

LABOR & EMPLOYMENT

>> ALERT

NEW YORK ENACTS WAGE THEFT PREVENTION ACT

On December 13, Governor Paterson signed into law the Wage Theft Prevention Act (WTPA). The act amends the New York Labor Law by increasing employer obligations to provide information to employees regarding their pay, both annually and with every payment of wages.

The WTPA also significantly increases the:

- >> penalties for noncompliance with New York's wage payment laws,
- >> reach of the labor law's criminal sanctions, and
- >> power of the Commissioner of Labor (Commissioner).

In addition, the new act greatly expands the scope of wage complaint retaliation claims. The law goes into effect 120 days from its enactment, and a summary of the major provisions and changes is noted below.

ANNUAL NOTICE REQUIREMENTS

Employers must annually provide written notice of:

- >> rate of pay and basis thereof (i.e., hourly, weekly, salary, commission, etc.)
- >> allowances, if any, claimed as part of the minimum wage (i.e., tip, meal, or lodging allowances)
- >> the regular payday
- >> 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 a mailing address (if different)
- >> the telephone number of the employer; and
- >> other information as the Commissioner of Labor deems material and necessary.

For non-exempt (overtime eligible) employees, the notice must state the regular hourly rate and the overtime rate of pay.

The notice must be provided at the time of hire and on or before February 1 each year (only notice at time of hire was required prior to the WTPA).

The notice must be signed and dated by the employees.

The notice must be provided in English and in the language identified by the employee as his/her primary language.

THE BOTTOM LINE

Although the Department of Labor will produce templates for the required notices, New York employers should begin taking steps to ensure that they are in a position to provide the required wage statements when the WTPA goes into effect, either by updating their own payroll systems or working with their third-party payroll provider.

The Commissioner will provide dual-language templates that comply with the notice requirements, and employers are relieved of the primary language obligation if it is a language for which the Commissioner has not prepared a template.

The notice must be retained for six years (up from three years prior to the WTPA).

>> continues on next page

Employers must notify employees in writing of a change to the information in any notice at least seven calendar days prior to the change, unless the change is noted on the wage statement (discussed below).

Penalties

- 1) An employee who is not provided the required notice within 10 days of hire may recover \$50 for each work week that the violation continued, up to a maximum of \$2,500, plus costs and reasonable attorney's fees; and
- 2) The Commissioner may assess damages of \$50 per week for any violation of the notice requirement, with no cap; but
- 3) No damages are recoverable or assessed if the employer can prove that it made complete and timely payment of all wages due.

WAGE STATEMENT REQUIREMENTS

Employers must furnish to employees with every wage payment a statement of:

- >> dates of work covered by that payment of wages;
- >> name of the employee;
- >> name of the employer;

- >> address and phone number of the employer;
- >> rate of pay and basis thereof (i.e., hourly, weekly, salary, commission, etc.);
- >> gross wages, deductions and net wages; and
- >> allowances, if any, claimed as part of the minimum wage (i.e., tip, meal or lodging allowances).

For non-exempt (overtime eligible) employees, the statement must also provide the regular hourly rate, the overtime rate of pay, the number of hours worked, and the number of overtime hours worked.

Contemporaneous and accurate payroll records must be maintained for six years (up from three years prior to the WTPA).

Penalties

- 1) An employee who is not provided a required statement or statements may recover \$100 for each work week that the violation occurred, up to a maximum of \$2,500, plus costs and reasonable attorney's fees; and
- 2) The Commissioner may assess damages of \$100 per week for any violation of the notice requirement, with no cap; but

- 3) No damages are recoverable or assessed if the employer can prove that it made complete and timely payment of all wages due.

ENHANCED LIQUIDATED DAMAGES AND PENALTIES

In any successful wage claim, an employee shall recover:

- >> the full amount of any overpayment;
- >> all reasonable attorney's fees;
- >> prejudgment interest; and
- >> unless the employer proves that its underpayment was in good faith, liquidated damages equal to 100% of the wages due (as opposed to 25% prior to the WTPA).

Judgments for violation of the notice or wage statement provisions remaining unpaid after 90 days will automatically increase by 15%.

In any civil action for violation of the notice or wage statement provisions, the employee may collect attorney's fees and costs incurred in enforcing a court judgment (in addition to the attorney's fees awarded for obtaining the judgment).

>> *continues on next page*

The officers and agents of partnerships and limited liability corporations (in addition to those of corporations as in effect prior to the WTPA) face criminal penalties for knowingly permitting an employer to fail to pay wages in accordance with the wage payment law or for knowingly permitting the violation of the notice or wage statement provisions. As was the case prior to the WTPA:

- >> the first offense is classified as a misdemeanor and provides for a fine from \$500 to \$20,000, or imprisonment for up to a year, and
- >> a second violation occurring within six years of the first conviction is a felony with a fine ranging from \$500 to \$20,000, or imprisonment for up to a year, or a fine and imprisonment.

Under the WTPA, the same criminal penalties also now apply to violations of the minimum wage provisions and for failure to maintain required records.

RETALIATION

Employers (including officers and agents) and “any other person” are prohibited from discharging, threatening (new under the WTPA), penalizing, or otherwise discriminating against an employee because the employee has complained to his/her employer, the attorney general, or “any other person” that the employer engaged in conduct he/she “reasonably and in good faith” believes to be a violation of the wage payment laws;

The Commissioner may enjoin violations, order payment of up to \$10,000 per violation as liquidated damages, order reinstatement, award lost compensation, and award front pay in lieu of reinstatement.

In a civil action, in addition to other damages, courts are required to award liquidated damages of up to \$10,000.

NEXT STEPS

New York employers should review their record-keeping systems and ensure that they have protocols in place to maintain the required records, and the new notices, for at least six years. In addition, given the increased penalties for violations of the wage laws, now is a good time to review all payment practices and policies, especially with respect to exempt/nonexempt classifications, overtime payment practices, and tip credits (where applicable).

FOR MORE INFORMATION

Gregg Gilman
Partner/Co-Chair
212.468.4840
ggilman@dglaw.com

Gregg Brochin,
Associate
212.468.4950
gbrochin@dglaw.com

or the D&G attorney with whom you have regular contact.

DAVIS & GILBERT LLP

T: 212.468.4800
1740 Broadway, New York, NY 10019
www.dglaw.com

© 2010 Davis & Gilbert LLP