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DC's Amended Wage Theft Prevention Act Expands Employer Penalties and Imposes New Notice Requirements

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The District of Columbia is set to implement the Wage Theft Prevention Amendment Act of 2014 (the "Act"), a measure broad in scope that amends several existing D.C. laws. Notably, the Act amends D.C.'s wage payment and collection laws, minimum wage law, and the Accrued Sick and Safe Leave Act of 2008. The Act enhances remedies, fines, and administrative penalties when an employer fails to pay earned wages, and includes new anti-retaliation provisions and a written notice requirement that will affect all D.C. employers. According to the D.C. Council's web site, the Act is slated to go into effect on February 26, 2015, when a 30-day period provided to permit congressional review of the law will expire.

Written Notice Requirement

Within 90 days of the effective date of the Act, employers will be required to provide a notice to each D.C.-based employee containing specific information about the employee's terms and conditions of employment. In addition, employers will be required to provide a similar notice to all new hires at the time of hiring¹ and to any employee whenever any of the employment information contained in the notice changes.

Each notice must include:

- The employer's name
- Any "doing business as" names used by the employer
- Physical address of the employer's main office or principal place of business
- Employer's mailing address
- Employer's telephone number

¹ In the case of temporary staffing firms, the notice will have to be provided at both the initial interview and at the time of hire. In addition, when a temporary staffing firm assigns an employee to a job, the employee must be given a written notice of: (1) the specific designated payday for the particular assignment, (2) actual rate of pay and benefits, if any, (3) overtime rate or exemption from overtime and basis for the exemption, (4) location and name of client employer and the temporary staffing firm, (5) anticipated length of the assignment, (6) whether training or safety equipment is required and who is obligated to provide/pay for the equipment, (7) legal entity responsible for workers' compensation and (8) contact information for designated enforcement agency for concerns about safety, wage and hour, or discrimination.

- Employee's rate of pay and the basis of that rate (by the hour, shift, day, week, salary, piece, commission)
- Any allowances claimed as part of the minimum wage: tip, meal, or lodging allowances
- The employee's overtime rate of pay
- Exemptions from overtime pay
- Living wage
- Exemptions from the living wage
- Applicable prevailing wages

The notice must be furnished to employees both in English and in the employee's primary language, and must be signed and dated by the employer and the employee. The employer must then retain copies of all the notices furnished to the employee for at least three years.

Employers may not have to craft their own notice forms, as the Mayor is directed to make one or more model notices available within 60 days of the effective date of the Act. In addition, employers will be required to post a copy or summary of the Minimum Wage Act and the amendments in a form prescribed or approved by the Mayor. Employers will not be liable for failure to post this notice, however, if the Mayor fails to provide the employer with the required copies or summaries within 60 days of the effective date of the Act.

Penalties for failing to comply with the notice requirements are substantial. Each failure to provide an employee with the written notice will subject the employer to a \$500 administrative penalty, and an employer will be subject to a \$100 penalty for each day it fails to post the required notices. Failures to comply will be taken into account and will undermine the credibility of an employer's testimony regarding the rate of pay promised, if a failure to pay wages claim against the employer arises in the future. Furthermore, the three-year statute of limitations period applicable to employee wage claims will not begin to run until the employer is in compliance with the written notice and posting requirement.

Changes to Employee Pay Period and Pay on Departure

The new legislation will also amend D.C.'s existing wage payment and collection law in significant ways. At present, the term "employee" is defined to exclude individuals who are employed in a "bona fide executive, administrative, or professional capacity" (as those terms are defined by D.C. regulation). Those exclusions are stricken from the revised version of the law, meaning that once the Act takes effect, exempt executive, administrative and professional employees must now be paid in accordance with the wage payment law. That means, unless the employer has previously paid its employees at least once per month (by custom, contract, or agreement), employers must pay all workers at least twice a month and within 10 days of the end of the designated pay period. In addition, most discharged employees will be entitled to their final pay on the day after the last day worked. All employees will have recourse to liquidated damages and the panoply of remedies included by the Wage Theft Prevention Act's revisions to the law.

Steeper Penalties, Remedies, and Fines

The Act amends the District of Columbia Code to provide harsher fines and penalties for employer violations in other areas. Instead of per-violation penalties, the Act imposes administrative penalties in the amount of \$50 for each employee for the first violation and \$100 for each employee for subsequent violations for each day that the employer violates or continues to violate D.C. minimum wage or overtime requirements. Although the revised Act permits fines and imprisonment for both negligent and willful violations of the minimum wage and living wage laws, emergency legislation amending the not-yet-effective Wage Theft Prevention Act will cap the total fine that may be assessed at \$5,000 and \$10,000 per incident.

Further, the Act allows for a court or administrative law judge to award to the employee liquidated damages of not less than \$1,000 and not more than \$10,000 for instances of discrimination or retaliation based on the employee's exercise of his or her rights under the Act. If an employer is found to have paid any employee less than the wage to which that employee is entitled, the statute provides monetary

remedies to the affected employee. First, the employer must pay the employee any difference in unpaid wages. In addition, the employer may be ordered to pay statutory penalties and an additional amount as liquidated damages (as determined by the court) up to three times the amount of the wages in dispute. Employees who engage in protected conduct under the Act (such as making a claim or complaining that the employer is not complying with the amended laws) are protected against retaliation, and any employee who loses his or her position within 90 days of engaging in such conduct will be entitled to a presumption of retaliation, which the employer can overcome only with clear and convincing evidence.

In addition to these penalties, the new law authorizes the District of Columbia to deny or suspend the business license of any employer found guilty of committing a willful violation of D.C.'s wage laws.

Joint and Several Liability

When a temporary staffing firm or a subcontractor violates the amended laws by failing to pay employees any wages to which they are entitled, the temporary firm and the employer, and/or the subcontractor and the general contractor, will be jointly and severally liable to the employees for violations. Unless otherwise agreed by the parties in a contract that predates the effective date of the Act, the temporary staffing firm must indemnify the employer for the temporary staffing firm's violations of the amended acts, and the subcontractor must indemnify the general contractor, unless the subcontractor's violations were due to the general contractor's lack of prompt payment under the general contractor and subcontractor's contract.

Next Steps for Employers

Prior to the Mayor making available the model notices and summaries that must be posted as a result of the law changes, employers should, in the interim, work with legal counsel to prepare notices. Furthermore, employers should review their contracts with temporary staffing firms or contractors to ensure they include proper indemnification language and procedures to monitor compliance. Employers may also want to consult with counsel to ensure their next round of trainings address prevention of retaliation based on an employee's exercise of his or her rights under the Act.

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