

June 2018

COMPLIANCE IS EASY; NON- COMPLIANCE IS EXPENSIVE!

NEW YORK WAGE THEFT PREVENTION ACT

New York Labor Law section known as the Wage Theft Prevention Act (“WTPA”)¹ requires employers to give written notice to each employee at the following times:

- A. To a new hire “at the time of hiring” and
- B. To any employee that has a change in pay rate and/or other designated wage information “at least seven calendar days prior to the time of such changes”

THE BAD NEWS

The written notice must include all the following information²:

- The rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other;
- Allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances;
- The regular pay day designated by the employer in accordance with the Labor Law;
- The employer’s name and 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 employer’s telephone number;
- The regular hourly rate and overtime rate of pay for employees who are not exempt from overtime compensation;
- Plus, such other information as the labor Commissioner deems material and necessary.

¹ NY Labor Law Section 195.1

² NY Labor Law Section 195.1(a)

MORE BAD NEWS

Each time the employer provides WTPA notice to an employee, the employer must obtain from the employee a signed and dated written acknowledgement of receipt of the notice which³:

- is in English AND in the primary language of the employee, ,
- the employer must preserve and maintain for six years
- includes the employee's affirmation that he or she accurately identified his or her primary language to the employer.

SOME GOOD NEWS

While these obligations would be burdensome for most employers, the state has gone a long way in easing that burden by creating and publishing WTPA Notice forms in seven languages⁴ in addition to English. The forms can be found on the New York State Department of Labor website at:

<https://labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm>

These forms eliminate much of the employers' administrative burden by (1) converting the exercise to form filling and (2) handling the translation burden.

BUT NOT ALL GOOD NEWS

On the other hand, the forms do not eliminate all sticky employer issues, such as calculating "The regular hourly rate and overtime rate of pay for non-exempt⁵ employees" who are not paid hourly (e.g. paid annual salary) and determining, in the first instance, which employees are exempt, and which are non-exempt.

ADMINISTRATIVE PENALTIES AND PRIVATE ENFORCEMENT

Q. Why should employers care about WTPA compliance?

A. Because non-compliance can be very expensive!

The Labor Law is replete with enforcement provisions that may come into play for WTPA non-compliance. These include:

- **NY Labor Law Section 198 1-a.** authorizes the labor Commissioner to bring "any legal action necessary" to collect any claim on behalf of any employee paid less than the earned wage, including liquidated damages equal to the full amount of the underpayment, i.e. double damages.

³ NY Labor Law Section 195.1(a)

⁴ Spanish, Italian, Chinese, Haitian Creole, Korean, Polish and Russian

⁵ "Non-exempt" employees are those that must be paid time and a half for overtime hours.

- **NY Labor Law Section 198 1-b.** authorizes an employee to bring a private civil action to recover fifty dollars for each work day that the violations occurred or continue to occur, up to five thousand dollars, together with costs and reasonable attorney's fees.
- **NY Labor Law Section 198 1-b.** also authorizes the commissioner to bring legal action to collect the employees claim, and as part of such legal action, the commissioner may assess against the employer additional damages of fifty dollars for each work day that the violations occurred or continue to occur, up to five thousand dollars.
- **NY Labor Law Section 215** prohibits any act by an employer in retaliation for an employee taking action relating to enforcement of WTPA rights and authorizes civil damage action by the employee for liquidated damages, attorney's fees, and authorizes the DOL commissioner to assess a civil penalty up to \$10,000 and up to \$20,000 if the employer has violated WTPA (or other LL requirements) another time in the preceding six years. LL Section 215 (3). Makes retaliation a criminal violation (Class B Misdemeanor)

HISTORY

When originally enacted WTPA Notice was also required for every employee between January 1st and February 1st each year, i.e. annually! Recognizing the burden this created, in December 2014 Governor Cuomo signed legislation amending WTPA to eliminate the annual notice requirement. This however left in place the requirements for WTPA Notice (a) at the time of hiring and (b) whenever an employee's pay rate changes.

However, that same 2014 legislation also (a) increased penalties for violations⁶ (b) authorized personal liability for the 10 largest owners of a limited liability company⁷ and (c) increased penalties for two-time Labor Law offenders⁸

ADDITIONAL INFORMATION

A WTPA Fact Sheet promulgated by the New York State Department of Labor is found at:

<https://www.labor.ny.gov/formsdocs/wp/p715.pdf>

CONCLUSION

Since the 2010 passage of the Wage Theft Prevention Act, New York State has ratcheted up the monetary risk for non-compliance. However, during the same period New York State has made compliance less burdensome mostly through eliminating the annual filing requirement and by

⁶ \$50 penalty per workweek, per worker is now increased to \$50 per workday, per worker, up to a maximum of \$5,000

⁷ Previously such personal liability only attached to owners of a corporation...not owners of an LLC.

⁸ The \$10,000 maximum additional penalty for those found to have committed a second labor law violation within six years was increased to \$20,000.

providing user friendly multilingual forms on the DOL website...thus, a little prevention can now go a long way!

If you have any questions about WTPA compliance, or about any other facet of employment law, please contact Richard Waxman at:

rwaxman@waxmanlaw.com

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