December 20, 2010

More Obligations and Penalties for New York Employers

On December 13, 2010, New York Gov. David Paterson signed the Wage Theft Prevention Act (the "Act") enhancing the notification obligations on New York employers. This amendment to the New York Labor Law also increases the penalties associated with violations and expands the scope of retaliation claims. The Act becomes effective April 12, 2011. **New Notice and Pay Statement Obligations and Penalties** In 2009, the New York Labor Law was amended to require employers to provide new hires with written notice of the employees' pay rate(s); overtime pay rate(s), if applicable; and regular payday. Now there is more. **Notice of Wages** All New York employers must notify each employee, in writing, at the time of hire and annually (on or before February 1) of (1) the employee's rate of pay and the basis of such pay (*e.g.,* hourly, weekly, salary, commission); (2) the overtime rate, if applicable; (3) any allowances claimed as part of the minimum wage; (4) the regular payday; (5) the name of the employer and any "doing business as" names; and (6) the address of the employer's main office or principal place of business and a phone number. This notice must be in English and the primary language of the employee. The employee must provide a signed and dated written acknowledgment of receipt of such annual notice, and the employer must retain that for six years. To the extent information in the notice changes, employers must advise employees seven days prior to the change unless the change is documented on the employee's wage statement. **Wage Statement** In addition, with each paycheck, all New York employers must provide each employee with a wage statement that includes, among other things, the dates of work covered by the check, rate and basis of pay, gross and net wages and deductions, any allowances, and the regular hourly and overtime rate for nonexempt employees. Employers must maintain these payroll records for six years. **Penalties** Under the Act, both employees and the Commissioner of Labor (the "Commissioner") can bring an action to recover specific damages plus attorneys' fees and costs against an employer who fails to provide the notice of wages or wage statement. Specifically, an employee who is not provided with a notice of wages within 10 business days of his or her first date of employment may seek $50 for each workweek he or she does not receive such notice, up to $2,500. An employee who is not provided with a wage statement may seek $100 for each workweek of such violation, up to $2,500. Notably, the Act empowers the Commissioner to recover these civil penalties without any cap. **Heightened Penalties and Powers of the Commissioner** In addition to the penalties it provides for noncompliance with the notice and wage statement requirements, the Act increases the penalties associated with other violations of the New York Labor Law and grants the Commissioner additional enforcement power. Some highlights of the Act follow:

- The liquidated damages on unpaid wages will increase from 25% to up to 100% of the amount of the lost wages.
- The six-year statute of limitations for failure to pay wages is tolled as of the earlier of the date the employee files a complaint with the Commissioner or the Commissioner commences an investigation, until the date of disposition by the Commissioner. The two-year statute of limitations on retaliation claims is similarly tolled.
- Employees and the Commissioner are entitled to attorneys' fees and costs incurred enforcing a court judgment against an employer for a wage or notice violation. Further, the total amount of any judgment will automatically increase by 15% in the event an employer fails to pay within 90 days.
- If an employer fails to satisfy a Commissioner's order to comply, the Commissioner is empowered to require the employer to provide an accounting of its assets. The failure to provide such an accounting may result in a civil action to compel such information and a civil penalty of up to $10,000.
- The Commissioner may require an employer who violates certain sections of the New York Labor Law to post a notice visible to employees at its worksite detailing the employer's violation. If the violation is willful, the Commissioner may also order this notice to be posted in a place visible to the public.

- The officers and agents of partnerships and limited liability corporations (in addition to those of corporations) now face criminal penalties associated with knowingly permitting an employer to violate certain provisions of the New York Labor Law.
- There are new criminal penalties associated with failure to pay minimum wage or overtime as well as failure to maintain records that include financial penalties or imprisonment. Although an initial violation constitutes a misdemeanor, a second violation, within six years of the first, constitutes a felony.

Expanded Retaliation Claims Employers also must beware of the newly expanded retaliation provisions under the Act that will protect not only those employees who complain about wage violations but employees who the employer believes have complained. Such complaint need not be to the employer or the Commissioner but may now be to the Attorney General or "any other person." In addition to the existing forms of retaliation, employers are now explicitly prohibited from threatening an employee who complains. The Act makes it clear that an employee need not refer to a specific provision of the law when complaining. **Repercussions for Employers** New York employers need to understand these upcoming changes and take steps to ensure that their policies and practices comply with the expanded New York Labor Law. Specifically, employers must draft compliant wage notices and statements or revise their existing documents to comply with the Act. Employers should also ensure that their human resources personnel and management employees understand the prohibition on retaliation related to employees who complain about their wages.