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Key Changes to New York's Wage Theft Prevention Act Become Law

By Bruce Millman, Stephen Fuchs and Jill Lowell

After a delay of nearly six months, on December 29, 2014, New York Governor Andrew Cuomo signed into a law a bill (A 8106-C, S5885-B) that amends the state's Labor Law, including the Wage Theft Prevention Act (the WTPA), and the law's application to limited liability companies, contractors and successor employers. The key provisions of the amendments, which become effective on February 27, 2015, (i) eliminate the burdensome annual wage notice requirement; (ii) significantly increase penalties for non-compliance with the WTPA; (iii) expand contractor accountability, successor liability and personal liability for violations; and (iv) create a Wage Theft Prevention Enforcement Account.

An announcement on the Department of Labor's website also states that legislative leaders and the Governor have agreed to a further amendment [not yet enacted] to make the elimination of the annual wage notice requirement effective immediately, so "the Department will not require annual statements in 2015."¹

I. Repeals the WTPA's Annual Wage Notice Requirement

The new law repeals the 2011 amendment to the WTPA that required employers to provide annual wage notices and to obtain employee acknowledgements yearly between January 1 and February 1, thus removing an onerous administrative requirement for employers. Private-sector employers had raised significant concerns about a notice that many believe provides no meaningful benefit to employees. With this change, except for employers in the hospitality industry, the Department of Labor will not enforce the annual notice requirement for 2015, and employers do not have to provide annual wage notices in 2016 or in future years.

Despite the change in the law, hospitality industry employers must issue new pay notices to their employees earning minimum wage in 2015 and 2016. The Department of Labor's Minimum Wage Order for the hospitality industry requires that employees receive a new pay notice each time his or

¹ New York State Department of Labor, Notice of Pay Rate, available at <http://www.labor.ny.gov/workerprotection/laborstandards/employer/wage-theft-prevention-act.shtm> (last visited Dec. 31, 2014).

her pay rate changes, as do Department of Labor guidelines.² Because the hourly minimum wage in New York increases to \$8.75 per hour on December 31, 2014, and to \$9.00 per hour on December 31, 2015, employers in the hospitality industry are still required to issue new pay notices in 2015, 2016, or in any subsequent year in which a statutory wage change takes effect.

Employers, however, still must obtain signed acknowledgments from new employees that the employees have received wage notices in English, and if an employee's primary language is Spanish, Haitian-Creole, Russian, Polish, Chinese or Korean, in the primary language as well, and issue written notices to employees when wage rates or other WTPA-required information changes.³

II. Increases Penalties for Non-Compliance with the WTPA

The amendments substantially increase penalties for non-compliance with the WTPA. Under the prior version of the WTPA, if an employer failed to provide the required wage notice within 10 days of an employee's hire date, the employee could recover a penalty of \$50 for each week the violation continued, up to \$2,500. The amendments allow employees to recover \$50 per day for a violation, up to \$5,000. Damages available for actions brought by the Commissioner of Labor (Commissioner) have also increased to \$50 per day. The Commissioner's recovery, previously uncapped, is now capped at \$5,000 per violation.

Likewise, the amendments increase penalties for failing to provide paystubs that comply with the WTPA from \$100 to \$250 per violation. The statutory cap on damages has increased to \$5,000.

If the Commissioner obtains a judgment against an employer, a portion of the judgment must go to the employees harmed. Prior to the amendment, the Commissioner had discretion whether to assign any portion of the judgment to the aggrieved employees.

To help curb repeat offenses, penalties from \$1,000 to \$20,000 may be imposed upon those found to have violated the law in the previous six years, up from a prior \$10,000 statutory cap. For repeat, willful, or egregious violations, the employer may also be required to disclose certain wage data to the Commissioner for posting on the New York Department of Labor's website.

III. Imposes Personal Liability on Limited Liability Company Members

The amendments provide that the 10 members with the largest percentage ownership interest in a limited liability company (LLC) are now jointly and severally liable for all debts, wages or salaries due and owing to the LLC's employees for their services to the LLC. This provision is virtually identical to a longstanding provision of New York's Business Corporation Law (§ 630), which imposes similar liability on the 10 largest shareholders of a closely held New York corporation.

The term "wages and salaries" is defined broadly to include salaries, overtime, vacation, holiday and severance pay, employer contributions to pension or annuity funds, and any other money properly due or payable for services rendered. Employees may also recover liquidated damages, penalties, interest, and attorneys' fees or costs incurred in successfully pursuing such claims. Before an employee can make a claim against an LLC member for "wages and salaries" due for services he/she provided to the LLC under this provision, the employee must first notify the LLC member in writing of his or her intention to do so, within 180 days of the termination of such services.

Because members are now jointly and severally liable, a member may be required to pay more than his or her pro rata share of wages or salaries due to the employee. That member can then seek contributions from the other members of the LLC in court.

IV. Imposes Successor Liability and Expands Contractor Liability

The amendments also include language intended to prevent employers from avoiding their liabilities by forming "alter ego" companies. Thus, an employer that is similar in operation and ownership to a prior employer found to have violated New York Labor Law is deemed to be

2 12 NYCRR § 146-2.2(b); New York State Department of Labor, Hospitality Industry for Employers: Frequently Asked Questions, available at <http://www.labor.ny.gov/workerprotection/laborstandards/workprot/MW%20Updates/MW%20Hosp%20ER%20FAQs.shtm> (last visited Dec. 31, 2014); Wage Theft Prevention Act Frequently Asked Questions, available at <http://www.labor.ny.gov/workerprotection/laborstandards/pdfs/wage-theft-prevention-act-faq.pdf>.

3 The Department of Labor has issued guidelines stating that – outside the hospitality industry – written notice need not be provided if there is an increase in a wage rate that is reflected in the employee's pay stub.

the “same employer if the employees of the new employer are engaged in substantially the same work in substantially the same working conditions under substantially the same supervisors, or if the subsequent employer has substantially the same production process, produces substantially the same products and has substantially the same body of customers.”

The amendments impose a new notice requirement on construction industry contractors and subcontractors found to have failed to pay all wages. These employers must now provide written notice of violations to *all* of their employees as an enclosure with employees’ wage statements.

V. Increases Investigation Requirements and Creates an Enforcement Account

The amendments require that any investigation by the Commissioner of any alleged wage payment violations cover the entire six-year statute of limitations period unless the Commissioner notifies all affected employees otherwise. The amendments also create a “Wage Theft Prevention Enforcement Account” designed to offset the costs in the administration and enforcement of New York Labor Law, to be funded by fines and penalties collected by the New York Department of Labor.

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