CLIENT ALERT: New York Wage Theft Prevention Act Takes Effect April 9, 2011, and Imposes Significant New Obligations on Employers

The New York Wage Theft Prevention Act (the "Act"), which was signed by New York Governor David A. Paterson at the end of his term in December 2010, takes effect on Saturday, April 9, 2011. The Act makes several major changes to existing labor law in the state, including the imposition of enhanced notice and recordkeeping requirements. It also increases penalties for violations of New York's wage payment laws. The Act applies to employers of all sizes and affects both exempt and non-exempt employees.

Enhanced Notice Requirements

The existing version of the New York Labor Law requires employers to provide all newly hired employees with written notice of their rate of pay and regular pay date. For employees not exempt from overtime, it also requires the employer to state the regular and overtime hourly rates. Under the Act, notice to newly hired employees must include all of that information plus the following information: (1) the basis for an employee's rate of pay (e.g., hourly, by shift, daily, weekly, salary, piece rate, commission, or other); (2) allowances, if any, claimed as part of the minimum wage, such as tip, meal or lodging allowances; (3) the employers name and any "doing business as" names used by the employer; (4) the physical address of the employer's main office and a mailing address if it is different; and (5) the telephone number of the employer.

Employers must receive a signed and dated acknowledgement from employees of receipt of this notice. These records must be maintained by employers for six years.

The Act also requires that the pay notice be provided in English and in the language identified by each employee as his or her primary language. The New York State Commissioner of Labor has developed notice templates in various languages. If no template is available for a language spoken by the

employee, the employer must only provide the notice in English. Employers should make sure to have the employee identify his/her primary language on the acknowledgement form itself and to affirm that notice was provided in the language identified.

Although the current version of the law only requires employers to provide pay notices to new employees at the time of hire, the Act now requires employers to provide this information to existing employees on an annual basis, on or before February 1st of each year. As with the new hire notices, acknowledgements of pay notices for existing employees must also be maintained for a period of six years.

Additionally, employers are required to notify employees in writing of any changes to any of the information contained in the pay notice at least seven calendar days prior to the change, unless the changes are contained in a detailed statement that accompanies every wage payment (such as a pay stub). The Act does not specify whether the employer must obtain an acknowledgement for such changes.

The Act imposes potentially severe penalties for employers who do not comply with the notice provision for new employees. If an employer does not provide a pay notice to a new employee within ten business days of the employee's hire, the Act permits both the employee and the Commissioner to bring an action against the employer. An employee may be able to recover $50 for each workweek that he/she did not receive a pay notice, to a maximum of $2500, plus costs and attorneys' fees. In a separate action brought by the Commissioner, the Commissioner will also be able to recover $50 per workweek per employee who did not receive a pay notice. There are no damages caps for the amount that the Commissioner can recover.

Enhanced Wage Statement Information Requirements

The Act also requires employers to provide more detailed information to employees in their pay stubs. By April 9, employers are required to provide a statement with every payment of wages explicitly listing the following details: (1) the name of the employer; (2) the address and telephone number of the employer; (3) the dates of work covered by the wage payment; (4) the pay rates and basis thereof (hourly, by shift, day, week, salary, piece rate, commission, or other); (5) gross wages; (6) deductions; (7) allowances, if any, claimed as part of the minimum wage; and (8) net wages. This is a significant change from existing law, which only requires employers to

provide statements identifying gross wages, deductions and net wages with each wage payment.

For non-exempt employees, pay stubs must also state the following information: (1) the regular hourly rate or rates of pay; (2) the overtime rate or rates of pay; (3) the number of regular hours worked; and (4) the number of overtime hours worked. For employees paid at a piece rate, the pay stub must include the applicable piece rate or rates of pay and the number of pieces completed at each piece rate. Any employee may request that the employer provide a written explanation of how it calculated the wage payment.

The Act requires employers to maintain payroll records for six years. The term "payroll records" includes all the information that must be included in a wage statement, as described above.

Employers who do not comply with the enhanced wage statement information requirements could face large penalties. Under the Act, both employees and the Commissioner can bring actions against employers who do not provide compliant pay stubs. An employee can recover $100 for each workweek that he/she did not receive a pay stub, up to $2,500, plus costs and attorneys' fees. The Commissioner can also recover through a separate action $100 per workweek per employee who did not receive a wage statement, without any cap on damages.

Anti-Retaliation

The Act expands the anti-retaliation provisions available under existing law. Specifically, the Act prohibits retaliation against any employee who has filed or is believed to have filed a complaint for violations of the Act. The Commissioner may order reinstatement, back pay and front pay for employees found to be aggrieved under the anti-retaliation provision. The employee may also recover up to $10,000 in liquidated damages.

Increased Penalties for Violations

In additional to the penalties described above, the Act also increases the Commissioner's enforcement powers. The Commissioner can remedy an issue directly by assessing damages or ordering reinstatement (where applicable) and by imposing an additional 15% damage on employers who default on a damage payment for more than 90 days. The Commissioner can also require an employer to post a notice of certain violations in a place visible to employees, or

post a notice of willful violations in a place visible to the public.

In addition to the monetary penalties described above, the Act permits the Commissioner to assess damages for violations equal to the underpayment of wages plus liquidated damages up to 100% of the wages due. Under existing law, the cap on liquidated damages is 25% of wages due. Employers may avoid the liquidated damages penalty by proving that they have a good faith basis for not complying with the law. Violations found to be willful and egregious, or subsequent violations, provide the Commissioner with the authority to penalize the employer with a damages payment of up to three times the amount of wages due to the employee.

The Act also expands criminal liability to officers and agents of partnerships and LLCs, who are not exposed to liability under the existing labor law. A first offense is considered a misdemeanor punishable by a monetary fine ranging $500 to $20,000 and/or up to one year in prison. These criminal penalties explicitly apply to violations of the payroll records retention requirements stated above.

Conclusion

New York employers should be taking the steps right now – prior to April 9, 2011 – to make sure that their offer letters and wage statements comply with the Act. Additionally, employers should consider drafting annual notice requirements for existing employees to roll out prior to February 1, 2012. New York employers should also take a close look at their records retention procedures to make sure they are in a position to safeguard the key information for a period of six years. Given the potentially severe penalties assessed for violations, employers should carefully consider the implications of the Act on their business.

Please note that this alert discusses some of the most important implications of the Act but does not address every change. Employers should speak to their MBJ attorney to discuss the specific provisions of the Act applicable to their business.

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