

LABOR & EMPLOYMENT ALERT

HIGHLIGHTS OF THE CALIFORNIA AND NEW YORK WAGE THEFT PREVENTION ACTS

New York and California have both recently enacted “Wage Theft Prevention Acts” (“WTPA”). These WTPAs were enacted to give greater protection and wage information to employees and to impose penalties on employers that fail to comply with the WTPA requirements. One of the key components common to both of these laws is that they require employers to provide detailed written notices to employees regarding their pay related matters. Key points regarding the New York and California WTPAs are set forth below.

THE NEW YORK WAGE THEFT PREVENTION ACT

On April 9, 2011, the New York WTPA expanded employer requirements to notify new hires and current employees of certain wage information. The WTPA also increased sanctions for non-compliance with these notice requirements.

Specifically, the New York WTPA requires all private employers to give written notice of certain pay-related matters to new employees at the time of hire and to current employees on or before February 1 of each year (beginning February 1, 2012), as follows:

General Requirements

Written Notice

The New York WTPA provides, among other things, that a written notice of rates of pay and regular payday be given to new hires and employees. Specifically, the New York WTPA requires that:

1. The written notice provided to new hires and employees must contain certain information including, but not limited to:
 - (a) the employee's rate or rates of pay (including the overtime rate of pay for nonexempt employees);
 - (b) whether the employee will be paid by the hour, shift, day, week, salary, piece, commission or otherwise;
 - (c) whether the employer will claim any allowances as part of the minimum wage (e.g., tip, meal or lodging allowances);
 - (d) the employer's regular pay day;
 - (e) the employer's name and any names under which the employer does business; and
 - (f) the physical address and telephone number of the employer's main office or principal place of business (and, if different, the employer's mailing address).

2. Employers must have each employee sign and date the completed notice and must provide a copy to each employee. If the employee refuses to sign the notice, the employer should still give the notice to the employee and note the employee's refusal to sign.
3. As stated above, the written notice must be provided to employees at the time of hire and, on or before February 1st of each subsequent year of the employee's employment.
4. If any data in the notice changes, the employer must notify employees at least a week before it happens unless they issue a new paystub that contains this notice. The employer must also notify an employee in writing before they reduce the employee's wage rate.

Wage Statements

1. In addition, under the NY WTPA, employers must give each employee a wage statement or pay stub each payday that lists:
 - (a) hours worked - (regular and overtime);
 - (b) rate or rates of pay (regular/overtime);
 - (c) how the employee is paid: by the hour, shift, day, week, commission, etc. - pay at the piece rate must show what rates apply and the number of pieces at each rate;
 - (d) employee's gross and net wages;
 - (e) itemized deductions;
 - (f) itemized allowances and credits claimed by the employer, if any (tip, meal and lodging allowances or credits);
 - (g) employee's name;
 - (h) employer's name, address and phone number; and
 - (i) dates covered by the payment.
2. The employer must also give any employee who asks a written explanation of how the employee's wages were computed.

Language Requirement

The written notice required by the New York WTPA must be provided to the employee in English and in the language identified by each employee as his or her primary language. The employer may provide its own notice, as long as it includes all of the required information, or may use the New York State Department of Labor's ("NYSDOL") sample notices. These sample notices are available in a variety of languages on the NYSDOL website at: <http://www.labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm>

Recordkeeping

Under the New York WTPA, employers must:

1. Keep records of the new notice and acknowledgment and payroll records for six (6) years.
2. Keep accurate records of hours worked by employees and wages paid on an ongoing basis. The employer may not make up the records after the fact at the end of the week, month or year.

3. For each week an employee works, the payroll records must contain:
 - (a) hours worked - (regular and overtime);
 - (b) rate or rates of pay (regular/overtime);
 - (c) how the employee is paid: by the hour, shift, day, week, commission, etc. (Pay at the piece rate must show what rates apply and the number of pieces at each rate);
 - (d) employee's gross and net wages;
 - (e) itemized deductions; and
 - (f) itemized allowances and credits claimed by the employer, if any (tip, meal and lodging allowances or credits).

Penalties for Non-Compliance

The penalties for failing to comply with the New York WTPA are significant. They include:

1. If an employer fails to provide an employee with the above notice within ten (10) business days of the employee's first day of employment, the employee may be able to recover \$50 for each work week during which the violation occurred, or continues to occur, up to a maximum of \$2,500 per employee, together with attorney's fees and costs.
2. Employers that do not give the employees the required wage statements may have to pay damages of up to \$100 per week, per employee (up to a maximum of \$2,500, together with attorney's fees and costs), unless they paid employees all wages required by law.
3. In addition, for a willful failure to pay all wages under this law, the NYSDOL may post a summary of violations in a place where the public can see it, for up to ninety (90) days. In addition, it is a misdemeanor to remove or tamper with this notice without permission.

THE CALIFORNIA WAGE THEFT PREVENTION ACT

California recently enacted its own WTPA effective January 1, 2012. One of the primary differences between the New York WTPA and the California WTPA is that the California WTPA requires employers to provide only new nonexempt hires with written notice of specific wage information. It also increases the penalties for nonpayment of all wages due, including overtime premiums and minimum wage for all hours worked. The notice requirement does not apply to state government employees, salaried exempt employees under California state law, or employees covered by a valid collective bargaining agreement.

General Requirements

1. The California WTPA mandates that at "the time of hire" of any nonexempt employee, an employer must provide to the employee a written notice containing all of the following information:
 - (a) the employee's rate or rates of pay (including overtime rates), and whether the employee is paid hourly, by the shift, by the day, by the week, by salary, by piece, by commission, or otherwise;
 - (b) any allowances claimed as part of the minimum wage (i.e., allowances for meals or lodging);

- (c) the regular payday;
- (d) the name of the employer, including any D/B/A names the employer uses.
- (e) the physical address of the employer's main office or principal place of business, and a mailing address if it is different;
- (f) the employer's telephone number;
- (g) the name, address, and telephone number of the employer's workers' compensation insurance carrier; and
- (h) any other information that the Labor Commissioner deems material and necessary – the Labor Commission has posted a sample Notice to Employees. Pursuant to its regulatory authority, the Labor Commissioner is requiring employers to provide the following additional information:

- hire date;
- type of employer entity (i.e., sole proprietor, corporation, limited liability company, etc.) or other type of entity, such as a staffing agency
- whether the "employment agreement" is oral or written;
- the name, physical address, mailing address or telephone number of "any other business or entity used to hire employees or administer wages or benefits" other than a recruiting service or a payroll processing service;
- the workers' compensation policy number or certificate number for consent to self-insure;
- an acknowledgement of receipt by the employee; and
- a statement informing employees of their right to receive a notice in writing of any changes in the information on the Notice within seven (7) calendar days of the changes, unless all changes are provided on a timely wage statement or notice of all changes in provided in another writing required by law.

2. As set forth above, employees must be notified of any changes to the information provided in the initial notice within seven (7) calendar days after these changes are made. This notice of changes may take the form of an entirely new notice, a notice of only the changed information, or a timely wage statement that reflects the changes.

Language Requirement

Employers must provide the notice in the language that the employer normally uses for communicating employment-related information to employees. The California Division of Labor Standards and Enforcement (DLSE) has created a template available to employers online at: http://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html.

Recordkeeping

Under the California WTPA, employers must:

1. maintain payroll records for three (3) years (rather than only two (2)); and
2. maintain both itemized wage statements and records of deductions.

In addition, employers are now specifically prohibited from forbidding an employee from maintaining a personal record of hours worked, or, if paid on piece-rate basis, piece rate units earned.

Penalties for Non-Compliance

The California WTPA contains numerous provisions that subject employers to substantial penalties and damages for noncompliance with various Labor Code provisions, including the following:

1. The Labor Commissioner is authorized to collect liquidated damages, in addition to wages and penalties, for failure to pay the minimum wage. (Previously, liquidated damages were only available in civil court);
2. The time period for which the Labor Commissioner can require that employers post bonds in order to incentivize compliance and ensure the employer can pay any future awards during that period has been increased from six months to two years. If the employer does not post the bond and does not appeal the order requiring a bond, the Labor Commissioner may order an accounting of the employer's assets and subject the employer to an additional civil penalty of up to \$10,000;
3. An employer that has been convicted of violating wage laws for the second time within 10 years or has failed to satisfy a judgment for nonpayment of wages could be issued an immediate restraining order from conducting business within the state for 30 days unless the employer posts a bond conditioned on making correct wage payments or satisfying any judgment for nonpayment of wages;
4. The DLSE now has three years from the date a penalty or fee becomes final to collect it.
5. Employees are now able to recover attorney's fees and costs incurred in enforcing a court judgment for unpaid wages.
6. An employer may be criminally liable for a misdemeanor for the willful refusal to pay a final court judgment or final order for wages by the Labor Commissioner within ninety (90) days. Each offense carries a minimum \$1,000 fine or minimum six (6) months of imprisonment. If the total wages due are more than \$1,000, the minimum fine per offense is \$10,000 and an employer may be subject to both the fine and imprisonment.

Our Labor and Employment team stands ready to assist your company with these new requirements. Please contact us.