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D.C. Amends Wage Theft Prevention Act to Increase Employer Obligations and Penalties

October 27, 2014

Absent Congressional action, employers in the District of Columbia will soon face a slew of new requirements and penalties as a result of the Wage Theft Prevention Amendment Act of 2014 (the "Act"), which amends a law that has only been in place for one year. The Act was signed without any great fanfare by Mayor Vincent Gray on September 19, 2014, and published in the District of Columbia Register on October 3, 2014. The Act is currently expected to be transmitted to Congress on or about November 12, 2014. Barring Congressional action, it will become effective in mid-December following a mandatory 30-day review period.

Employers need to become familiar with the new requirements and penalties of the Act and prepare for its eventual enactment into law. The key provisions of the Act are set forth below:

New Pay Notice Requirements

Within 90 days of the Act's effective date, employers must provide every employee a written notice, in English and in the employee's primary language, containing the following information:

- The name of the employer and 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;
- The telephone number of the employer;

The employee's rate of pay and the basis of that rate, including by the hour, shift, day, week, salary, piece, commission, any allowances claimed as part of the minimum wage, including tip, meal or lodging allowances, or overtime rate of pay, exemptions from overtime pay (which may require employers to list the specific exemption), living wage, exemptions from the living wage, and the applicable prevailing wages;

- The employee's regular payday designated by the employer; and
- Any other information the Mayor considers to be material and necessary.

In addition, once the Act is effective, employers must immediately provide to all new employees the same written notice upon hiring. Employers must also provide amended notices to existing employees any time any of the above information is changed (including, but not limited to, any time an employee's rate of pay increases or decreases). All notices must be signed and dated by the employer and the employee. Employers must retain copies of the signed notices as proof of compliance.

The Mayor's office will issue a sample template of the notice within 60 days of the Act's effective date. It is unclear at this point whether the Mayor's office will provide sample translated notices into common languages other than English, or whether employers will be obligated to self-translate into every "primary" language of its employees.

Employers that fail to comply with the Act's notice requirements are subject to civil fines of $500 per employee.

Expanded Scope and Penalties of Other DC Employment Laws

The Act also amends the Wage Payment and Wage Collection Law (WPWCL) (D.C. Code §§ 32-1301, *et seq.*), the Living Wage Act (LWA) (D.C. Code §§ 2-220.01, *et seq*.), the Minimum Wage Revision Act (MWRA) (D.C. Code §§ 32-100, *et seq*.), and the Accrued Sick and Safe Leave Act (ASSLA) (D.C. Code §§ 32-131.01, *et seq*.) in a number of respects.

The WPWCL requires all employers to pay hourly employees all wages earned and promised at least twice a month on designated pay dates, and to pay all wages owed upon termination of employment. The amendment expands the scope of these requirements to employees classified as exempt employees under the executive, administrative or professional exemptions who were not previously covered by the WPWCL.

- General contractors are expressly jointly and severally liable for their subcontractors' violations of the WPWCL, the LWA, and the ASSLA, and failure to pay wages under the MWRA. Subcontractors are required to indemnify general contractors for any damages incurred as a result of such violations, unless the violations were the result of the general contractor's failure to comply with payment provisions set forth in the subcontract.
- Companies that use temporary staffing firms will be jointly and severally liable for violations of the WPWCL, the LWA, the MWRA and the ASSLA. Temporary staffing firms are required to indemnify their clients for damages incurred as a result of such violations, unless the parties otherwise agree.
- Penalties for violations of the WPWCL and the MWRA will also be increased. New penalties will be added for negligent violations and negligent violations will subject the violator to misdemeanor liability. Previously, only willful violations were penalized.
- The Act establishes a detailed administrative process for pursuing complaints under the MWRA, the LWA, the ASSLA and the WPWCL. This process, which is meant to be fast-tracked, is not subject to appeal on the merits, and has the potential to be burdensome and invasive for employers.
- The Act expands the civil action provision in the WPWCL to include violations of the MWRA, ASSLA and the LWA. Prevailing parties are currently entitled to attorneys' fees, costs and appropriate legal and equitable remedies, including back pay and reinstatement. Under the MWRA, liquidated damages will be increased to three times the amount of unpaid wages.

The Act also will make it easier to pursue class-wide relief by defining "similarly situated" employees as two or more persons who are employed by the same employer at some point during the applicable statute of limitations period, who allege one or more violations that raise similar questions as to liability, and who seek similar forms of relief. The Act expressly provides that employees cannot be considered dissimilar because they seek different amounts in damages or have different job titles or classifications.

- The Act also provides that when an employee prevails in a civil action under the WPWCL, MWRA, ASSLA or LWA, in addition to awarding the plaintiff(s) their attorneys' fees and costs, the court shall also award each attorney for the employee an ***additional judgment*** for costs, including attorneys' fees. Costs are defined to also include expert witness fees, deposition fees, witness fees, juror fees, filing fees, certification fees, the costs of collecting and presenting evidence, and any other costs incurred in connection with obtaining, preserving, or enforcing the judgment. It is entirely unclear how this additional judgment – including what appears to be a second set of attorneys' fees – will actually be handled in practice.
- In addition to these penalties, any business found guilty or liable in any judicial or administrative proceeding of committing or attempting to commit ***willful*** violations of these laws cannot be issued a license to do business for the three-year period following the violation.

Retaliation

- The Act prohibits retaliating against any employee who made or is believed to have:
  - Made a complaint to his employer, the Mayor, the DC Attorney General, any federal or District employee, ***or any other person***, that the employee reasonably believes in good faith that his employer has violated any provision of the WPWCL, MWRA or the LWA;
  - Initiated or is about to initiate a proceeding under the Act;

Provided information to the Mayor, the DC Attorney General, any federal or District employee, ***or any other person*** regarding a violation, investigation or proceeding under the Act;

- Testified or is about to testify in an investigation or proceeding under the Act; or
- Otherwise exercised rights under the Act.

Retaliation is presumed to have occurred if an adverse action is taken against the employee within 90 days of the protected activity. Employees can bring a civil action or file an administrative complaint asserting a retaliation claim under the statute. Employers found liable for retaliation will be subject to a variety of penalties, including economic damages, civil penalties, liquidated damages, attorneys' fees, and injunctive relief (including reinstatement of the complaining employee).

What Should Employers Do?

As employers operating in states such as New York and California have experienced over the past few years, state wage theft laws and pay notice requirements can be complex and burdensome and require strict compliance to avoid liability for even inadvertent violations. In addition, the plaintiffs' bar has become extremely active in pursuing litigation under these types of provisions, and the increased penalties and requirements of the Act are likely to spur further administrative enforcement and private civil actions.

Because many of the new pay notice provisions of the Act are highly technical and specific, it is particularly important for employers carefully to review the Act and its new requirements, speak with legal counsel, and consult with their payroll vendors to prepare for the Act's enactment and ensure compliance. Among other things, employers are well advised to take the following steps:

- Consult with counsel to create pay notices for their current employees and for all future hires that comply with the law, and be prepared to issue them when the Act becomes effective.
- Review current policies and practices to ensure compliance with the DC laws now subject to enhanced penalties, ideally with the assistance of counsel to ensure the review is privileged.

Employers should ensure their managers are aware of the new expansive anti-retaliation provisions in the Act and implement procedures to limit the risk of employee terminations.

- Review all subcontractor and temporary staffing agency agreements to ensure that they expressly provide for indemnification.
- Analyze subcontractor and temporary staffing agency relationships to assess the risk of violations and ability to indemnify in the event of a violation.

Proskauer's Labor & Employment lawyers have extensive experience assisting employers with pay practices, wage-hour classification and compliance audits under both federal and state/local laws, as well as training human resources professionals in these areas of the law. If you have any questions about this client alert, please contact your Proskauer relationship lawyer or any of the lawyers listed in this alert to assist you in your compliance efforts with the DC Wage Theft Prevention Amendment Act of 2014.

Related Professionals

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