

## New York Assembly Approves Wage Theft Prevention Act

December 3, 2010

On November 30, the New York State Assembly gave final legislative approval to a bill targeted at employers that violate the state's wage laws. The bill (S08380),<sup>1</sup> which was approved by the state senate earlier this year, has now been submitted to Governor David A. Paterson (D), who has not yet indicated whether he will sign the measure. If signed into law, the Wage Theft Prevention Act (the Act) would amend the New York Labor Law to provide additional notice and recordkeeping requirements, increase penalties for violations of wage requirements, increase protection against retaliation for workers who complain about violations of the New York Labor Law, and provide new avenues for investigation and prosecution of "wage theft," or underpayment of wages. Underpayment of wages includes, but is not limited to, failing to pay minimum wage, failing to pay overtime, requiring off-the-clock work, pilfering tips, and misclassifying workers.

### Additional Notice Requirements

Currently, New York Labor Law Section 195(1) requires employers to notify all newly hired employees at the time of hiring, in writing, of their regular rate of pay, regular pay day, and overtime rate of pay if they will be eligible for overtime.<sup>2</sup> The Act would require employers to include the following additional information on the required preemployment notice of wage rates:

- In addition to the rate of pay, the basis of the wage payment (*e.g.*, whether paid by the hour, shift, day, week, salary, piece, or commission, or on another basis)
- The employer's intent to claim allowances (*e.g.*, tip or meal allowances) as part of the minimum wage
- Additional information about the employer, including any d/b/a names

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<sup>1</sup> Available online at [http://www.assembly.state.ny.us/leg/?default\\_fld=&bn=S08380%09%09&Summary=Y&Actions=Y&Text=Y](http://www.assembly.state.ny.us/leg/?default_fld=&bn=S08380%09%09&Summary=Y&Actions=Y&Text=Y).

<sup>2</sup> To read more about this requirement, see our December 3, 2009 LawFlash, "NYDOL Reverses Position: Employers Not Required to Use Previously Published Wage Rate Notice and Acknowledgement Form," and the LawFlashes referenced therein, available online at [http://www.morganlewis.com/pubs/LEPG\\_WageRateNoticePositionReverse\\_LF\\_03dec09.pdf](http://www.morganlewis.com/pubs/LEPG_WageRateNoticePositionReverse_LF_03dec09.pdf).

The Act requires that the notice be updated and provided again to the employee at least seven calendar days prior to any changes to the employee's pay or other terms contained in the notice (unless such changes are reflected in the employee's wage statement).

The Act would also require that the notice be provided to the employee both in English and in the language identified by the employee as his or her primary language. The employer would be required to obtain from each employee a signed and dated written acknowledgment, in English and in the primary language of the employee, of receipt of the notice.

### **Recordkeeping Requirements**

Recordkeeping requirements would also be amended by the passage of the Act. Employers would be required to preserve and maintain the employee's acknowledgment(s) of the notice for a period of six years. The Act would also increase the length of time an employer must preserve and maintain payroll records from three to six years.

### **Enhanced Civil and Criminal Penalties**

Employers would be subject to significantly increased penalties for noncompliance with the Act's requirements and the improper payment of wages.

First, the Act would increase the civil penalties imposed upon an employer for any violation, including paying less than the wage to which an employee is entitled. Under the current New York Labor Law, liquidated damages for nonpayment of wages are capped at 25% of the total amount of the wages found to be due. The proposed legislation, however, increases the amount of liquidated damages to 100% of that amount. An employer will also be assessed an additional 15% in liquidated damages if it defaults on paying a final judgment for more than 90 days.

Second, the Act provides for the recovery of prejudgment interest and attorneys' fees in any civil action to recover unpaid wages brought by an employee or by the state's labor commissioner. For willful or egregious violations, additional payments may also be assessed against an employer, up to double the total amount found to be due.

Third, the Act would add civil penalties for employers that fail to provide employees with the required preemployment notice of wages required by Section 195. An employee who does not receive a 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 work week that the violation occurred or continues to occur (not to exceed a total of \$2,500) plus costs and reasonable attorneys' fees. Alternatively, the Act permits the labor commissioner to bring a civil or administrative action on behalf of the employee to collect or assess such damages from the employer.

Finally, the Act would expand the types of businesses subject to criminal penalties for nonpayment of wages to include partnerships and limited liability corporations. Currently, criminal penalties under the New York Labor Law apply only to corporations and their officers and agents.

### **Retaliation Provisions**

The Act would enhance the antiretaliation provisions of the New York Labor Law to further protect employees who complain of conduct that they reasonably and in good faith believe constitutes a

violation of the New York Labor Law. Under the Act, the labor commissioner would be given authority to remedy retaliation with powers that parallel those of the courts, including the ability to take the following actions:

- Award compensatory damages
- Enjoin the offending conduct
- Order payment of liquidated damages (not to exceed \$10,000)
- Order injunctive relief, including the rehiring or reinstatement of the employee or front pay in lieu of reinstatement

The Act also provides that the two-year statute of limitations for an employee to bring a retaliation action in court shall be tolled if an employee files a complaint with the labor commission.<sup>3</sup> Specifically, the Act provides for tolling of the statute of limitations from the date an employee files a complaint with the labor commission or the date on which the labor commissioner commences an investigation, whichever is earlier, until the later of the date an order to comply issued by the commissioner becomes final or the date on which the commissioner notifies the complainant that its investigation has concluded.

### **Expanded Enforcement Powers of the New York State Department of Labor**

The Act provides enhanced power to the labor commissioner, making it easier to collect damages from employers that violate the law. For example, the Act would allow the commissioner to institute administrative actions (as opposed to a civil judicial action) to recover penalties and collect claims. The commissioner is given the ability under the Act to require an employer that defaults on an administrative order to provide an accounting of all of its assets.

### **Conclusion**

While the Wage Theft Prevention Act does not dramatically alter employers' basic obligations, it demonstrates that the issue of nonpayment of wages remains at the forefront of legislative initiatives. If passed, the Act will result in significant civil and criminal penalties for employers that fail to satisfy the requirements of the New York Labor Law.

If you have additional questions about the impact of the legislation discussed in this Morgan Lewis LawFlash on your policies and procedures, please contact any of the following Morgan Lewis attorneys:

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<sup>3</sup> Filing a complaint with the commissioner is neither a prerequisite to nor a bar against an employee bringing a civil court action under the retaliation provisions of the New York Labor Law.

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