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CivilLITIGATION

A new trap for the unwary New York employer

It is no secret that it's expensive to do business in New York. During the last decade, we have seen viable and successful businesses flee to other states to improve their bottom line and gain the economic advantages they cannot get here.

The new "Wage Theft Prevention Act," which goes into effect on April 9, is positive in philosophy in the sense that it adds additional protections for New York workers, but, at the same time, is likely to make it even more difficult for businesses to succeed here.

By amending various provisions of the labor law, the legislature has substantially increased the notice requirements regarding the payment of wages and significantly increased penalties for violations by employers. Every New York employer must familiarize itself with the new obligations and bring itself into compliance in the next 30 days, or risk being subject to the wrath of the plaintiffs' bar or the Department of Labor.

The act may become an administrative nightmare, especially for large employers, mainly because of the notice requirements. The act amends Section 195 of the Labor Law to mandate that employers provide all employees with written notice, both at the time of hiring and on or before Feb. 1 of each subsequent year, of additional detailed information regarding pay rates, exempt status, regular pay days, basis of pay, employer's address, allowances and any other information the Commissioner of Labor at any point deems "material and necessary."

Also, any changes to the information must be given to the employee at least seven days in advance of the change, unless the changes are reflected in each employee's wage statement. As if that were not enough, the notice must be signed and acknowledged by the employee each and every time it is received. For large employers, this will be an especially substantial burden.

For employers who employ a diverse workforce, there is an additional burden. Each notice must be provided in English, and if the particular employee's primary language is not English, then in the employee's primary language as identified by the employee.

The legislature recognized the significance of this burden as it has mandated in the act that the Commissioner of Labor prepare template notices for use in multiple languages. With less than a month until the effective date of the act, it is yet to be seen

whether the commissioner will prepare and provide these templates in a timely manner.

In addition to the notice and language requirements of the act, it further amends Section 195 of the Labor Law to provide specific information in every wage payment including, but not limited to, the dates of work covered; employer's address and telephone number; the rate of pay and the manner in which it is paid; allowances against minimum wage; gross wages; net wages; and specific rate information for non-exempt employees including the number of regular and overtime hours worked. All these relevant records must be maintained by the employer for six years.

Because of the significant increase in the notice and wage statement requirements, it is likely that technical violations by employers will occur, especially for employers without comprehensive human resource departments, where notices may fall through the cracks or employers may fail to obtain signed acknowledgments from each and every employee.

So what happens if an employer is found in violation of these new requirements? The act significantly increases the penalties, both civil and potentially criminal, for violations. Yes, you read that properly.

First, if an employer fails to provide the required notice within 10 days of the date of hire of an employee, every employee who did not receive the notice can pursue penalties and damages of \$50 per week for each work week the violation occurred, up to a total of \$2,500, plus costs, attorneys' fees, and injunctive relief.

If the commissioner, rather than the employee, brings the action, there is no cap on the damages that may be awarded.

While it has yet to be seen how this will shake out, one potential problem is that savvy employees who are aware of an employer's failure to give the required notice, or failure to provide the required information in wage statements, have an incentive to sit back, not report the violation, and allow the damages to grow with each passing week. Employers must thus be diligent with their recordkeeping habits.

Additional wage statement violations also now appear to subject the employer to increased penalties including: (1) the total amount of underpayment of any wages; (2) liquidated damages of

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100 percent of the amount of the underpayment (increased from 25 percent under the current labor law); (3) attorneys' fees; and (4) pre-judgment interest. Even further, the commissioner can add damages of up to 15 percent of any judgment if the judgment remains unpaid after 90 days.

Employers must now be cognizant of the new anti-retaliation provisions. First, an employer that retaliates against an employee who made complaints regarding the conduct of the employer when the employee had a reasonable and good faith basis to believe a violation occurred, may be subject to liquidated damages of up to \$10,000, reinstatement with back pay, and/or front pay in lieu of reinstatement. Any type of retaliation in this regard may also be a misdemeanor.

Employers who ignore these anti-retaliation provisions and engage in repeated violations or willful and/or egregious conduct, can also be subject to treble damages (double the amount of wages, benefits or supplements due plus liquidated damages of 100 percent).

Significantly, the act requires that employers found in violation of any of these wage payment laws post a notice of the violation in the workplace, for all employees to see, and if the violation is deemed willful, it must be posted in an area visible to the general public for 90 days.

The detrimental affect of the posting of these notices could be

widespread and crippling, not only to the employer's workforce, but to its business prospects and ultimately the bottom line. In some cases, such drastic consequences will be appropriate, but the risk of inappropriate results is significant.

Finally, depending on the type of violation and whether it is for failure to pay minimum wage or overtime compensation, or failure to maintain the proper records, violations by the employer can result in criminal penalties, including fines between \$500 and \$20,000, or imprisonment of up to one year. Subsequent violations can increase the penalty to a felony and additional jail time.

The significance of these penalties cannot be understated. It is impossible to tell whether imprisonment will ever be sought or proposed for these types of violations but it will be interesting to monitor the enforcement of the act, and the case law that is sure to develop.

Since similar provisions in other states have given rise to substantial litigation, including class-action lawsuits seeking damages in the millions of dollars, New York employers of all shapes and sizes would be wise to examine their recordkeeping, notice and wage statement practices now, before it's too late.

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