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New York's Wage Theft Prevention Act Increases Employer Obligations and Penalties

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On December 13, 2010 Governor Patterson signed the New York State Wage Theft Prevention Act (the “Act”) into law. The new statute will offer further protection to employees and misclassified workers from minimum wage, off-the-clock, and overtime violations, by requiring more stringent pay notice requirements and increasing penalties for wage payment, notice, and recordkeeping violations. All New York employers will need to update and/or revise their pay practices to come into compliance by no later than the Act’s effective date, April 12, 2011.

New Hire/Yearly Notice Requirements

The Act significantly increases notice requirements under New York Labor Law Section 195(1), both in terms of the information that must be provided and the frequency with which it must be disseminated. *First*, with respect to new hires, Section 195(1), previously only required employers to notify employees at the time of hiring, in writing, of their regular rate of pay, regular pay day, and overtime rate of pay (if the employee was eligible for overtime). Under the Act, employers will *also* be required to disclose to the employee (both in English and in the language identified by the employee as his or her primary language) whether the employee is paid by the hour, shift, day, week, salary, piece, commission or otherwise, and whether the employer intends to claim allowances, such as tips, meal, and/or lodging allowances against the minimum wage. *Second*,the Act now mandates that employers provide this information not only at the time of hire, but also *to all existing employees* by February 1, 2012, *and* every subsequent year. The Act further provides that the employer obtain a signed and dated written acknowledgment from each employee confirming that this notice was provided each and every year. Copies of these records (including the employee acknowledgment) must be maintained for a minimum of six (6) years. In addition, for existing non-exempt employees, "the notice must state the regular hourly rate and overtime rate of pay." The new Act also affords the commissioner the right to obtain such other information as the commissioner "deems material and necessary." The commissioner is directed to prepare "templates that comply with the requirements" of the Act.

Notice Requirements Per Pay Period

The Act also incorporates many of the notice requirements previously set forth in the New York Department of Labor's regulations found at 12 N.Y.C.R.R. § 142-2.6. Thus, the Act requires employers to furnish employees covered by the Minimum Wage Law with a statement every pay period identifying the employee's wage rate; the basis thereof (e.g., whether paid by the hour, shift, day, week, salary, piece, commission, and allowances); the amount of gross wages; any wage deductions; and the net wages paid. The Act also mandates that employers maintain these payroll records for a minimum of six (6) years. The Act has special rules regarding those paid on a piece rate basis.

Heightened Penalties

Penalties for employers in violation of the New York Labor Law are increased significantly by the Act. Pre-amendment, an employer who violated New York's wage payment laws faced liability for all unpaid wages due employees, plus interest at the prevailing rate as prescribed by the banking law (up to a maximum of 16 percent per year). N.Y. Lab. Laws §§ 218 and 219; NY CLS Bank § 14-a. Reasonable attorneys' fees also were available. N.Y. Lab. Law § 198-(1-a). Notably, if the wage violation was considered "willful" (e.g., the employer did not have a good faith and reasonable basis for its conduct), the employer, up until now, could be held liable to the employee for liquidated damages up to 25 percent of the total wages due. N.Y. Lab. Law § 198-(1-a).

Under the Act, liability for unpaid wages plus interest, as well as the ability to recoup attorneys' fees, remains intact. However, liquidated damages for nonpayment or underpayment of wages are now increased to 100 percent of wages due (as under the federal law) unless the employer can prove a "good faith basis" for believing that its underpayment of wages was in compliance with legal requirements. The Act also allows employees or the labor commissioner to recover prejudgment interest in any civil action to recover unpaid wages as well as to collect attorneys' fees and costs incurred in enforcing any court judgment.

The state labor commissioner will also have the authority to assess up to 100 percent liquidated damages in an administrative action and will be able to "bring any legal action necessary," including an administrative action, to collect on claims. Also, if the commissioner finds that an employer has engaged in willful or egregious violations, or the employer previously has been found in violation of the New York wage laws, the commissioner "shall direct payment to the commissioner [in other words, the New York Department of Labor] of an additional sum . . . in an amount not to exceed double the total amount of wages, benefits, or wage supplements found to be due." Further, the statute of limitations is "tolled" from the date an employee files a complaint with the commissioner.

Penalties under Labor Law Section 195 also are increased. An employee who does not receive the mandatory notice of wages within 10 business days of his or her first day of employment may bring a civil action to recover damages of $50 for each workweek that the violation occurred, plus costs and reasonable attorneys' fees. These damages are capped at $2,500. Similarly, with respect to existing employees, if any do not receive the mandatory wage statements, described earlier, the employer may be subject to a civil action and damages of $100 per week, per employee, for each week the violation occurred but not to exceed a total of $2,500, plus costs and reasonable attorneys' fees.

Employers who are found liable and have penalties levied against them face additional pitfalls, e.g., an employer who defaults on paying a judgment for more than 90 days, after the judgment is final, must pay an additional 15 percent of damages to defray the cost to the employee of collecting on the judgment.

Posting Requirement

Notably, an employer who violates the wage payment law may now be required by the commissioner to post a notice of the violation in the workplace, for up to one year, in an area visible to employees summarizing the violations found. If the violation was willful, the employer must post the notice in an area visible to the general public for up to 90 days.

Criminal Penalties

An employer, its officer or agent, who fails to pay minimum wages or overtime compensation in violation of the provisions of the Labor Law may be found guilty of a Class B misdemeanor, which carries with it a penalty ranging between $500 to $20,000. Offenders also may be imprisoned (instead of being fined) for up to one year. N.Y. Lab. Law § 198-a. In the event the employer is found guilty of a second or subsequent offense within six (6) years of the conviction for a prior offense, the employer will be guilty of a felony. While the Act did not amend these previously existing criminal penalties, it did expand the range of covered employers to include partnerships and limited liability corporations. Previously, the criminal sanctions of the New York Labor Law only applied to corporations and their officers and agents.

Retaliation

The Act also increases penalties against employers for retaliation against employees who make complaints regarding conduct the employee reasonably and in good faith believes is in violation of the wage payment laws. If retaliation is found, the employee is entitled to reinstatement, back pay, and front pay. Liquidated damages are now also available against the employer *or person*, though they are capped at $10,000. Similarly, if the commissioner finds that an employer or person engaged in retaliatory conduct, the commissioner may also levy a civil penalty of up to $10,000. Retaliation claims are tolled from the date an employee files a complaint with the commissioner or an investigation is commenced, whichever is earlier, until an order to comply becomes final or the employee is notified that the investigation has concluded. Unlawful retaliation also is deemed a Class B misdemeanor.

Impact on Employers

The Act has laudable goals, such as protecting employees from minimum wage, off-the-clock and overtime violations, as well as from misclassification as independent contractors. At the same time, it raises a host of issues for many employers who, over the past several decades, have become complacent in their payroll practices and wage-hour classification of employees. The plaintiffs' bar already has been extremely active in pursuing misclassification and wage-hour cases, and the increased penalties of the Act, i.e., raising the liquidated damages cap from 25 percent to 100 percent, and going back six years in time, are likely to spur further private civil actions.

Notably, while the legislature has dubbed the legislation the "Wage Theft Prevention Act," the "theft" at issue need *not* be purposeful. The Act does not differentiate between willful and non-willful violations, and so a well-meaning employer who inadvertently misclassifies a worker as an independent contractor, and who accordingly foregoes compliance with record keeping and pay stub requirements, is just as much at risk of liability as an employer who blatantly ignores the law. Similarly, misclassifying employees as exempt, when they are not, might well subject the employer to liability, not only for overtime back wages due, but also for notice and record keeping violations.

In order to avoid liability, employers should ensure they are in compliance with these new statutory wage notice and payroll practice requirements. Among other things, employers are well advised to take these action steps:

- Review and update your New York Labor Law § 195.1 new hire forms;

- Update wage statement forms (if not already in compliance);
- Make sure you have a system in place that accurately records and maintains payroll records for a minimum of six years;
- In order to ensure against "off-the-clock" claims brought by non-exempt employees, employers are required to keep track of hours, meaning times of arrival and departure (and technically, for meal periods too);
- If an employer suspects that it may have worker classification issues, the impending increase in penalties (and six-year limitations period) make this an ideal time to consider a wage-hour classification audit of selected jobs and a payroll practices audit; and
- Train officers, managers, and supervisors in the requirements of New York's wage payment and payroll practices laws, as such agents of the employer can, in certain circumstances, be held both civilly and criminally liable under the Act.

Proskauer's Employment Law Counseling & Training Group has extensive experience assisting employers with wage-hour classification and compliance audits under both federal and state laws, as well as training human resources professionals in this area of the law. Identifying potential violations pro-actively, *before* the New York Department of Labor or a plaintiff's attorney does so, can often save hefty litigation costs and future headaches.

If you have any questions about this client alert, please contact your Proskauer relationship attorney or any of the members of Proskauer's Employment Law Counseling & Training Group.

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