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**LAMB & BARNOSKY, LLP**

ATTORNEYS AT LAW

## MEMORANDUM

**TO: OUR PRIVATE SECTOR EMPLOYER CLIENTS**

**FROM: LAMB AND BARNOSKY, LLP**

**DATE: DECEMBER 30, 2011**

**RE: WAGE THEFT PREVENTION ACT**

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We are writing to advise you about the New York Wage Theft Prevention Act, legislation amending the New York Labor Law that became effective on April 9, 2011, and the guidance recently published by the Department of Labor regarding compliance with the Act. The Act's purpose is to address the failure of some private sector employers to pay statutorily-mandated minimum wages and overtime.

The Act applies to all private sector employers. Employees who work outside of the State of New York and Federal, state and local government employers are not covered by the Act. According to the Department of Labor, charter schools, private schools and not-for-profit corporations are covered by the Act because they are not public entities.

The following is a summary of the major changes to existing law.

### **Notice Requirements**

The Act requires employers to provide the following information to all new employees at the time of hire (before work is performed), **as well as** to all employees once per year on or before February 1:

- the employee's rate of pay;
- the employee's regular pay day;
- for employees eligible for overtime compensation, their overtime rate of pay;
- the basis of the rate(s) of pay (*e.g.*, by the hour, shift, day, week, salary, piece, commission; etc.);
- allowances, if any, claimed as part of the minimum wage, including tip, meal or lodging allowances, and the amount of those allowances;
- the name of the employer and any "doing business as" names used by the employer;

- the physical address of the employer's main office or principal place of business and, if different, the employer's mailing address; and
- the employer's telephone number.

**The first yearly notice must be provided to all employees between January 1 and February 1, 2012 and then again between January 1 and February 1 of each following year.** Notices provided at any other time will not satisfy the yearly notice requirement (except that seasonal workers who do not work in January must be provided the yearly notice upon their return to work). The Department of Labor has advised that workers may not waive the notice requirement and that, although the notice may be included in letters and/or employment agreements provided to new hires, the notice must be set forth on its own form.

Employers must provide this notice in writing in both English and in the employee's primary language (only if the Department of Labor has published a template in that language).<sup>1</sup> Employers must obtain a signed and dated written acknowledgement from the employee each time the notice is provided. The acknowledgement must include an affirmation by the employee stating that he or she accurately identified his or her primary language and that the notice was in that language or, if the employee's primary language is one for which a template notice was not created, that the employer provided an English-language notice. Employers must retain the signed and dated notices and acknowledgements for at least six years.

The Act requires employers to notify employees in writing of any change to the information included in the notice at least seven calendar days before the effective date of the change, unless the change is reflected on the employee's wage statement or pay stub. The Department of Labor has advised, however, that written notice is required before an employee's wage rate is reduced and that, for hospitality industry employers (the hotel and restaurant industries), written notice is required every time a wage rate is changed.

The Department of Labor has created guidelines and sample notice templates in English and in other languages for several common types of pay agreements. These documents are available at: <http://www.labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm>.

If an employer fails to provide these notices, it may be required to pay damages of \$50 for each work week that the violation occurs. For an action commenced by an employee, these damages are capped at \$2,500, plus costs and reasonable attorneys' fees. For an action commenced by the Commissioner of Labor on behalf of an employee, there is no cap on damages.

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<sup>1</sup> The Department of Labor sample notice templates (see below) provide a space for the employee to identify his or her primary language.

### **Wage Statements**

The Act requires employers to provide a wage statement (or pay stub) to each employee with each payment of wages listing the following information:

- gross wages;
- deductions;
- net wages;
- dates of work covered by the payment;
- name of the employee;
- name, address and phone number of the employer;
- rate(s) of pay and the basis thereof (*e.g.*, by the hour, shift, day, week, salary, piece, commission; etc.); and
- allowances, if any, claimed as part of the minimum wage.

For employees eligible for overtime compensation, the statements must also include the following:

- regular hourly rate(s) of pay;
- overtime rate(s) of pay;
- number of regular hours worked; and
- number of overtime hours worked.

For employees paid a piece rate, the statements must also include the following:

- applicable piece rate(s) of pay; and
- number of pieces completed at each piece rate.

Employers must retain these statements for at least six years (wage statements previously had to be maintained for only three years). Upon an employee's request, the employer must furnish a written explanation about how the employee's wages were computed.

The Department of Labor has created a sample wage statement, available at:  
[http://www.labor.ny.gov/workerprotection/laborstandards/images/sample\\_wage\\_statement.jpg](http://www.labor.ny.gov/workerprotection/laborstandards/images/sample_wage_statement.jpg).

If an employer fails to provide these statements, it may be required to pay damages of \$100 for each work week that the violation occurs. For an action commenced by an employee, these damages are capped at \$2,500, plus costs and reasonable attorneys' fees. For an action commenced by the Commissioner on behalf of an employee, there is no cap on damages. An employer can establish an affirmative defense by showing that it made complete and timely payment of all wages due to the employee who was not provided with a wage statement or that it reasonably believed in good faith that it was not required to provide a statement to the employee.

### **Prohibition of Retaliation**

Prior to the Act, the Labor Law prohibited employers from discharging, penalizing or in any other manner discriminating or retaliating against employees who complain about their employer's violations of the Labor Law. Pursuant to the Act, employers and all other persons are now also prohibited from *threatening retaliation* (in addition to actually retaliating).

The Commissioner or a court of law may order the following relief for a violation of these anti-retaliation provisions:

- a civil penalty from \$1,000 to \$10,000;
- an injunction against the conduct of the employer or other person;
- liquidated damages of up to \$10,000;
- requiring the employer to rehire or reinstate the employee;
- lost compensation or front pay; and
- costs and reasonable attorneys' fees (if a court action is commenced).

A violation of the anti-retaliation provisions is a class B misdemeanor.

### **Damages and Criminal Penalties**

The Act increases the amount of liquidated damages an employee (or the Commissioner on behalf of the employee) can collect against an employer for a failure to pay wages. The Commissioner or a court of law may order the following relief for a failure to pay wages:

- the full amount of any underpayment;
- liquidated damages of up to 100% of the total wages due (prior to the Act, this was 25%), unless the employer proves a good faith basis for having believed that the underpayment was lawful; and
- costs, prejudgment interest and reasonable attorneys' fees (if a court action is commenced).

The Act also increases the criminal penalties for a failure to pay minimum wages or overtime to a fine of up to \$20,000 or one year in prison.

If you have any questions regarding the implementation of this legislation, please do not hesitate to contact us.

THIS MEMORANDUM IS MEANT TO ASSIST IN GENERAL UNDERSTANDING OF CURRENT LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. THOSE WITH PARTICULAR QUESTIONS SHOULD SEEK THE ADVICE OF COUNSEL.