

Employer Compliance with the new Wage Theft Prevention Act  
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In response to recent increases in wage and hour abuses by employers in New York, on December 10, 2010 Governor Patterson signed into law the Wage Theft Prevention Act (“WTPA”). (Chapter 564 of the Laws of 2010 [Effective April 9, 2011]).

The WTPA amends several sections of New York Labor Law to require employers to give increased written notice of wages to both exempt and non-exempt employees. The law also provides employees with several new causes of action against their employers. Secondary literature from plaintiff and defense firms alike forecast the need for employers to gird themselves against these new requirements and possible litigation. As of now, the Department of Labor has not issued model forms or documents to be distributed, but the WTPA is quite specific in what it requires.

The WTPA requires employers to provide: (1) written notice **to all employees** of several aspects of compensation **on regular wage statements accompanying each pay stub**; (2) written notice **to all new hires** of several aspects of compensation hired after April 9, 2011; (3) written notice **to all employees** [exempt and non-exempt] of several aspects of compensation on or before February 1<sup>st</sup> of each year starting in 2012; (4) any current employees with written notice where there is “a change in the terms and conditions of employment related to the various statutory elements, as amended, e.g. a change in rate of pay, allowances, pay date” seven days before the change. N.Y. Labor Law § 195 [Effective April 9, 2011]; Maria Colavito, Counsel for NY Department of Labor, DOL Opinion Letter, Feb. 22, 2011. The WTPA also requires: (5) that employees acknowledge in writing receiving the new hire or annual notification in their primary language and/or English; and that employers post (6) information regarding leave time and vacation policies and hours. Id.

The following memo outlines the various requirements for (I) notifications to all employees accompanying Regular Wage Statements; (II) notification required when any new employees are hired and annually to all employees; (III) other new notification requirements; (IV) expanded employee retaliation protection; and (V) other new civil and criminal penalties.

## **I. Regular Wage Statements**

### **Expanded Requirements for Regular Wage Statements**

The WTPA requires employers to provide **all employees** with additional information in the wage statement issued **with every payment of wages**. N.Y. Labor Law § 195(3) [Effective April 9, 2011]. Currently, under New York regulations, the wage statement must (1) list hours worked, (2) rates paid, (3) gross wages, (4) allowances, if any, claimed as part of the minimum wage, (5) deductions and (6) net wages.

The WTPA incorporates the above regulations into the text of the above statute and will require employers to include the following additional information in every wage statement (some of which was previously required by the regulations): (7) dates of work covered; (8) name of employee; (9) name, (10) address and (11) phone number of employer; (12) rate or rates of pay and (13) basis thereof (e.g. hourly, salary, commission); (14) gross deductions, (15) allowances claimed as part of the minimum wage and (16) net wages. Id.

Employers must provide **non-exempt employees** with the following additional information: (i) regular rate of pay, (ii) overtime rate of pay, (iii) number of regular hours worked, and (iv) number of overtime hours worked. **Employers must retain wage statements for six years.** N.Y. Labor Law § 195(4) [Effective April 9, 2011].

### **Remedies for Failure to Provide Wage Statement**

The WTPA allows employees to bring civil actions against employers who do not furnish the requisite wage information with each pay stub. The WTPA calls for employers to pay \$100 damages for each week the law is violated, up to \$2,500, plus costs, attorney's fees and injunctive relief. N.Y. Labor Law § 198(1-d) [Effective April 9, 2011]. The Commissioner of Labor may also bring such an action and assert claims for the same relief, except there is no similar cap on damages. The WTPA provides employers with two affirmative defenses. An employer can avoid liability if it demonstrates that it: (1) paid all wages legally required; or (2) had a good faith, reasonable basis for not providing notice. N.Y. Labor Law § 198(1-b) [Effective April 9, 2011].

## **II. Wage Notice to New Employees and Annual Notice to All Employees**

### **Expanded Requirements for New Employees and Annual Notice to All Employees**

Previous New York Labor Law required employers to provide newly hired employees, both exempt and nonexempt, with written notice of their (1) rate of pay, (2) regular pay date and, if applicable, (3) overtime rate of pay.

The WTPA requires employers to provide the following additional information in the notice to new employees: (4) how the wage payment is calculated (e.g. hourly, salary, commission); (5) allowances, if any, claimed as part of the minimum wage (e.g. tip, meal, or lodging); (6) the employer's name and any "doing business as" names; (7) the physical address of the employer's main office or principal place of business (and, if different, a mailing address); (8) the employer's telephone number; (9) plus other information deemed "material and necessary" by the Commissioner of Labor. For all nonexempt employees, the notice must also contain: (10) the employee's regular hourly rate and (11) overtime hourly rate. N.Y. Labor Law § 195(1)(a) [Effective April 9, 2011].

### **Frequency of Notice**

Notice must be issued not only when an employee is hired (as is currently required), but also: (1) on or before February 1 of every subsequent year, and (2) at least seven days prior to any changes to the information contained in the wage notice, unless such changes are reflected in the wage statement employers must provide with each paycheck. N.Y. Labor Law § 195(2) [Effective April 9, 2011].

### **Primary Language Other than English**

The wage notice must be provided in English and, if applicable, the primary language of each employee. The WTPA specifies that the wage notice must be provided in English and, if applicable, the primary language of each employee. The Commissioner of Labor is directed to prepare template wage notices in English and additional languages chosen in the Commissioner's discretion. If an employee identifies as his or her primary language a language for which a template is not available from the Commissioner of Labor, an employer complies with this requirement by providing the notice in English. N.Y. Labor Law § 195(1)(a)-(e) [Effective April 9, 2011].

### **Employee Acknowledgment of Receipt of Wage Notice**

Employers must obtain, and maintain **for six years** (increased from three years), a signed and dated employee acknowledgment each time a wage notice is provided in English and in the primary language of the employee. N.Y. Labor Law § 661 [Effective April 9, 2011]. The WTPA adds additional required elements to the acknowledgment--**employees must affirm** that (1) they accurately identified their primary language to the employer, and, (2) the employer provided the notice in such language or, if the Commissioner of Labor has not made a template notice available in such language, in English. N.Y. Labor Law § 195(1)(a)-(e) [Effective April 9, 2011].

### **Remedies for Failure to Provide the Annual Written Wage Notice**

If an employer fails to provide the written wage notice within 10 business days of an employee's date of hire, the WTPA permits both the employee and the Commissioner of Labor to bring an action against the employer. An employee may recover \$50 for each work week in which a violation occurred, up to a maximum of \$2,500, plus costs, reasonable attorney's fees and injunctive relief. N.Y. Labor Law § 198(1-b) [Effective April 9, 2011]. The Commissioner, likewise, may recover \$50 per workweek per employee, but there is no cap on damages in an action by the Commissioner. The WTPA provides employers with two affirmative defenses. An employer can avoid liability if it demonstrates that it: (1) paid all wages legally required; or (2) had a good faith, reasonable basis for not providing notice. N.Y. Labor Law § 195 [Effective April 9, 2011].

## **III. Other Notice Requirements**

### **Notice of Leave Policies and Hours**

The employer must notify his employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays and hours. N.Y. Labor Law § 195(5) [Effective April 9, 2011].

### **Notice of Employee Termination and Employee Health Benefits**

The employer must notify any employee terminated from employment, in writing, of the **exact date of such termination** as well as the **exact date of cancellation of employee benefits** connected with such termination. In no case shall notice of such termination be provided more than five working days after the date of such termination. Failure to notify an employee of cancellation of accident or health insurance subjects an employer to an additional penalty of up

to \$5,000 and appropriate damages including reimbursement for medical expenses which were not covered by the policyholder's insurer by virtue of his termination of the policy or failure to remit such premiums. N.Y. Labor Law § 195(6) [Effective April 9, 2011] (cross-citing N.Y. Labor Law § 217).

#### **IV. Expanded Retaliation Protection and Penalties**

##### **Expanded Retaliation Provisions**

The WTPA also expands the retaliation provision of New York's wage statute. Under current law, an employee may bring a claim for retaliation against an employer that "discharge[s], penalize[s], or in any other manner discriminate[s] or retaliate[s] against an employee" that complains to the employer or the Department of Labor "that the employer has violated any provision of" New York's wage statute.

Under the WTPA, the provision is amended to prohibit retaliation against an employee (i) who complains to the employer, the Department of Labor, the New York Attorney General, "**or any other person**" that an employer "**engaged in conduct** that the employee, reasonably and in good faith, believes violates any provision of" the New York wage statute or any order by the Commissioner of Labor, or (ii) "**because such employer . . . believes that such employee has made a complaint to his or her employer**, or to the [Commissioner of Labor], or to the attorney general . . . , or to any other person that the employer has violated any provision of this chapter, or any order issued by the" Commissioner of Labor. N.Y. Labor Law § 215(1)(a) [Effective April 9, 2011].

##### **Additional Retaliation Remedies**

The WTPA clarifies and expands the remedies available to employees asserting retaliation claims under New York's wage law. Currently, an employee bringing an action for a violation may seek "all appropriate relief," including "lost compensation," "damages," reinstatement to the employee's former position, and reasonable attorneys' fees.

Under the WTPA, an employee may also seek an order "enjoining the conduct of any person or employer," liquidated damages of no more than \$10,000, and an award of front pay in lieu of reinstatement. N.Y. Labor Law § 215(1)(b) [Effective April 9, 2011].

#### **V. Other Added or Expanded Penalties**

##### **Increased Damages for Failure to Pay Wages**

The WTPA increases damages available for failure to pay wages. Currently, employees may recover, as liquidated damages for failure to pay wages due, 25% of unpaid wages. The WTPA **increases liquidated damages to 100%** of wages owed. N.Y. Labor Law § 198(1-a) [Effective April 9, 2011]. The WTPA also clarifies that employees may recover prejudgment interest on unpaid wages. This is now aligned with the federal wage act, the FLSA.

### **Criminal Liability for Partnerships and LLCs**

The WTPA expands criminal liability to corporations, partnership, or limited liability company but not LLPs. The WTPA calls for criminal penalties of up to one year in prison and a \$20,000 fine **for failure to keep or furnish proper records or pay minimum wage or overtime compensation** in accordance with New York Labor Law. N.Y. Labor Law § 198-a(2) [Effective April 9, 2011].

### **Postings of Wage Violations**

The WTPA also empowers the Commissioner of Labor to require employers to post a summary of the employer's wage violations in the workplace and, for willful violators, to affix violations in an area visible to the general public. N.Y. Labor Law § 219-c [Effective April 9, 2011].

### **Penalty for Failure to Fulfill Judgment**

Employers who are found liable and have penalties levied against them face additional pitfalls, e.g., an employer who defaults on paying a judgment for more than 90 days, after the judgment is final, **must pay an additional 15 percent** of damages to defray the cost to the employee of collecting on the judgment. N.Y. Labor Law § 198(4) [Effective April 9, 2011].

### **Tolling of the Statute of Limitations**

The WTPA does not alter the six year statute of limitations for wage suits, but does add a tolling provision whereby the statute of limitations is tolled from the earlier of either the date an employee files a complaint with the Department of Labor or the date the Commissioner commences an investigation. N.Y. Labor Law § 198(3) [Effective April 9, 2011].