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## New York Enacts Wage Theft Prevention Act

*New York's recently enacted Wage Theft Prevention Act will require New York employers to provide employees additional wage information at the time of their hire and annually thereafter, and will expand recordkeeping requirements. The new law, which significantly increases penalties for wage payment violations, will take effect on April 9, 2011.*

### Background

New York Labor Law Section 195(1) currently requires employers to inform new hires in writing of their regular rate of pay, overtime rate (if applicable) and regular pay day, and to obtain a written acknowledgement of receipt. (See our October 21, 2009 [For Your Information](#).) New York State Department of Labor (NYSDOL) [guidelines](#) further require the notice to exempt employees to specify the exemption from overtime that applies. (See our December 9, 2009 [For Your Information](#).) Other sections of the Labor Law detail wage payment, minimum wage, and recordkeeping requirements, as well as penalties for noncompliance.

On December 10, 2010, then New York Governor David Paterson signed into law the Wage Theft Prevention Act (WTPA) (Senate Bill 8380/Assembly Bill 11726), which amends New York's Labor Law effective April 9, 2011. The WTPA expands existing employer notice and recordkeeping obligations, increases employer penalties for wage violations, adds additional employee protections for those who make wage-related complaints, and gives the New York Labor Commissioner greater enforcement authority.

### The Wage Theft Prevention Act

The key changes made by the WTPA to the provisions of the New York Labor Law are highlighted below.

#### Increased Notice Requirements

**Timing and Frequency.** In addition to providing each employee with a written notice of his or her regular pay rates and pay days at the time of hire, the Act requires employers to provide each employee an updated notice at least seven calendar days prior to any changes in pay or other information (e.g., overtime eligibility) contained in the employee's most recent notice, unless the changes are shown on the employee's wage statement. Beginning in 2012, employers will also have to provide an annual notice to every employee on or before February 1.

**Additional Information.** Along with the rate of pay, overtime rate (if applicable) and regular pay day, the following new information must be included in the employee notice:

- Basis of wage payment (e.g., hourly, weekly, salary, commission, etc.);
- Allowances claimed against minimum wage (including tip, meal or lodging allowances);
- Address of employer's principal place of business, mailing address (if different), and telephone number; and
- Additional employer information, such as "doing business as" names.

**Language.** The employee notice must be provided both in English and also in the employee's primary language (as identified by the employee). The employee acknowledgement confirming receipt of the notice must also be in both languages, and include an affirmation by the employee that he or she accurately identified his or her primary language and notice was provided in that language. A signed and dated written acknowledgment in English and the employee's primary language must be secured each time a notice is received by an employee.

***BUCK COMMENT.** The Labor Commissioner has been charged with developing dual-language templates for the notice and acknowledgement in English and other languages to be determined in its discretion. In the absence of a template in the employee's primary language, an employer will be in compliance if it only provides an English-language notice or acknowledgement.*

**Method of Providing Notice and Securing Written Acknowledgment.** The WTPA is silent on whether the written notice and employee acknowledgement required by amended Labor Law Section 195(1) may be provided or executed electronically. However, in Opinion Letters issued on [January 14, 2010](#) and [December 18, 2009](#), the NYS DOL indicated that both the notice and written acknowledgement required under the current Section 195(1) may be provided electronically, and that the required acknowledgement may be executed electronically as long as certain conditions are met.

***BUCK COMMENT.** We expect that the same or similar rules applicable under the current Section 195(1) will apply to acceptable methods of providing written notice and securing the signed acknowledgement under the amended law.*

## Wage Statements

Under the amended law, each employee pay statement must include all of the information required in the notice as well as the dates the wages cover, the rate or rates of pay, the basis of pay, gross wages, deductions, and net wages. For overtime eligible (nonexempt) employees, pay statements must also include their regular hourly rate or rates of pay and overtime rates as well as the number of regular and overtime hours worked. Special rules apply to those paid on a piece rate.

**BUCK COMMENT.** *The NYSDOL is likely to give increased scrutiny to wage statements, including employee exempt/nonexempt classifications, when the new requirements take effect. To minimize potential risk, employers may want to consider conducting a self-audit or other review prior to April 2011 to ensure that overtime eligible employees have been properly classified.*

## Recordkeeping

The WTPA extends from three to a minimum of six years the length of time an employer must maintain payroll records. The new law also requires the employee notices and signed employee acknowledgements described above to be maintained for six years and imposes penalties against employers for noncompliance.

## Anti-Retaliation Protections

To protect employees who make wage-related complaints, the WTPA expands the anti-retaliation provisions of the Labor Law and the remedies for violation. The Labor Commissioner is authorized to assess penalties against employers that retaliate or threaten to retaliate against employees who complained or are believed to have complained to their employer, the NYSDOL, the state Attorney General or to “any other person” about violations of the Labor Law or any order issued by the Labor Commissioner. Other protected conduct includes filing a proceeding under the Labor Law, providing information to the NYSDOL or Attorney General, testifying in a Labor Law investigation or proceeding, and exercising other rights protected under the Labor Law. It is also unlawful for an employer to retaliate against an employee because it has received an adverse determination from the NYSDOL.

The WTPA provides the following relief for violation of the anti-retaliation provisions:

- Civil penalties of up to \$10,000;
- Compensatory damages;
- Liquidated damages (not to exceed \$10,000 per aggrieved employee); and/or
- Injunctive relief, including rehire/reinstatement with back pay or front pay in lieu of reinstatement.

Employers that violate the anti-retaliation provisions will also be guilty of a misdemeanor.

The WTPA clarifies that the two-year statute of limitations period for filing a civil action for retaliation is tolled if the employee files a complaint with the Labor Commissioner. In such cases, the limitations period is tolled from the earlier of the date the employee files a complaint or the date on which the Labor Commissioner begins an investigation until the date an order by the Commissioner to comply becomes final or, where the Commissioner does not issue an order, the date on which the Commissioner notifies the employee that the investigation has ended.

## Increased Penalties

The WTPA significantly increases penalties for employers that violate the New York Labor Law.

**Wage Underpayments.** The WTPA increases liquidated damages for a prevailing employee from 25% to up to 100% of the total unpaid wages due, unless the employer can show that it had a good-faith basis for noncompliance. In addition, a penalty of up to double the total amount of wages due may be assessed for “willful or egregious” violations. An additional 15% in liquidated damages will be assessed if the employer defaults on payment of a final judgment for more than 90 days.

***BUCK COMMENT.** The WTPA has eliminated the Labor Commissioner’s discretion to decide whether to seek liquidated damages. Because the Commissioner will be required to seek liquidated damages and recovery of the full amount of the underpayment with increased penalties, the starting point for negotiations will be higher and employers may be less likely to settle wage disputes.*

The new law clarifies that the six-year statute of limitations period for filing an action to recover wages is tolled if the employee files a complaint with the Labor Commissioner. The tolling period is determined in the same manner as discussed above for retaliation claims.

In any civil action brought by an employee or the Labor Commissioner to recover unpaid wages, prejudgment interest, costs, and reasonable attorneys’ fees will be recoverable.

**Employee Notices.** Under the WTPA, either the employee or Labor Commissioner may bring a civil action or the Labor Commissioner may bring an administrative action on behalf of the employee to recover damages for an employer’s failure to provide the notice required under Section 195(1) within 10 business days of the employee’s start date. In such cases, employees can recover damages of \$50 for each work week that the violations occurred or continue to occur (up to a maximum of \$2,500), plus costs, attorneys’ fees and injunctive relief.

**Pay Statements.** The WTPA also provides penalties for failure to provide pay statements with all the required information, and permits the Labor Commissioner to bring an enforcement action. Employees can recover damages of \$100 for each work week that the violations occurred or continue to occur (up to a maximum of \$2,500), plus costs, attorneys’ fees and injunctive relief.

**Criminal Penalties.** An employer that fails to pay minimum wage or overtime is guilty of a misdemeanor, subject to a minimum fine of \$500 up to a maximum fine of \$20,000 or up to one year imprisonment. A second violation within six years of a prior conviction will be a felony and subject the employer to a fine of \$500 up to \$20,000 and/or imprisonment for no more than one year and one day. An employer that fails to maintain payroll records is guilty of a misdemeanor for which a court can impose fines of \$500 to \$5,000 or a one year imprisonment. A subsequent conviction within six years will be a felony and result in a fine of \$500 to \$20,000 and/or imprisonment for a period not to exceed one year and one day. Although current criminal penalties for nonpayment of wages

and maintaining adequate payroll records only apply to corporations, their officers and agents, the WTPA extends the criminal penalties to partnerships, limited liability corporations, their officers and agents.

## Other Provisions

The WTPA permits the Labor Commissioner to pursue legal action (including administrative actions) against any employer for failure to pay wages or pay inequities based on gender. It also gives the Labor Commissioner the authority to require an accounting of assets (including bank accounts, real and personal property, accounts receivable, etc.) by an employer that fails to satisfy an order to comply issued against it. Failure to provide the accounting may subject the employer to a civil penalty of up to \$10,000.

The WTPA also creates a posting requirement for employers that violate New York's wage payment laws. In such cases, the Labor Commissioner may require an employer to post a notice of violation for a period of up to one year in an area visible to employees. If the violation was willful, the employer can be required to post a notice visible to the general public for a period of up to 90 days.

## Effective Date

The Wage Theft Prevention Act takes effect April 9, 2011.

## Conclusion

The new law significantly increases current notice, recordkeeping, and payroll practice requirements for New York employers, and provides enhanced penalties for noncompliance and nonpayment of wages. Employers should begin taking steps to ensure that they will be prepared to satisfy the new notice requirements and their wage statements will comply with the amended Labor Law when it goes into effect in April 2011. Because mistaken classification of a worker's exempt or independent contractor status will put employers at increased risk, employers should consider reviewing current worker classifications as well.

Buck's consultants are available to discuss the impact of the new law on your pay and recordkeeping practices and overall record retention strategy, and to assist in your ongoing compliance efforts.

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*This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*