

New York Wage Theft Prevention Act to Take Effect April 9, 2011

December 15, 2010

On December 13, New York Governor David Patterson signed into law the Wage Theft Prevention Act (the Act).¹ The Act amends 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 so-called “wage theft,” or underpayment of wages. Underpayment of wages under the new law 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. Below is a summary of the Act’s key provisions, which take effect on April 9, 2011.

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.² The Act amends Section 195 to require that employers provide all employees, both at the time of hiring and on or before February 1 of each subsequent year, the following additional information on the required notice:

- In addition to the rate of pay, the basis of the wage payment (e.g., whether the employee will be 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
- The employer’s main address and phone number
- Additional information about the employer, including any d/b/a names

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 pay statement).

¹ The New York State Assembly submitted the bill (S08380) to Governor Patterson on December 1, 2010. See our December 3, 2010 LawFlash, “New York Assembly Approves Wage Theft Prevention Act,” available online at http://www.morganlewis.com/pubs/LEPG_LF_NYAssemblyApprovesWageTheftPreventionAct_03dec10.pdf.

² 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.

The Act also requires 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 is required to obtain from each employee a signed and dated written acknowledgment, in English and in the primary language of the employee, confirming receipt of the notice.

Pay Statements

The Act also amends Labor Law Section 195 to require that employers provide pay statements that specify the applicable dates the wages cover and the rate and basis of pay, among other information. For nonexempt employees, pay statements must also include the regular and overtime pay rates and the number of regular and overtime hours worked.

Recordkeeping Requirements

The Act amends employers' recordkeeping obligations. Employers are required to preserve and maintain all payroll records and employee acknowledgments of the notice described above for a period of six years. The Act thus increases the length of time an employer must preserve and maintain payroll records from three to six years.

Enhanced Civil and Criminal Penalties

Numerous provisions in the Act will cause employers to be subject to significantly increased penalties for noncompliance with the Act's requirements and the improper payment of wages. These include the following:

- The Act amends Section 198(1)(a) of the Labor Law to increase civil penalties imposed upon an employer for any violation, including paying less than the wage to which an employee is entitled. Specifically, the Act now permits liquidated damages of up to 100% of the total amount of wages found to be due, an increase from 25% under the current New York Labor Law, unless an employer can prove that it had a good-faith basis for not complying with the law. 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.
- The Act amends the Labor Law to provide for the recovery of prejudgment interest and all reasonable attorneys' fees in any civil action to recover unpaid wages brought by an employee or by the state's labor commissioner.
- The Act adds civil penalties for employers that fail to provide employees with the required preemployment notice of wages required by the amended 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.
- The Act adds civil penalties for employers that fail to provide pay statements with the information required by Section 195. An employee may recover damages in the amount of \$100 for each work week that the violation occurred or continues to occur (not to exceed \$2,500), plus

costs and attorneys' fees. Again, the Act permits the labor commissioner to bring an action to enforce these civil penalties.

- The Act imposes new criminal penalties against employers that fail to pay the minimum wage or overtime compensation due. Any employer that pays less than the amount owed may be guilty of a misdemeanor and, if convicted, will be fined a minimum of \$500 and a maximum of \$20,000 or imprisoned up to one year. A second violation that occurs within six years of a first conviction will be a felony.
- The Act expands the types of businesses subject to criminal penalties for nonpayment of wages to include partnerships and limited liability corporations and the officers and agents of those entities. Currently, criminal penalties under the New York Labor Law apply only to corporations and their officers and agents.

Anti-Retaliation Provisions

The Act enhances the anti-retaliation 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 is authorized to remedy retaliation with powers that parallel those of the courts, including the ability to take the following actions:

- Assess civil penalties of up to \$10,000
- 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 commissioner.³ Specifically, the Act provides for tolling of the statute of limitations from the date an employee files a complaint with the labor commissioner or the date on which the labor commissioner commences an investigation, whichever is earlier, until the later of the date on which an order to comply issued by the commissioner becomes final or the date on which the commissioner notifies the complainant that the investigation has concluded.

Expanded Enforcement Powers for 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 vests the labor commissioner with authority to institute administrative actions (as opposed to civil judicial actions) to recover penalties and collect claims. The commissioner is also given the ability under the Act to require an employer that defaults on an administrative order to provide a bond and/or an accounting of all of its assets. Assets include bank accounts, property, accounts receivable, and more. Under the Act, the labor commissioner may also order additional payments against an employer as a civil penalty for willful or egregious violations,

³ 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.

including up to double the total amount found to be due, in addition to a 100% liquidated damages payment (or what appears to be a quadruple damages award).

Conclusion

While the Wage Theft Prevention Act does not dramatically alter employers' basic obligations, it dramatically increases notice requirements and imposes significant penalties for violations of the Act's requirements. We have seen such provisions in other states give rise to substantial litigation, including class action suits seeking millions of dollars in damages. Thus, it is critical that employers become familiar with the new legal requirements and take steps now to be in compliance when the law goes into effect on April 9, 2011.

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

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