

Labor and Employment Law Bulletin

New “Wage Theft” Law Imposes Greater Wage-Hour Responsibilities on NY Employers and Increases Penalties for Violations

The New York Wage Theft Prevention Act (WTPA), effective April 12, 2011, responds to a popular belief that many New York employers shortchange (or completely fail to pay) their employees’ overtime wages.¹ While not changing the underlying requirements for paying overtime wages, the WTPA imposes very stringent new notice requirements on employers, and enhances penalties for both willful and non-willful violations of the wage-hour laws.

Notice Requirements

For employers, the most newsworthy aspect of the WTPA is the legislation’s notice provisions. The Labor Law currently requires employers to notify newly hired employees of their regular rate of pay, payday and rate of overtime pay, and the Labor Department has added a controversial requirement that employers inform employees of the type of exemption claimed if the employee is deemed exempt from overtime requirements. The WTPA imposes additional notice requirements.

■ **Newly Hired Employees**

The WTPA requires employers to notify all newly hired employees of the following: (1) the basis for the wage payment (i.e., hourly, daily, weekly, by commission, per piece, etc.) and (2) whether the employer intends to claim any wage deductions (e.g., meal or lodging allowances). This notification *must be provided in both English and the language identified by the employee as his or her primary*

language. In addition, all employers must obtain a *signed acknowledgment from each newly hired employee* on forms that must be maintained for a minimum of six years. If an employer thereafter intends to amend any of the terms included in the initial notification, it must notify the employee in writing seven calendar days prior to the change.

■ **Current Employees**

The WTPA also requires employers to provide the *same notification to all current employees* (rate of pay, basis for the wage, etc.) by February 1, 2012, and by February 1 in every subsequent year thereafter, again in both English and the employee’s “primary language,” with annual acknowledgment forms maintained for a minimum of six years.²

■ **Penalties for Failure to Notify**

If an employer fails to provide a newly hired employee with the appropriate notification within ten days of the start of employment, the employee may recover damages in the amount of \$50 per week for each week the violation continued (up to \$2,500) plus costs and reasonable attorneys’ fees. If the employer does not provide the wage notification to a current employee, the employee may recover \$100 per week (up to \$2,500) plus costs and reasonable attorneys’ fees.

Pay Period Requirements

The WTPA also codifies several Department of Labor pay period regulations, including the requirement that employers include the following information with every wage payment: the employee’s regular rate of pay, the basis for that rate, the amount of gross and net wages paid and any applicable deductions. Employers must

¹ In the last year alone, the State’s Department of Labor recovered \$28.8 million in unpaid wages.

² The Commissioner of Labor is required to prepare template notification forms that comply with the law’s requirements.

maintain these records for a period of no less than six years.

Increased Penalties

Employers who violate the state's wage and hour laws—not only the new provisions of the WTPA—will be subject to enhanced civil and criminal penalties. Both willful and non-willful violations may subject a corporate entity as well as individual officers and managers to liability.

■ **Civil Remedies**

The WTPA amends the Labor Law by raising the liquidated damages recoverable by employees who win a civil or administrative action for unpaid overtime from the current 25 percent of the lost wages to 100 percent. This provision makes the state law equal in severity to federal overtime law for liquidated damages. Successful employees may also be awarded prejudgment interest, attorneys' fees, and 15 percent interest if the employer fails to pay the court-awarded damages within 90 days of judgment.

■ **Criminal Penalties**

Employers who fail to pay minimum and overtime wages may be convicted of a misdemeanor, fined up to \$20,000 and face up to one year in prison, and employers who violate the law multiple times within a six-year period may be guilty of a felony. Employers who fail to maintain accurate records may be fined up to \$5,000 and imprisoned for one year. The fine can increase to \$20,000, however, for employers who commit a second violation within a six-year period. Finally, employers found guilty of violating the wage payment laws may be required to post a notice of the violation in a visible workplace location for up to one year. If the violation was willful, however, the employer may also be required to post the notice in a location visible to the public for up to 90 days.

Antiretaliation Provisions

The WTPA also provides greater protection to employees who complain about employer wage and hour violations or whom the employer believes to have made such complaints. Where the employee demonstrates that an employer engaged in retaliatory conduct, the Commissioner of Labor

may award liquidated damages up to \$10,000, reinstatement, back pay, and/or front pay in lieu of reinstatement.

How Should Employers Respond to the WTPA?

The WTPA does not change the basic overtime pay requirements of New York's wage and hour laws, but it does impose significant new requirements on the state's employers, including enhanced damages and penalties for violations. Its very title, suggesting that failure to pay proper overtime pay is "theft," marks the severity of the legislature's attitude about wage-hour violations.

Ensuring compliance with the laws is therefore more important than ever. We strongly recommend that employers: (1) prepare to comply with the new employee notice requirements that go into effect in April, including updating—where necessary— notices and forms, wage payment practices, record-keeping practices and the accuracy of worker classifications, both as to employee status and as to exempt/nonexempt status; and (2) prepare to comply with the new requirement that all notifications be provided in both English and the language identified by the employee as his or her primary language.

Because the New York State Department of Labor is preparing the requisite template forms in a variety of languages, employers should consider including some form of the following provision in the English-language version of the initial notice: "If your primary language is not English, please contact us to obtain this form in the language that you consider to be your primary language. Any information provided relating to the language that you consider to be your primary language will only be used for purposes of compliance with New York Labor Law § 195." This language should protect the employer from the accusation that it made an impermissible inquiry regarding the employee's national origin.

Call **Alan M. Koral** (212-407-7750) or any other Vedder Price attorney in the New York Labor and Employment Group with questions. Vedder Price will be happy to assist you in any way possible to avoid wage-hour liability.

New York Labor and Employment Group Members

Alan M. Koral..... 212-407-7750	Jonathan A. Wexler 212-407-7732	Daniel C. Green..... 212-407-7735
Neal I. Korval..... 212-407-7780	Lyle S. Zuckerman..... 212-407-6964	Roy P. Salins 212-407-6965
Laura Sack 212-407-6960	Michael Goettig..... 212-407-7781	

Washington, D.C. Labor and Employment Group Members

Amy L. Bess..... 202-312-3361
Sadina Montani Boik 202-312-3363

Chicago Labor and Employment Group Members

Thomas G. Abram..... 312-609-7760	Thomas G. Hancuch..... 312-609-7824	Paul F. Russell 312-609-7740
Bruce R. Alper..... 312-609-7890	Benjamin A. Hartsock..... 312-609-7922	Richard H. Schnadig 312-609-7810
Paige O. Barnett..... 312-609-7676	J. Kevin Hennessy..... 312-609-7868	Robert F. Simon 312-609-7550
Mark I. Bogart..... 312-609-7878	Scot A. Hinshaw..... 312-609-7527	Patrick W. Spangler 312-609-7797
Lawrence J. Casazza..... 312-609-7770	Jonathan E. Hyun 312-609-7791	Kenneth F. Sparks 312-609-7877
Katherine A. Christy 312-609-7588	John J. Jacobsen, Jr. 312-609-7680	James A. Spizzo 312-609-7705
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Thomas P. Desmond 312-609-7647	Christopher L. Nybo 312-609-7729	Jessica L. Winski..... 312-609-7678
Aaron R. Gelb..... 312-609-7844	Margo Wolf O'Donnell 312-609-7609	Charles B. Wolf 312-609-7888
Elizabeth N. Hall..... 312-609-7795	Michelle T. Olson 312-609-7643	
Steven L. Hamann 312-609-7579	James S. Petrie..... 312-609-7660	

VEDDER PRICE[®]

1633 BROADWAY, 47TH FLOOR
NEW YORK, NEW YORK 10019
212-407-7700 FAX: 212-407-7799

222 NORTH LASALLE STREET
CHICAGO, ILLINOIS 60601
312-609-7500 FAX: 312-609-5005

875 15TH STREET NW, SUITE 725
WASHINGTON, D.C. 20005
202-312-3320 FAX: 202-312-3322

www.vedderprice.com

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Questions or comments concerning the LABOR AND EMPLOYMENT LAW BULLETIN or its contents may be directed to the firm's Labor Practice Leader, Thomas M. Wilde (312-609-7821); the Managing Shareholder of the firm's New York office, Neal I. Korval (212-407-7780); or, in Washington, D.C., Amy L. Bess (202-312-3361).