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New York's New "Wage Theft" Law: What It Means, and What To Do Now

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The New York Wage Theft Prevention Act (the "WTPA") takes effect on April 9, 2011. The new law, part of a lame-duck legislation package signed by former Governor David Paterson in December 2010, amends the New York Labor Law in a number of significant respects. The WTPA modifies Articles 6, 7, and 19 of the Labor Law, most notably by: (1) increasing by fourfold the amount of liquidated damages an employee or the Commissioner of Labor can recover in an action for unpaid wages, (2) amplifying employers' existing notice and wage statement requirements, and (3) expanding both the substantive protections and the remedies available to employees under the anti-retaliation provisions of the Labor Law.

This client alert summarizes the most meaningful of the Labor Law amendments in the WTPA and presents an immediate action plan for compliance.

Liquidated Damages for Wage Violations Increased From 25% to 100%

Under existing law, an employee who prevails on a claim for unpaid wages under the Labor Law is entitled not only to recover those wages, but also to recover reasonable attorneys' fees and—unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law—liquidated damages equal to 25% of the total wages found to be due.[1] The Commissioner of Labor can recover those same liquidated damages in an action on behalf of the employee.[2]

Under the WTPA, the recoverable amount of liquidated damages in an employee or Commissioner action for unpaid wages is increased to 100% of the total amount of wages found to be due. Similar to the relief available for willful violations of the Fair Labor Standards Act ("FLSA"), the WTPA allows a plaintiff to recover "double damages" for wage violations. Unlike the FLSA, however, the New York Labor Law has a six-year statute of limitations, rendering the newly-quadrupled amount of available liquidated damages considerably more consequential for employers facing wage claims.

Amplification of Employer Notice Requirements

For decades, Section 195(1) of the Labor Law has required employers to notify employees, at the time of hiring, of their rate of pay and regular pay day. Under amendments to the Labor Law that became effective in 2009, employers are required to deliver that notice in writing; to obtain a written acknowledgement of receipt of the notice from each employee; and to include in the notice, for employees eligible for overtime pay, the employee's "regular hourly rate and overtime rate of pay."[3]

Under the WTPA, employers are required not only to provide the Section 195(1) notice to employees at hiring, but also on or before February 1 of each subsequent year of their employment. In addition, the notice must now include the following information:

- the rate or rates of pay, and the basis thereof (*e.g.*, whether paid by the hour, shift, day, week, salary, piece, commission, or other basis);
- for employees who are not exempt from the overtime laws, the "regular hourly rate and overtime rate of pay";
- any allowances claimed as part of the minimum wage (*e.g.*, tip, meal, or lodging credit);
- the employee's regular pay day;
- the name of the employer;
- any "doing business as" names used by the employer;
- the physical address of the employer's main office or principal place of business, and mailing address if different;
- the telephone number of the employer; and
- "such other information as the Commissioner deems material and necessary."

The Commissioner has yet to deem any other information "material and necessary" for purposes of the WTPA.

Under the WTPA, employers must provide the Section 195(1) notice to employees not only in English, but also in the language identified by each employee as his or her "primary language." The Commissioner is preparing dual-language templates for the Section 195(1) notices, and if an employee identifies a "primary language" for which a template is not yet available from the Commissioner, the employer need only provide that employee an English-language notice.

Each time it provides a Section 195(1) notice to an employee, the employer must obtain from the employee a signed and dated written acknowledgement, in English and in the "primary language" of the employee, confirming receipt of the notice. The Commissioner is preparing dual-language templates for these acknowledgements as well, and if the employee identifies a "primary language" for which a template is not yet available from the Commissioner, the employer need only provide an English-language acknowledgement. The acknowledgement form must include an affirmation by the employee that the employee accurately identified his or her "primary language" and that the notice was in that "primary language" (if required). The acknowledgement must conform to "any additional requirements established by the Commissioner with regard to content and form." No such additional requirements have yet been made public. Employers must retain copies of the signed acknowledgements for six years.

As of the date of this alert, the Commissioner has not yet made available any templates for the Section 195(1) notice or acknowledgement.

Any employee not provided with a Section 195(1) notice within ten business days of his or her first day of employment can recover in a civil action $50 for each work week that the violations occurred or

continue to occur, not to exceed a total of $2,500, together with costs and attorneys' fees. The WTPA authorizes courts to award such other relief, including injunctive and declaratory relief, as they deem necessary or appropriate.

Under the WTPA, employers must provide written notice of any changes to the information contained in a Section 195(1) notice at least seven calendar days prior to the date such changes take effect, unless such changes are reflected on the employee's wage statement.

Amplification of Wage Statement Requirements

Under current law, employers are required to furnish each employee with a statement accompanying every payment of wages that lists gross wages, deductions, and net wages. In addition, upon the request of the employee, the employer must furnish an explanation of how such wages were computed.[4] Under the WTPA, wage statements must contain the following *additional* information:

- the dates of work covered by the payment of wages;
- the name of the employee;
- the name of the employer;
- the address and phone number of the employer;
- the rate or rates of pay, and the basis thereof; and
- any allowances claimed.

In addition, for employees who are not exempt from the overtime laws, each wage statement must include:

- the "regular hourly rate or rates of pay";
- the "overtime rate or rates of pay";
- the number of "regular hours" worked; and
- the number of overtime hours worked.

For employees paid on a piece rate, the wage statement must include the applicable piece rate or rates or pay and number of pieces completed at each piece rate.

Employers that fail to provide a wage statement containing the required information are subject to civil suits or administrative proceedings and to damages of $100 for each work week that the violations occurred or continue to occur, not to exceed a total of $2,500, together with costs and (in a suit by the employee) attorneys' fees. The WTPA authorizes courts to award such other relief, including injunctive and declaratory relief, as they deem necessary or appropriate. The WTPA provides an affirmative defense to employers in such legal actions where the employer made complete and timely payment of all wages due.

Under the WTPA, employers must preserve the information contained in each wage statement for six years.

Expanded Anti-Retaliation Protections and Remedies

Since 1967, New York has prohibited employers and their agents from retaliating against employees who complain internally or to the New York State Department of Labor ("NYSDOL") about Labor Law violations, who file complaints under the Labor Law, or who testify in Labor Law investigations or proceedings. Employees alleging retaliation can bring a civil action for "all appropriate relief," including reinstatement with restoration of seniority, back wages, and reasonable attorneys' fees.[5]

The WTPA expands significantly the breadth of the Labor Law anti-retaliation provision and the remedies available for its violation. Under the new law, it will be unlawful for an employer or "any other person" to discharge, threaten, penalize, or in any other manner discriminate or retaliate against an employee because:

- such employee has made a complaint to his or her employer, to the NYSDOL, to the attorney general, or to "any other person" that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision of the Labor Law or any order issued by the Commissioner;
- such employer or person believes that such employee has made a complaint to his or her employer, to the NYSDOL, to the attorney general, or to "any other person" that the employer has violated any provision of the Labor Law or any order issued by the Commissioner;
- such employee has filed or is about to file a proceeding under or related to the Labor Law;
- such employee has provided information to the NYSDOL or to the attorney general;
- such employee has testified or is about to testify in a Labor Law investigation or proceeding;
- such employee has otherwise exercised rights protected under the Labor Law; or
- the employer has received an adverse determination from the NYSDOL involving the employee.

It is unclear how courts will interpret the phrase "any other person" in the first two protected activities listed above. As with other retaliation claims, however, proof of a violation is likely to focus more on the connection between the allegedly protected activity and the adverse job action than the nature and quality of the protected activity itself.

Mirroring how courts generally have interpreted anti-retaliation provisions in other contexts, the WTPA states that an employee need not make explicit reference to any particular section or provision of the Labor Law to trigger the protections of the anti-retaliation law.

Under the WTPA, remedies for violation of the anti-retaliation provision of the Labor Law now explicitly include injunctive relief, lost compensation, reinstatement or front pay in lieu thereof, and liquidated damages of up to $10,000 per aggrieved employee. Employers and individuals who retaliate against employees will also be guilty of a misdemeanor.

Commissioner's New Power to Post Notice of Violations in Workplace and Publicly

In a brand new provision created by the WTPA, the Commissioner will have the power to post notices of employer violations of the Labor Law, in such form and manner as he or she determines appropriate. Where the violation is a "willful failure" to pay wages, the Commissioner can post the notice for a period of up to 90 days in "an area visible to the general public." For all other violations of Articles 6, 19, or 19-A of the Labor Law, the Commissioner can post the notice "summarizing the violations found" for a period of up to one year in "an area visible to employees." It will be a misdemeanor offense to remove, alter, deface, or otherwise interfere with a notice posted under the new law.[6]

Practical Responses to the WTPA

The very first thing that employers should do in response to the WTPA is to make sure that their wage statements are compliant with new Section 195(3) of the Labor Law, beginning April 9, 2011. Employers with operations in states with more robust "pay stub" laws, such as California, likely will find that they already are including much of the information soon to be required in New York in wage statements issued in those other states. Employers that have only had to comply with New York's existing wage statement law to date will be required to reconfigure their pay statements in near entirety. Employers that do not believe they will have sufficient lead time and/or resources to make their wage statements WTPA-compliant before April 9, 2011 should strongly consider issuing supplemental written statements to employees accompanying their pay checks, containing any missing information required by amended Section 195(3).

Employers should also immediately prepare Section 195(1) notice and acknowledgement forms to provide to employees hired on or after April 9, 2011. Until such time as the Commissioner issues the template forms required by the WTPA, employers should be prepared to use their own forms that contain the information required by amended Section 195(1). Employers need not issue such forms in any language other than English until such time as the Commissioner issues template forms in such other languages.

Employers should revisit their recordkeeping practices and protocols in light of the WTPA to ensure that they are maintaining the required information for at least six years.

Employers should ensure that their managers are aware of the expanded anti-retaliation provisions in the Labor Law and should include a discussion of those provisions as part of regularly-scheduled management training.

Employers should be especially mindful of the enhanced liquidated damages soon to be available to employees who sue for unpaid wages in New York, especially in evaluating risk in connection with a potential lawsuit for overtime pay. With a six-year statute of limitations and the availability of "double damages," New York may well become a forum state of choice for plaintiffs bringing nationwide class action claims seeking back pay.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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1 N.Y. Lab. Law §§ 198(1-a), 663(1).
2 N.Y. Lab. Law §§ 198(1-a), 663(2).
3 N.Y. Lab. Law § 195(1).
4 N.Y. Lab. Law § 195(3).
5 N.Y. Lab. Law § 215(1)(a).
6 N.Y. Lab. Law § 219-c (eff. Apr. 9, 2011).