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New Law Increases Burdens and Risks For New York State Employers

The recently enacted New York State Wage Theft Prevention Act (the "Act") imposes burdensome new notice and recordkeeping requirements on all New York State employers. The Act also increases penalties for violations of the New York State Labor Law (the "Labor Law") and related retaliation claims. The Act is effective beginning April 9, 2011. All New York State employers should now be preparing to comply with the Act's requirements by that date in order to avoid the risk of incurring potentially significant penalties for non-compliance.

Summary of the Key Provisions of the Act

- Employers must provide a written notice to each employee upon hire and annually thereafter. The notice must include information on the employee's rate of pay, among other items listed in the Act (the "Mandatory Notice").
- Employers must obtain a signed and dated written acknowledgement of receipt of the Mandatory Notice from each employee, and save the records for at least six years.
- Employers must provide each employee with detailed wage payment information in a written statement each pay period (the "Wage Statement"), and save the records for at least six years.
- Employers who do not provide the Mandatory Notices or Wage Statements to employees may be subject to civil or administrative action, and damages of \$50 per week per employee who is not provided the Mandatory Notice and \$100 per week per employee who is not provided the required Wage Statement, subject to certain statutory maximums.
- The Act increases the amount of liquidated damages an employer can be subject to for violations of the wage and hour laws from 25% of the unpaid wage amount to 100% of the unpaid wage amount. The Act also increases other civil and criminal penalties to which an employer may be subject.

New Hire and Annual Notice Requirements

Under current New York State law, at the time of hire, employers must provide new employees with written notice of their rate of pay and, if applicable, rate of overtime pay, and their regular payday, and obtain from employees a written acknowledgement that they have been provided with this notice. This notice requirement applies only to New York State employees hired on or after October 26, 2009.

Beginning April 9, 2011, the Act requires a written notice to be provided both at the time the employee is hired and on or before February 1st of each subsequent year of each employee's employment. This means that employers will be obligated to provide annual written notices to all of their New York State employees, in addition to notices to new hires at the time of hiring. This Mandatory Notice must provide the following information to each employee:

- the employee's regular rate of pay, overtime rate of pay if applicable, and regular payday;
- whether the employee is paid by the hour, shift, day, week, salary, piece, commission or other basis;
- allowances, if any, claimed as part of the minimum wage (e.g., tips, meal, or lodging allowances);
- the employer's name and any "doing business as" names used by the employer;
- the employer's physical and mailing addresses and telephone number; and
- such other information as the New York State Commissioner of Labor (the "Commissioner") may require.

The Mandatory Notice must be provided in English and the language identified by the employee as his or her primary language. The employer must obtain a signed and dated written acknowledgement of receipt of the Mandatory Notice from each employee, both in English and the employee's primary language (if different), which must include an affirmation by the employee that he or she accurately identified his or her primary language. This acknowledgement must be preserved by the employer for six years. Note that it is not entirely clear how and when New York State expects employers to determine what is the primary language of each of their employees.

The Commissioner will be issuing templates employers can use to comply with the Mandatory Notice requirements. However, it is not yet known whether those templates will be issued by the April 9, 2011 effective date of the Act. Also note that, if an employee identifies as his or her primary language a language for which a template has not been provided by the Commissioner, an employer can comply with the notice requirements by providing only an English language notice.

The Act also contains a requirement that an employer must notify each of its New York State employees in writing of any change to the information in the Mandatory Notice at least seven days before the effective date of the change (unless the change is reflected in the required Wage Statements, described below).

Statements To Be Provided With Each Payment of Wages

Under existing regulations promulgated by the New York State Department of Labor, an employer must provide to each employee, with every payment of wages, a statement listing hours worked each week, rates paid, gross wages, allowances claimed as part of the minimum wage (if any), deductions, and net wages. The Act adds to these wage statement requirements and provides that with every payment of wages, each employee must be provided with a statement that includes the following:

- the dates of work covered by that payment of wages;
- the name of the employee;
- the name, address, and phone number of the employer;
- the rate or rates of pay and the basis thereof (whether paid by the hour, shift, day, week, salary, piece, commission or other basis);
- deductions;
- allowances claimed as part of the minimum wage (if any);

- net wages;
- for non-exempt employees, the regular hourly rate of pay, the overtime rate of pay, the number of regular hours worked, and the number of overtime hours worked;
- for employees paid on a piece rate, the applicable piece rate or rates and the number of pieces completed at each piece rate; and
- upon the request of an employee, a written explanation of how such wages were computed.

Records of this information must be maintained and preserved by the employer for six years. Note that existing regulations also require employers to keep records of each employee's social security number, the number of hours worked daily and weekly (including the time of arrival and departure of each employee working a split shift or spread of hours exceeding ten hours), and student classification (if applicable), although this information need not be provided to each employee in the written Wage Statement.

Penalties for Violations of the Mandatory Notice and Wage Statement Requirements

If an employee is not provided with the Mandatory Notice within ten business days of beginning employment, he or she may recover \$50 for each week in which it is not provided, up to \$2,500, together with costs and reasonable attorneys' fees. A court may also award other relief, including injunctive or declaratory relief, that it deems necessary or appropriate. The Commissioner is also permitted to bring an action on behalf of an employee who is not timely provided the Mandatory Notice, including an administrative action, and may assess against the employer damages of \$50 for each week in which the Mandatory Notice is not provided, with no cap on the amount of damages that can accrue.

If an employee is not provided with the Wage Statement during each pay period, he or she may recover \$100 per week for each week in which the Wage Statement is not provided, up to \$2,500, together with costs and reasonable attorneys' fees. A court may also award other relief, including injunctive or declaratory relief, that it deems necessary or appropriate. The Commissioner is also permitted to bring an action on behalf of an employee, including an administrative action, to collect such a claim, and may assess against the employer damages of \$100 for each week in which the Wage Statement is not provided, with no cap on the amount of damages that can accrue.

In proceedings against an employer to recover these damages, it will be an affirmative defense that (i) the employer completely and timely paid all wages due to the employee who was not provided the Mandatory Notice or Wage Statement, or (ii) the employer reasonably believed in good faith that it was not required to provide the employee with the Mandatory Notice or Wage Statement.

Increased Penalties for Violations of the Wage and Hour Laws

The Act increases the penalties to which an employer can be subject for violations of the Labor Law. Under current law, an employer found to have violated the wage and hour laws can be liable for all unpaid wages due, plus interest at the prevailing rate under the banking law, plus reasonable attorneys' fees and costs. The Act now provides for the recovery of prejudgment interest as well.

Under current law, an employer found to have violated the wage and hour laws "willfully" can be liable for additional liquidated damages equal to 25% of the unpaid wage amount. The Act increases the

liquidated damages penalty to 100% of the unpaid wage amount ("double damages") unless the employer can prove it had a good faith basis for believing it was in compliance with the wage and hour laws. Also, while current law states that the penalties "may" be imposed on the employer, the Act states that these penalties "shall" be imposed on the employer, so imposition of these damages will be mandatory.

Under the Act, these same increased penalties are applicable (i) in a civil action brought by an employee in a court of law, (ii) in a civil action brought by the Commissioner on behalf of an employee in a court of law, or (iii) under an administrative order by the Commissioner determining that an employer has violated the wage and hour laws. Further, if any court judgment awarding damages remains unpaid 90 days after it is issued (or, if later, 90 days after the time to appeal has expired if no appeal is pending), the amount of the judgment will automatically increase by 15%. In the administrative context, if damages remain unpaid 90 days after the issuance of a final administrative order, the Commissioner has authority to provide for a similar automatic 15% increase in the amount due.

Like under current law, in the case of a willful or egregious violation, or if it is not the employer's first violation, the Commissioner can fine the employer with a civil penalty payable to the government in addition to the damages owed to the employee. The civil penalty imposed can be up to double the amount owed as damages. In assessing the amount of the civil penalty, the Commissioner is to take into consideration the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the seriousness of the violation, the history of previous violations by the employer, and any failure of the employer to comply with recordkeeping or related requirements.

Criminal Penalties

The Act expands the application of criminal penalties for failure to pay minimum wage or overtime and for violations of the recordkeeping requirements to officers and agents of partnerships and limited liability companies (previously, besides employers, only officers and agents of corporations were covered). For a first offense, the Act imposes fines between \$500 and \$20,000 or imprisonment for up to one year. In the case of a second offense within six years of the first, both a fine and imprisonment for up to one year and one day can be imposed. Note that, as under current law, officers and agents of the employer who knowingly permit the employer's violations of the Labor Law can be personally subject to these criminal penalties.

Stronger Anti-Retaliation Provisions

The Act strengthens the anti-retaliation provisions of the Labor Law by expanding the scope of protected activities and the persons or entities who may be subject to penalties for unlawful retaliation. In the event of unlawful retaliation, a court may (i) enjoin the retaliatory conduct of any person or employer, (ii) order payment of liquidated damages of up to \$10,000, plus costs and reasonable attorneys' fees, and (iii) where the person or entity in violation is the employer (as opposed to, for example, a supervisor), order reinstatement of the employee to his or her former position with restoration of seniority or an award of front pay in lieu of such reinstatement, plus an award of lost compensation and damages. The Act grants the Commissioner the authority to provide similar, but not identical, relief through administrative orders.

Tolling of Statute of Limitations

The Act does not alter the existing statute of limitations for claims of wage and hour violations, which is six years. However, the Act tolls the statute of limitations from the date an employee files a complaint

with the Commissioner or the Commissioner begins an investigation, whichever is earlier, until the date on which an order from the Commissioner becomes final or the Commissioner notifies the complainant that the investigation is concluded. The tolling of the statute of limitations also applies to retaliation claims, for which the statute of limitations is two years. Note that filing a complaint with the Commissioner is neither a prerequisite nor a bar to an employee bringing a civil court action against an employer.

Action Required

Employers must prepare to come into compliance with the Act by April 9, 2011. Employers may need to take the following actions:

- Review payroll practices and ensure all information required to be furnished on new hire and annual Mandatory Notices is available and included (templates to be issued by the Commissioner in the future can be used);
- Ensure Wage Statements are furnished with each pay period and contain all required information;
- Put policies in place to ensure that all pay-change information is communicated in writing to employees at least seven days before the new pay practices are implemented or is reflected in Wage Statements;
- Given that the protections of the Act will likely be used by employees and their counsel to continue to challenge employer determinations that an individual is either an employee exempt from the overtime rules or an independent contractor, take this opportunity to audit your workforce and payroll practices for potential "misclassification" issues;
- Ensure that all hours worked by each employee, including times of arrival and departure, are tracked and recorded;
- Coordinate with outside payroll providers and internal payroll personnel to make sure records containing all required information are maintained for at least six years; and
- Train supervisors and human resources personnel in the new requirements and their responsibilities under the Act.

We would be happy to answer any questions you may have about the requirements of the Act, and assist you with coming into compliance with the new requirements.

Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

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