

## In This Issue:

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Prior to leaving office, the former Governor of New York signed into law sweeping changes to the New York Labor Law that create new notice and recordkeeping obligations for employers in the state, substantially increase and create new penalties for violations, and strengthen protections on the state level.

## Lame Duck Reform: New York's Wage Theft Prevention Act

By Barbara E. Hoey and Gary D. Shapiro

Governor David Paterson, as one of his last official acts in office, signed on December 13, 2010, a sweeping reform of the New York Labor Law entitled the Wage Theft Prevention Act (the "WTP Act").<sup>1</sup> The WTP Act, which becomes effective on April 9, 2011, modifies numerous sections of the New York Labor Law and imposes new recordkeeping and notice obligations on virtually every company that employs people in the state.

### Highlights

The highlights of the WTP Act, which are detailed below, are as follows:

- Written pay notices (with extra categories of required information) that must be given to all employees annually;
- Seven-day advance written notice of any pay changes;
- Broader remedies for retaliation against employees who make wage complaints;
- Expanded criminal penalties for violators of the New York Labor Law; and
- Increases in penalties and fines for violations of the New York Labor Law.

### New Notices

**Annual Notices** – Currently, New York employers are required to give all newly hired employees written statements setting out their pay days, pay rates, and, if nonexempt, their overtime rates of pay.

The WTP Act substantially expands on the requirements already contained in Labor Law section 195(1) by requiring that all employees receive follow-up notices containing this information every year, on or before February 1. The notice must include all of the information required by the existing notice, plus:

- the basis of the individual's rate or rates of pay (*i.e.*, hourly, shift, daily, weekly, salary, piece, commission, or other);

- allowances claimed, if any, as part of the minimum wage;
- the name of the employer, including any “d/b/a” names;
- 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; and
- “such other information as the commissioner deems material and necessary.”

These notices must be provided in both English *and* the employee’s primary language (as identified by the employee, but only to the extent a form in that language is issued by the Department of Labor), signed and dated by the employee with an acknowledgment prescribed by the Department of Labor, and retained by the employer for six years.

**Pay Change Notice(s)** – In addition to the annual notice, employers will be required to notify employees of any changes to the information provided in the annual notice, in writing and at least seven calendar days in advance unless such changes are indicated on the detailed wage statement that must accompany every payment of wages.

**Wage Statements** – When providing the wage statements that must accompany every payment of wages, employers will be required to include the following information – in addition to listing the employee’s gross wages, deductions, and net wages:

- the dates of work covered by the payment;
- the name of the employee;
- the name of the employer;
- address and phone number of the employer;
- rate or rates of pay and basis thereof (*i.e.*, hourly, shift, daily, weekly, salary, piece, commission, or other); and
- allowances claimed as part of the minimum wage.

For employees who are not exempt from the overtime pay requirements of New York State law or regulations, the wage statement must also include the employee’s:

- regular hourly rate(s) of pay;
- overtime rate(s) of pay;
- number of regular hours worked;
- number of overtime hours worked; and
- for employees paid on a piece rate, the applicable piece rate or rates of pay and the number of pieces completed at such piece rate.

The amended Labor Law section 195(3) will also require employers, upon request by employees, to explain in writing how the employee’s wages were computed.

**Penalties** – Notably, the newly implemented Labor Law sub-sections 198(1-b) and 198(1-d) impose specific penalties for noncompliance with the wage notice and wage statement requirements. An employee who is not provided the wage notice required by Labor Law section 195(1) within the first 10 business days of his employment may recover through a civil action damages of \$50 for each workweek that the violations occurred, up to a maximum of \$2,500, plus costs and reasonable attorney’s fees. Similarly, an employee who is not provided the wage statement required by Labor Law section 195(3) may recover through a civil action damages of \$100 for each workweek that the violations occurred, up to a maximum of \$2,500, plus costs and reasonable attorney’s fees. Under both of the newly enacted sections, courts may issue other relief, including injunctive and declaratory relief. In addition, both sections contain separate provisions concerning the Commissioner of Labor’s ability to recover damages.

## Expansion of Recordkeeping Requirements

The WTP Act also requires employers to establish, maintain and preserve for at least six years accurate payroll records that show for each week worked: the hours worked; the rate(s) of pay and basis thereof (whether paid by the hour, shift, day, week, salary, piece, commission, or other); gross wages; deductions; any allowances claimed as part of the minimum wage; and net wages for each employee. For employees who are not exempt from the overtime pay requirements of New York State law or regulations, these records must also include the regular hourly rate(s) of pay, the overtime rate(s) of pay, the number of regular hours worked, and the number of overtime hours worked. For all employees paid a piece rate, the payroll records must state the applicable piece rate(s) of pay and the number of pieces completed at each piece rate. This is significantly more information than the state previously required employers to retain.

Further, employers who are audited must, per Labor Law section 661, provide the Commissioner's duly authorized representative with a private location at the place of employment to interview employees, during working hours, about the wages and hours worked by that employee or other employees.

## Penalties for Noncompliance

Of significance, the WTP Act also increases the potential fines and damages that may be recovered for other violations of the Labor Law – which is likely to increase the number of claims. These include:

- A mandatory assessment of “liquidated damages” for successful wage claims (unless the employer can establish a good faith basis for its belief that its actions complied with the law) equal to 100% of unpaid wages (up from 25%) in private civil actions;
- Interest from the date of the underpayment to the date of payment;
- Additional penalties for employers who fail to comply within 90 days of final judgments or court orders equal to 15% of the amount of the total judgment due and owing; and
- Substantial increases in the criminal penalties and fines for failure to pay minimum wage or overtime compensation, as well as for failure to keep proper records.

Under newly enacted Labor Law section 219-c, the state Commissioner of Labor will be empowered to require employers found to have violated certain articles of the state Labor Law to post notices of the violation(s) in areas visible to employees, for up to one year. If the employer is deemed to have committed a “willful failure to pay all wages” required by certain articles of the Labor Law, the Commissioner may require it to post notices of the violation(s) in areas visible to the public for as long as 90 days. Individuals who take down such notices or alter, deface, or interfere with the notice shall be guilty of a misdemeanor.

## Increased Focus on Retaliation Actions

The WTP Act also expands the protections afforded to employees. As overhauled, Labor Law section 215 shall, in addition to its other protections, prohibit employees from being retaliated against because of any complaints to any person (including, but not limited to, the employer, the Commissioner of Labor, or the attorney general) “that the employer has engaged in any conduct that the employee, reasonably and in good faith, believes violates any provision of this chapter, or any order issued by the commissioner.” The revised statute shall also protect employees from retaliation because of any such complaints that the employer believes the employee made, whether that belief is accurate or not, or because the employee is about to institute a proceeding under the Labor Law.

If there is a finding that an employer or person violated Labor Law section 215, the Commissioner may assess a civil penalty of between \$1,000 and \$10,000. In addition, the Commissioner may order rehiring or reinstatement, front pay in lieu of reinstatement, an award of lost compensation, liquidated damages (not to exceed \$10,000, but to be assessed on behalf of every employee aggrieved under section 215), and injunctive relief. Labor Law section 215(2)(a) imports these provisions to civil actions brought by employees. The agents and officers of corporations, partnerships, and limited liability companies found to have violated the Labor Law's non-retaliation provisions provision shall be guilty of a Class B misdemeanor.

## Conclusion

It is anticipated that the Wage Theft Prevention Act will lead to increased activity by the New York State Department of Labor and plaintiffs' attorneys. It is therefore recommended that employers of all sizes consult with counsel to ensure that they are compliant with the Act.

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<sup>1</sup> Bill No. S8380/A11726.