

# NYSDOL Issues Guidelines re Controversial Notice of Pay Requirements

**February 19, 2010**

The New York State Department of Labor (NYSDOL) has issued new guidance to employers relating to compliance with the requirement to provide newly hired employees with notice of pay rates and pay dates, and to obtain an acknowledgment of notice, as set forth in amended New York Labor Law § 195.1. The seemingly simple requirement has proven to be confusing to many employers, particularly as the NYSDOL has expansively interpreted the requirements. As the NYSDOL's guidance on this issue has evolved, Proskauer has issued two prior Client Alerts in an effort to keep our clients and friends up-to-date on the latest developments. See, Proskauer's Client Alerts from August: [New York Amends Labor Law to Require Employers to Provide Written Notice to Employees of Rate of Pay and Overtime Rate](#) and October 2009: [Effective Oct 26, 2009 NY Employers are Required to Provide New Hires; NYS Commissioner of Labor Offers Guidance on Notice of Rates of Pay and Overtime Rate Provided to New Hires](#).

One major area of uncertainty was whether employers could incorporate the requirements of section 195.1 into their usual complement of hiring documentation, or whether use of the NYSDOL's "model form" was mandatory. Although the NYSDOL had initially indicated that use of their form was mandatory, the only model form issued at that time clearly related to hourly non-exempt employees. However, the NYSDOL did not provide guidance on how this "mandatory" form should or could be used with respect to other classifications of employees with non-hourly compensation arrangements.

Now, with the recently issued Guidelines (NYSDOL form LS 52 12/09) the NYSDOL has affirmatively clarified that use of the NYSDOL's "model" forms are **not** mandatory, and that employer-created notices or adaptations of the "model" forms may be used (including presumably modifications to the employer's usual offer letters or other hiring documentation) as long as the following NYSDOL requirements are satisfied: 1) the required information (the employee's regular rate of pay, overtime rate of pay and regular payday) is given to employees at the time of hiring, before any work is performed; 2) the employee is given a copy of the form to keep; and 3) the employee signs an acknowledgement of receipt, which the employer maintains on file for not less than six years. However, the Guidelines warn that NYSDOL-provided forms may be required "if employer notices do not meet requirements."

In addition to the "Guidelines," the NYSDOL has issued six (6) new variations of sample model forms, each applicable to various compensation arrangements, including forms for: 1) hourly rate; 2) multiple hourly rates; 3) a weekly rate or salary for a fixed number of hours (40 or fewer in a week); 4) salary for varying hours (including day rate, piece rate, flat rate or other non-hourly pay); 5) the prevailing rate on a public works project; and 6) salaried exempt employees. The Guidelines, new model forms, and an "instruction" document relating to the model notices are available at the NYSDOL website, accessible at [www.labor.state.ny.us](http://www.labor.state.ny.us), or you can contact your Proskauer relationship attorney or any of the Co-Chairs of Proskauer's Employment Law Counseling and Training Practice Group, whose contact information is listed below. This is in addition to separate and previously issued guidance and model forms for use by temporary help firms.

According to the NYSDOL's most recent pronouncements, the Guidelines and current NYSDOL forms do **not** require the notice to be certified under penalty of perjury by the preparer, as was previously suggested by the NYSDOL's original model form. However, all the new model forms, including the form created for exempt employees, retain a printed statement suggesting that "most employees in New York State must be paid overtime wages" which is similar to one in the original model form but slightly different (which read "Almost all employees . . . must be paid overtime wages"). As we pointed out in our October 2009 Client Alert on this subject, the statement suggesting that "most" employees are overtime-eligible ignores statutory exemptions which may apply to employees who fall within the executive, administrative, professional, computer professional, and outside sales exemptions, among other categories of employees who are *not* overtime-eligible under federal or state laws. See, Proskauer's client alert [NYS Commissioner of Labor Offers Guidance](#).

Given that such a statement regarding overtime eligibility is not a specific requirement of the statute, and that use of the model form is not mandatory, it does not appear that inclusion of this statement in employer-created forms is necessary for compliance with section 195.1 requirements.

Notably, however, the Guidelines appear to establish another new requirement that may cause significant confusion and concern for employers – section 195.1 ***"notice to exempt employees must state the specific exemption that applies"*** (emphasis added). While this is not a requirement stated in section 195.1, and does not appear to directly relate to the obligation to provide new hires with written notice of their rate of pay and regular pay days, the statutory language does provide that the "acknowledgment shall conform to any requirements established by the commissioner with regard to content and form." While it remains to be seen whether (and how) this requirement will be enforced, and withstand scrutiny, at the present time it does appear to be a NYSDOL mandate for compliance with section 195.1. It may be left for the courts to decide whether this requirement can be sustained.

In light of the recent proliferation of misclassification claims filed pursuant to the Fair Labor Standards Act and the New York Labor Law, employers should consult with counsel before making such determinations and designating an employee as exempt under a particular exempt classification.

The Guidelines also discuss alternative methods of compliance with section 195.1 for commissioned salespersons and farm workers, incorporating preexisting notice requirements for those classes of employees.

If you have any questions about the Guidelines, or whether your hiring forms are in compliance with New York Labor Law § 195.1, please contact your Proskauer relationship attorney or any of the attorneys listed below.

#### [Related Professionals](#)

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- **Anthony J. Oncidi**

Partner

- **Mark W. Batten**

Partner