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EMPLOYMENT ALERT

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New York's Wage Theft Prevention Act Imposes New Obligations and Increases Penalties for Employers

On December 13, 2010, Governor David Patterson signed into law the New York State Wage Theft Prevention Act (the "Act"), which becomes effective on April 12, 2011. The new law amends the New York Labor Law ("Labor Law") and provides additional protections for employees, creates new recordkeeping obligations for employers and allows employees to recover significantly greater penalties for violations of the law. All employers will have to modify their employment practices to insure proper record keeping procedures and disclosure requirements or face very stiff penalties for violations of the Act.

Notice Obligations For New Hires and Annual Notice Requirements For All Employees

Currently, Section 195.1 of the Labor Law requires employers to inform all new hires in writing of their regular rate of pay, pay day and overtime rate, if applicable. Under the Act, the written notice must also provide the following additional information:

- The basis of the wage payment (e.g., whether the employee will be paid by the hour, shift, day, week, salary, piece or commission).
- Any allowances that will be claimed as part of the employee's minimum wages (e.g., allowances for tips, wages or lodging).
- The employer's main address and telephone number.

The Act further mandates that employers provide this information to all *existing* employees by February 1, 2012, and every subsequent year.

Employers must provide notice to the employee both in English and in the language identified by the employee as his or her primary language. Employers also must obtain from each employee a signed and dated written acknowledgment confirming receipt of the notice each year.

Notice Requirements Per Pay Period

The Act requires employers to provide employees with pay statements each pay period that specify the applicable dates the wages cover, the rate of pay, the basis of pay, the amount of gross wages, any wage deductions and the net wages paid.

Under the new law, employers must provide employees with written notice at least seven days prior to the implementation of any changes to the employee's pay or other terms contained within the employee's most recent notice, unless the modifications are reflected in the employee's wage statement.

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Recordkeeping Requirements

Under the Act, employers are required to maintain all required notices, statements and acknowledgments for a minimum of six years.

Enhanced Penalties

Currently, liquidated damages for underpayment or nonpayment of wages is limited to 25% of wages due. The Act increases liquidated damages for such violations to 100% of wages due, unless the employer can demonstrate that it had a good faith basis that the method of payment was lawful. Under the Act, prejudgment interest and attorneys fees remain available. Moreover, an additional 15% in liquidated damages will be assessed against an employer who defaults on paying a final judgment for more than 90 days.

Additionally, under the Act, any employee who is not provided with a new hire notice within 10 days of his or her start date may bring a claim to recover \$50 for each workweek that a violation occurs and may recover up to \$2,500 plus attorneys fees and costs. If any existing employees do not receive the mandatory wage statements, the employer may be subject to damages of \$100 per week (up to \$2,500), plus attorneys fees and costs.

Although businesses are criminally punishable for violations of the Labor Law, currently only corporations and their officers and agents are subject to penalty. The new law extends coverage to both partnerships and limited liability corporations.

The Act provides enhanced powers to the labor commissioner, making it easier to collect damages from employers that violate the law and authorizes the commissioner to institute administrative actions to recover penalties and collect claims.

Anti-Retaliation Provisions

The Act enhances the anti-retaliation provisions of the Labor Law to further protect employees who complain of conduct that they reasonably and in good faith believe constitutes a violation of the Labor Law. Under the Act, the commissioner is authorized to remedy retaliation with powers that parallel the courts.

If retaliation is found, an employee is entitled to reinstatement, back pay and front pay. Liquidated damages of up to \$10,000 and civil penalties of up to \$10,000 are also available. Under the Act, an employee has two years to bring a retaliation claim in court, however the statute of limitations is tolled from the date an employee files a complaint with the commissioner.

What This Means To You

The Act, which dramatically increases employers' notice requirements and imposes significant penalties, is expected to spur further wage and hour litigation against employers. Significantly, the Act does not distinguish between willful and non-willful violations and even inadvertent infringements of the law can result in liability. Accordingly, to ensure compliance with the Act, employers should take the following steps in advance of April 12, 2011:



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- Review and, if necessary, update Section 195.1 new hire notice forms and acknowledgments.
- Create notice forms and acknowledgments for existing employees.
- Make sure that procedures are in place for maintaining payroll records, notices and acknowledgments for a minimum of six years.
- Ensure that employees' hours (arrival and departure times) are properly tracked and documented to avoid overtime and unpaid wage claims.
- Consider conducting an internal audit of your employee classification and payroll practices.
- Train managers, supervisors and human resources staff in the requirements of New York's wage payments, payroll practices and anti-retaliation laws.

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