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Legal Alert: Wage Theft Prevention Act, including Amendments

New York's Wage Theft Prevention Act (the "Act"), which took effect on April 9, 2011, amended the state's labor laws to increase penalties and strengthen enforcement of laws protecting workers from nonpayment of wages.

On December 29, 2014, New York Governor Andrew Cuomo signed into law a bill (A 8106-C, S5885-B) that amends the state's labor laws, including the Act (the "Amendments"). The key provisions of the Amendments (i) eliminate the annual wage notice requirement and (ii) significantly increase penalties for non-compliance with the Act. Other requirements of the Act, such as written salary notifications to new hires and written notice of pay changes to existing employees, remain in effect and are discussed below.

Notice and Language Requirements

As stated above, the Amendments repealed the portion of the Act that required employers to give specific information about their compensation in writing on or before February 1 of each year. While annual notices are no longer required, the Act still requires that employers give employees specific information about their compensation in writing within ten business days of their first day of employment and within seven days of any change in the required information that is not reflected in the employee's wage statement. The following information must be given to employees:

- the basis (i.e. hourly, weekly, etc.) for the rate of pay;
- the rate for overtime;
- any allowances such as lodging or meal;
- the employer's legal name as well as any "doing business as" names;
- regular payday designated by the employer as required by law;
- the physical address of the employer's main office and a mailing address if different; and
- the employer's telephone number.

All documentation provided to the employee must be both in English and the employee's identified primary language if it is not English.¹ The employee must (i) sign and date a written acknowledgement of receipt of each notice received, (ii) affirm that the he/she has identified his/her primary language to the employer, and (iii) affirm that he/she has received a copy in his/her

¹ Until the NYS Commissioner of Labor has developed the notice template in a particular language, employers may give notice in English only. As of September 2022, the notice template is available in English, Spanish, Italian, Russian, Polish, Yiddish, Vietnamese, Burmese, Traditional Chinese, Korean and Haitian Creole.

primary language (or that no template is available in that language). NOTE: In order to avoid potential violations of other laws, employers should not inquire about an applicant's primary language until after a job offer has been made and accepted. Such written acknowledgements must be retained by employers for six years.

If an employer fails to provide the aforementioned documentation, within ten business days of the employee's first day of employment, the employee may recover in a civil action \$50.00 per work day until the violations are remedied, capped at \$5,000.00. The Commission may also bring an action to enforce the law.

No particular form is required to be used by employers. Employers may create their own forms, or use and/or adapt one of the NYDOL model notice forms located online at: <https://dol.ny.gov/system/files/documents/2021/03/notice-for-hourly-rate-employees-ls54-english.pdf>.

Recordkeeping Requirements

Under the Act, employers are required to maintain contemporaneous, true and accurate payroll records of employee pay rate information, overtime rate and scheduled payday for at least six years.

Wage Statements

The Act also requires the following information to be provided in employee wage statements:

- the dates of work covered by the wage payment;
- the employee's name;
- the employer's name, address and telephone number;
- the rate or rates of pay and the basis (i.e. whether the employee was paid by the hour, shift, day, week, salary, piece, commission or other);
- gross wages;
- deductions;
- allowances (if any claimed as part of the minimum wage); and
- net wages.

The Act imposes additional requirements for the wage statements of non-exempt employees:

- the regular hourly rate(s) of pay;
- the overtime rate(s) of pay;
- the number of hours worked; and
- the number of overtime hours worked.

Both employees and the Commissioner may bring legal action against employers for failure to provide such information. Damages include \$250.00 per work day that the violations continue to occur, capped at \$5,000.00 for suits brought by employees.

Additional Penalty Under the Amendments

For repeat, willful, or egregious violations of the wage laws listed above, among other laws, the employer may be required to disclose certain wage data to the Commission for posting on the New York Department of Labor's website.

Retaliation Claims

The Act protects employees from retaliation in the event that an employee complains about employer conduct allegedly in violation of Labor Law. The Commissioner may assess civil penalties of up to \$10,000.00 (but not less than \$1,000.00), plus costs and attorneys' fees, to employers that are found to have engaged in retaliation. If the Commissioner has found that the employer engaged in retaliation in the preceding six years in addition to the current instance, the Commission may assess civil penalties of up to \$20,000.00 (but not less than \$1,000.00).

Liquidated Damages

Employees prevailing in a legal action are able to receive the total amount of the underpayment, costs, attorneys' fees, and in some instances liquidated damages equal to 100% of the underpayment. (This is the same amount allowable for violations of Federal wage and hour law.)

Personal Liability on Limited Liability Company Members

The Act provides that the 10 members with the largest percentage ownership interest in a New York limited liability company ("LLC") are jointly and severally liable for all debts, wages, or salaries due and owing to the LLC's employees for their services to the LLC. The Act requires that before any employee may bring a charge against an LLC member, the member must be given 180 days' advance written notice. LLC members are entitled to pro rata contribution from other liable members of the LLC.

Other Provisions

The Act also includes other provisions, including ones that (1) prohibit employers from forming new companies to avoid repeat wage violation liability; (2) require contractors and subcontractors in the construction industry that commit wage violations to notify all employees of the nature of the violations; (3) require that investigations by the Commissioner will be subject to a six-year statute of limitations, except in limited circumstances; and (4) mandate, rather than permit, the Commissioner to assign money that constitutes wages, wage supplements, interest on wages or wage supplements, or liquidated damages to an aggrieved employee for certain violations of the Act.

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