

New York Takes Significant Steps to Ensure Employee Awareness Regarding Wages

By James R. Hays, Eric Raphan and Maranda W. Rosenthal

In recent months, New York has taken significant steps to ensure that employees are aware of the amount of their wages and the methods through which such wages are calculated and paid. Specifically, the New York legislature has twice amended the New York Labor Law, and the New York State Department of Labor (NYSDOL) has issued new guidelines and a new Hospitality Wage Order. These changes provide New York-based employees with a number of enhanced protections. Many important aspects of these new provisions are discussed below.



Section 195 Amended

Effective Oct. 26, 2009, New York's legislature amended New York Labor Law Section 195.1 to require employers to notify employees, in writing at the time that they are hired, of their rate of pay and their regular payday. Further, if the employee is classified as nonexempt and, thus, entitled to overtime pay for hours worked in excess of 40 hours per week, then the notice must also inform such employee of his or her overtime rate.

Wage Theft Prevention Act Enacted

In a further effort to reform the wage payment laws, and with the stated intention of providing employees with enhanced protections, on Dec. 13, 2010, New York enacted the Wage Theft Prevention Act (WTPA). The WTPA, which took effect in April 2011, further amends portions of the New York Labor Law

including Section 195. Primarily, the WTPA created additional requirements for the wage notices discussed above, enhanced employers' recordkeeping requirements with respect to wage statements and payroll records, and adopted more-severe penalties for noncompliance.

Specifically, the WTPA requires employers to provide the wage notices in English and in the language identified by each employee as his or her primary language. In addition to the existing notice requirements, the WTPA dictates that the wage notice state whether the employee is paid by the hour, shift, day, week, salary, piece, commission or otherwise and whether the employer will claim any allowances as part of the minimum wage (e.g., tip, meal or lodging allowances). The WTPA also requires that this notice include the employer's name, physical address or principal place of business, and telephone number.

The WTPA further requires employers to provide the wage notice at the time the employee is hired and on or before Feb. 1 of each subsequent year of the employee's employment. The employer must obtain a signed acknowledgment for each issuance of the wage notice. Moreover, the acknowledgment must include an affirmation by the employee that the notice provided by the employer was in the employee's designated primary language. The acknowledgment must be maintained for a six-year period.

Finally, the WTPA requires that an employee's wage statements now include the following information:

- Dates of work covered by the wage payment.
- Employee's name.
- Employer's name.
- Employer's address and phone number.
- Employee's rate of pay.
- Basis of pay (i.e., by the hour, shift, day, week, salary, piece, commission or other).
- Gross wages.
- Deductions.
- Allowances, if any, claimed as part of the minimum wage.
- Net wages.

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For nonexempt employees, the wage statement must also include the employee's overtime pay rate and the number of regular and overtime hours worked by the employee. The WTPA also requires that, upon an employee's request, the employer provide an explanation, in writing, regarding how such wages were calculated.

Employers must also now establish, maintain and preserve contemporaneous payroll records for each employee, for each week worked, reflecting the above information for a period of no less than six years. The WTPA further expands the definition of covered employers to include partnerships and limited liability corporations.

In an attempt to provide further clarification regarding the WTPA's requirements, the NYSDOL issued model notices, guidelines, instructions and frequently asked questions (FAQs) for employers to consider when attempting to comply with the WTPA. The NYSDOL does not require employers to use the



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model notices, and an employer is free to develop its own notice as long as the employer's notice provides employees with the requisite information. The FAQs also attempt to clarify certain issues that remained unclear following the initial amendment to Section 195 in October 2009 and the passage of the WTPA. For example, the FAQs now make it clear that an employer is not required to identify the specific exemption that is being applied to workers deemed exempt from overtime pay. In addition, the FAQs explain that employers can provide employees with the requisite notice electronically as long as the employer has a system in place that allows the employee to acknowledge receipt of the notice and print out a copy of the notice.

Employers that fail to comply with the WTPA's new requirements may be subject to a series of enhanced civil, criminal and other penalties. With respect to civil penalties, if an employer fails to provide an employee with the wage notice within 10 business days of his or her first day of employment, then the employee may recover \$50 for each workweek during which the violation occurred, up to a maximum of \$2,500, together with attorneys'

fees and costs. Furthermore, if an employer fails to maintain proper payroll records as required by the WTPA, then the employee may recover \$100 for each workweek during which the violation occurred, up to a maximum of \$2,500, together with attorneys' fees and costs.

In addition to the above civil penalties, employers that fail to comply with the WTPA may also be subject to criminal penalties. Specifically, employers that fail to pay employees minimum wage or overtime compensation shall be guilty of a class B misdemeanor and upon conviction shall be fined an amount between \$500 and \$20,000 or imprisoned for up to one year. If the employer is convicted of a subsequent offense within six years of the prior offense, then such employer shall be guilty of a felony and upon conviction shall be fined an amount between \$500 and \$20,000 and/or imprisoned for up to one year and one day.

Moreover, employers found to have violated the WTPA may be required to post a notice of the violation for up to one year in an area visible to employees. If the employer's violation is deemed to have been willful, then the employer must post the notice in an area that is visible to the general public for up to 90 days.

As a further protective measure, the WTPA also contains an anti-retaliation provision. This provision provides that if an employer is found to have retaliated against an employee because the employee complained about the employer's conduct that the employee, reasonably and in good faith, believed violated any provision of the New York Labor Law, then the employee may be entitled to reinstatement, back pay and front pay. The employee also may recover up to \$10,000 in liquidated damages.

NYSDOL's New Hospitality Wage Order

Finally, the NYSDOL issued a new Hospitality Wage Order, which took effect March 1, 2011. The new Hospitality Wage Order combines and replaces the prior restaurant industry and hotel industry wage orders and significantly revises the regulations to deter excessively long hours and to encourage greater compliance with overtime pay laws within the hospitality industry.

Notably, the new Hospitality Wage Order requires employers to pay nonexempt hotel and restaurant employees on an hourly basis. In other words, employers are no longer permitted to pay such employees salaries, weekly rates, day rates or piece rates.

The new Hospitality Wage Order also regulates the payment of gratuities and makes clear that the sharing and pooling of tips among employees, both voluntarily and employer-mandated, is permissible. However, the Hospitality Wage Order requires that employers provide written notice to employees of the

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establishment's tip policies. If the employer mandates tip sharing or tip pooling, or adds charges to customer bills for tips, the employer must now keep records of the tips received and ultimately distributed. Such information must be provided to employees upon request.

The new Hospitality Wage Order also attempts to address a hotly contested issue in New York: whether "service charges," or other similar mandatory charges assessed to customers, are gratuities that must be distributed in full to service employees. In an attempt to codify the distinction between a charge that is purported to be a gratuity and a charge for the administration of a banquet, special function or package (such as an "administrative fee"), the new Hospitality Wage Order provides that there shall be a rebuttable presumption that any service charge, in addition to charges for food, beverage, lodging and other specified materials or services, whether labeled as a "service charge" or not, shall be a charge purported to be a gratuity that must be distributed in full to service employees. If an employer wishes to charge a fee for the administration of an event and prevent that charge from being deemed a gratuity, the employer must clearly identify the charge as an administrative fee and effectively communicate to customers that the charge is not a gratuity or a tip.

Conclusion

New York has taken numerous steps to provide employees with significant additional protections with respect to the calculation, payment and recording of their wages. These actions will place employers under greater scrutiny. We anticipate that this new legislation will lead to an increased amount of both individual and class-action lawsuits brought by plaintiffs' counsel as well as increased enforcement activity by the NYSDOL. Accordingly, it is imperative that New York employers review these new laws and regulations and ensure that their practices and policies are in compliance so that they can successfully defend against any potential claims.

James R. Hays, Eric Raphan and **Maranda W. Rosenthal** are attorneys in the Labor and Employment practice group in Sheppard Mullin's New York office.

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Editors: Allen Smith
Joanne Deschenaux

Copy Editor: Erin Binney

Designer: Mari Adams

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1800 Duke Street
Alexandria, VA 22314 USA

+1-800-283-7476 (U.S. only)
+1-703-548-3440 (Int'l)
+1-703-548-6999 TTY/TDD
+1-703-535-6490 FAX

Internet: www.shrm.org/law
E-mail: Allen.Smith@shrm.org

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