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Record-Keeping, Increases Fines for Minimum Wage and Overtime Violations

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On December 13, 2010, Governor Patterson signed the Wage Theft Prevention Act into law. The Act attempts to address the problem of employers who fail to pay statutorily mandated minimum wage and overtime by requiring new notifications, enhancing remedies for violations, and strengthening whistleblower protections. The Act is effective on April 12, 2011.

Recordkeeping and Employee Notifications

Amending Section 195 of the Labor Law, the Act requires employers to provide to all employees, both at the time of hiring (starting on the effective date of the Act), and on or before February 1 of each year (starting in 2012), an individual notice containing information regarding the rate (or rates) of pay and basis therefore (whether hourly, shift, salary, piece, etc.), allowances claimed, the regular payday, the name, "doing business as" name, address and phone number of the employer, and, for all non-exempt employees, the regular hourly rate and overtime rate of pay. The notification must be provided both in English and the employee's primary language (the Commissioner of Labor is responsible for supplying dual-language notices, and the employer is only responsible for an English language notice if the Commissioner does not supply a version in the employee's primary language). The employer must obtain a signed and dated acknowledgment from the employee of receipt of the notice.

In addition, beginning in February 2011, employers will be required to furnish employees with pay statements (pay stubs), which specify the applicable dates the wages cover, the rate and basis of pay, gross wages, deductions, allowances, net wages, and other information. Nonexempt employees must be informed of their regular and overtime rates. Those who are paid a piece rate are entitled to additional information. Payroll records must also reflect this information. Employers must notify employees of any changes to this data in writing, seven days prior to the effective date of the change, unless the changes are reflected in the pay statement. In addition, employees are entitled, upon request, to a written explanation of how their wages were computed.

All records listed above, in addition to payroll records, must be kept for six years. Violations of the initial notification requirement are punishable by a fine of $50 per workweek, up to $2,500, in addition to costs and attorney's fees. Violations of the wage statement requirement are punishable by a fine of $100 per workweek, up to $2,500, plus costs and attorney's fees.

Anti-Retaliation

The Act amends Section 215 of the Labor Law to allow the Commissioner to order additional remedies in the event of retaliation, including issuing injunctions, ordering reinstatement, the payment of lost wages, front pay and liquidated damages of up to $10,000, in addition to an award of costs and attorney's fees. Retaliation is defined as discharging, threatening, penalizing, or in any other manner discriminating or retaliating against any employee and constitutes a misdemeanor.

Wage Payment Discrimination

Under amendments to Section 197 of the Labor Law, the Commissioner is now empowered to take "any legal action necessary, including administrative action or a civil action" to recover a fine of $500 per violation of wage discrimination due to gender.

Accounting of Assets

The Act amends section 196 of the Labor Law, empowering the Commissioner to require an accounting of assets of the employer if the employer fails to comply with an order regarding minimum wage or overtime payment issued by the Commissioner, including but not limited to a list of all bank accounts, accounts receivable, personal property, real property, automobiles or other vehicles, and any other assets. Upon a failure to provide the accounting, the Commissioner may pursue legal action against the employer and obtain a civil penalty of up to $10,000.

Notice of Employer Violations

Section 219-c of the Labor Law will now require an employer which has violated wage payment laws to post a notice which explains these violations, for up to a year, in an area visible to employees.

Criminal Penalties

An amendment of Section 198-a of the Labor Law provides for an extension of criminal penalties to officers and agents of corporations, partnerships or limited liability companies who knowingly allow wage payment violations to occur. A first offense is a misdemeanor, and subsequent offenses occurring within six years are felonies.

Section 622 of the Labor Law was amended to impose new criminal and monetary penalties against employers who violate the minimum wage or overtime requirements. A first violation is considered a misdemeanor and is subject to a fine between $500 and $20,000, or imprisonment for up to one year. Subsequent violations which occur within six years constitute felonies and are punishable by a fine of $500 to $20,000, or imprisonment for one year plus one day, or both. A failure to keep records is also a misdemeanor, punishable by a fine of $500 to $5,000, or imprisonment for up to one year. Subsequent recordkeeping violations occurring within six years are felonies and are punishable by a fine of $500 to $20,000, or imprisonment for one year plus one day, or both.

Tolling of the Statute of Limitations

Sections 198, 215 and 663 of the Labor Law are amended to allow for a tolling period from the date of the employee's complaint or the date of the Commissioner's initiation of an investigation, whichever occurs earlier, until the Commissioner's order becomes final or the date on which the Commissioner notifies the employee that the investigation is concluded. Such tolling periods apply to actions under the Articles 6, 7 and 19 of the Labor Law, which are Payment of Wages, General Provisions and the Minimum Wage Act.

Award of Costs and Fees

The Act also amends Section 663 of the Labor Law to require a court to award all reasonable attorney's fees, prejudgment interest, and liquidated damages equal to 100% of the unpaid wages, in the case of unpaid minimum wages, eliminating the judge's discretion regarding such issues.

Under the amended section 198 of the Labor Law, the employee or the Commissioner may obtain attorney's fees and costs to enforce a court judgment in any civil action. After 90 days, if the amount remains unpaid, the judgment order automatically increases by 15%.

Municipal Employers

The provisions of the Wage Theft Prevention Act do not apply to municipal employers.

Conclusion

The Wage Theft Prevention Act imposes significant new burdens on employers, and heavy penalties for failure to comply. Employers should examine their wage payment practices, including the determinations of exempt/non-exempt employees, to ensure that employees are paid correctly. In addition, employers must also plan to notify employees of all information required by this Act, including pay stubs and the required annual notice beginning in 2012. Even if the workforce is unionized and the collective bargaining agreement already contains all applicable information, the employer should comply, since the Act is silent on whether there is preemption when a collective bargaining agreement exists. The attorneys in Cullen and Dykman's Labor and Employment practice group would be happy to assist with this or any other employment issue you are facing.

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