

## In This Issue:

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## Illinois Gets Tough on Wage Theft

By Darren Mungerson and Milton Castro

Illinois Governor Pat Quinn recently signed Senate Bill 3568 (SB 3568), the most extensive change to the state's wage payment statute in decades. The amendment to the Illinois Wage Payment and Collection Act (IWPCA), which becomes effective January 1, 2011, more clearly defines employees' rights to seek a private right of action; provides a new administrative forum for claims falling below a certain threshold; provides for enhanced civil and criminal penalties; and expands employees' protection from retaliation. "Illinois workers deserve every penny they have earned, on-time and in-full," said Governor Quinn. "This important legislation will help Illinois workers recover unpaid wages faster and will further crack down on wage theft throughout our state."

### The Illinois Wage Payment and Collection Act

Under the IWPCA, employers must pay those employees not exempt under the federal Fair Labor Standards Act, at a minimum, on a semimonthly basis. Employers must also keep posted, in a place easily accessible to all employees, one or more notices indicating regular paydays and the place and time of payment. The IWPCA also requires employers to pay separated employees, if possible, at the time that they are separated or, if not possible, no later than the next regularly scheduled payday for all employees. Generally, final compensation includes all wages, salaries, earned commissions, earned bonuses, monetary equivalent of earned vacation and holidays, and any other compensation owed to the employee pursuant to any employment contract or agreement.

The IWPCA prohibits employers from deducting from an employee's wages any sum that an employee has not expressly authorized in writing, with the exception of tax withholdings or any other withholdings required by law; insurance, pension, or sums that benefit the employee; and wage assignment or deduction orders, such as garnishment or child support withholding. Any agreement to deduct wages cannot

exceed 15% of the employee's gross wages per paycheck. The IWPCA also prohibits employers from terminating or discriminating against an employee for complaining to the employer, the Illinois Department of Labor (IDOL), or the employee's union about any purported IWPCA violations.

## **New Enforcement Procedures and Administrative Upgrades**

SB 3568 clearly sets forth an employee's right to file claims under the IWPCA with the IDOL, or to bypass the IDOL and file suit in state court, without being required to exhaust administrative remedies first. Notably, employees are now expressly permitted to bring class actions in state court on behalf of others similarly situated. Furthermore, SB 3568 expressly provides for a private right of action for an employee who has been retaliated against by his or her employer under enumerated circumstances: (1) for making a complaint that he or she has not been paid in accordance with the IWPCA internally to the employer, to the IDOL, in a public hearing or to a community organization; (2) for causing a proceeding to be instituted under the IWPCA; or (3) because the employee has testified or is about to testify in an investigation or proceeding under the IWPCA.

One important aspect of SB 3568 is that it empowers the IDOL to establish a more formal administrative procedure for processing "small" wage claims (those under \$3,000), which purportedly constitute 75% of all wage claims filed each year. This new administrative procedure will include instances (subject to the \$3,000 threshold) where an employer fails to timely respond to a notice of claim from the IDOL. Furthermore, the new procedure will allow the IDOL to issue final and binding administrative decisions subject to the Administrative Review Law. This means that the IDOL wage orders under this process will be considered final agency decisions, which the IDOL will be empowered to enforce. Finally, because these administrative orders are final and binding decisions, they will be subject to limited review by the courts.

## **Enhanced Civil and Criminal Penalties**

SB 3568 also authorizes new penalties for violations of the IWPCA. If an employee prevails before the IDOL, the employer must pay a non-waivable administrative fee of \$250 to the IDOL. In addition, if an employer fails to seek review of an IDOL demand or administrative or court order to pay wages under the IWPCA and does not comply with the demand or order within the specified time (15 days in the case of an IDOL demand or 35 days in the case of an IDOL administrative order or court order), the employer shall also be liable to pay the IDOL a penalty of 20% of the amount found owing, plus an additional penalty to the employee of 1% per calendar day for each day of delay in paying such wages.

Before these amendments, a prevailing plaintiff could only recover any compensation improperly withheld or due to him/her, not including any penalties paid to the employee due to an employer's delay in compliance with a demand or order. Under SB 3568, however, prevailing employees will also be entitled to additional damages of 2% on any wages found due for each month for which they are unpaid. This additional 2% damages will be available even if the employer immediately complies with any demand or order to pay. Significantly, employees are prohibited from recovering under both a claim filed with the IDOL and a civil action filed in state court.

Furthermore, prevailing employees in a civil action, whether for retaliation or non-payment of wages under the IWPCA, are expressly entitled to recover costs and reasonable attorneys' fees. This change eliminates the employee's need to comply with the provisions of the Attorneys' Fees in Wage Actions Act, which required that the plaintiff make a written demand for a definite amount at least three days prior to filing suit, and then recover at least the amount contained in that initial demand before attorneys' fees could be awarded. Under SB 3568, plaintiffs in IWPCA civil actions no longer need to meet these requirements to recover attorneys' fees and employers could be required to pay fees even if the employee does not recover the entirety of the amount demanded.

Finally, SB 3568 expands and increases criminal penalties for violations of the IWPCA. In the past, violations of the IWPCA were a Class C misdemeanor. Under SB 3568, a violation of the IWPCA of \$5,000 or less is a Class B misdemeanor, and a violation of the

IWPCA in excess of more than \$5,000 is a Class A misdemeanor, which carries a potential punishment of one year in jail, plus a fine of \$2,500. An employer or agent of an employer convicted of violating the IWPCA within two years of a prior criminal conviction for violating the IWPCA is guilty of a Class 4 Felony, which is punishable by up to three years in prison, plus a fine of up to \$25,000.

### **Practical Considerations**

With the enactment of SB 3568, Illinois joins a number of states that have passed tougher legislation to address wage and hour violations, which, according to the bill’s advocates, is a growing problem. Subject to possibly the strictest wage theft statute in the nation, Illinois employers now face a wide range of risk and liability for IWPCA violations, especially given that SB 3568 opens the gates to class actions being filed directly in state court. Furthermore, in the past, some employers took a “wait and see” approach with regard to wage claims under the IWPCA, particularly when plaintiff’s counsel had failed to comply with the requirements of the Attorneys’ Fees in Wages Actions Act, and only paid claims once a demand or order had been issued. However, in light of these new amendments, the penalties for non-compliance have increased substantially, and the “wait and see” approach will now place employers and their agents at a substantially higher level of risk in the event of an adverse finding. To reduce exposure, employers must review their wage and hour policies and procedures to ensure that employees are being correctly compensated and that their wages, when authorized, are being properly withheld. Employers should also immediately investigate and respond to any complaints or allegations of IWPCA violations.

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