six years.

In addition, employers will need to ensure, either on their own or with its third-party payroll vendor, that all of the required information is included on pay stubs.

III. Anti-Retaliation Provisions

Employers are prohibited from retaliating against any employee who has made a good-faith complaint about a potential violation of the wage payment laws. If an employer retaliates against an employee, he or she may be entitled to reinstatement, back pay, and front pay. The employee may also recover \$10,000 in liquidated damages.

IV. Enhanced Penalties for Non-Compliance and Liquidated Damages

The Act provides harsh penalties for non-compliance. Failure to provide the proper notice within ten business days of an employee's hire date results in damages of \$50 for each work week during which the violation occurred up to a maximum of \$2,500, plus costs, attorney's fees, and injunctive relief. Failure to provide the proper wage statements results in damages of \$100 for each work week during which the violation occurred up to a maximum of \$2,500, plus costs, attorney's fees, and injunctive relief. In either case, the Commissioner of Labor may assess damages for

any violation with no cap. An employer can avoid these penalties under two circumstances: (1) it made complete and timely payment of all wages due to the employee; or (2) the employer reasonably believed in good faith that it was not required to provide the notice.

In addition, in a successful wage claim, an employee may recover: (1) the full amount of any underpayment; (2) all reasonable attorney's fees; (3) prejudgment interest; and (4) liquidated damages equal to 100% of wages due, unless the employer can prove a "good faith basis" for believing that its underpayment was in compliance with legal requirements. Prior to the amendments to the Act, the liquidated damages provision provided for only 25% of wages due. Any employer who defaults on paying a judgment for more than 90 days after the judgment will also be assessed an additional 15% in damages to limit the cost to an employee to collect the judgment.

An employer who violates any wage payment law may also be required by the Commissioner to post a notice of the violation in an area of the workplace visible to employees for up to one year. If the violation was willful, the employer must post the notice of violation in an area visible to the public for up to 90 days.

Finally, an employer, its officers, and agents face criminal penalties for knowingly permitting an employer to fail to pay wages in accordance with the law or for knowingly permitting the violation of the notice or wage statement provisions, including a class B misdemeanor, which carries a penalty ranging from \$500 to \$20,000. Offenders may also face a prison sentence up to one year. If an employer is found guilty of a second offense within six years of a prior conviction, the employer will be assessed a penalty. These criminal penalties are not amended by the Act, however, the breadth of covered employers was expanded to include partnerships and limited liability companies.

V. Steps to Take

Prior to April 2011, all employers in New York should review and update their notices forms, review and update their wage statements, and review their recordkeeping policies to ensure they are maintaining records for the appropriate period of time.

If you have any questions regarding any matters discussed in this briefing, please contact any of the Winston & Strawn LLP Labor and Employment Relations Practice Group partners listed below or your usual Winston & Strawn contact.

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