SIMPSON THACHER MEMORANDUM

Employers Must Comply With New Wage Theft Prevention Act

January 20, 2011

With the new year comes a new wage law that imposes additional obligations – and, potentially, penalties – upon employers. The Wage Theft Prevention Act, which will take effect on **April 12, 2011**, is another step in the march towards greater enforcement of wage/hour and employee classification laws. The Act requires employers to comply with more burdensome and expansive notification requirements regarding wage payments, increases the penalties for wage payment violations and expands the Department of Labor's enforcement powers. The new law applies to all employers in New York that employ even a single employee regardless of size, including business entities, not-for-profit enterprises and domestic households. Below is a summary of the Act's main provisions.

EXPANDED NOTICE REQUIREMENTS: UPON HIRE *AND* ANNUALLY THEREAFTER

Last year, New York began requiring employers to give newly-hired employees written notification of their rate of pay, overtime rate and pay day. The new Act goes further, amending Section 195 of the Labor Law to require employers to provide additional information to new hires, and also to reissue the notice annually to all employees. When the Act takes effect in April 2011, employers will be required to provide the following information to new hires: regular rate of pay; overtime rate of pay (if applicable); basis of pay (by salary, hour, day, week, shift, commission, piece, etc.); regular pay date; any allowances claimed as part of the minimum wage (such as meals, lodging, tips, etc.); the employer's name, addresses and telephone number; and such other information "as the commissioner deems material and necessary" in regulations yet to be issued. Employers must also provide this information to all ongoing employees on or before February 1, 2012 and then by February 1st of every following year. Any changes to the information must be communicated to employees seven days in advance, unless the changes are already reflected in the wage statements discussed below.

Moreover, employers must provide this information in both English and the employee's primary language. The Labor Commissioner will promulgate templates, including dual-language templates, for the notification. If the Commissioner does not prepare a template in an employee's primary language, then an employer is deemed to be in compliance by issuing the notice in English. Employees must sign and acknowledge the notice each year, and employers must maintain these records for six years.

WAGE STATEMENTS

The Act also amends Section 195 to require that employers provide a more detailed wage statement with each paycheck, including pay rate, basis of pay, gross and net wages, allowances claimed as part of minimum wage, dates of work covered by the payment and employer's

name, address and telephone number. For non-exempt employees, the statement must also include the employee's regular hourly rate, overtime rate, number of regular hours worked and number of overtime hours worked. These records, too, must be maintained for six years.

EXPANDED LEGAL ACTIONS AND INCREASED PENALTIES AND DAMAGES

The Act authorizes the Labor Commissioner to bring "any legal action necessary" to collect on claims, including administrative actions. The six-year statute of limitations remains in place, but the Act provides that it shall be tolled from the date an employee files a complaint with the Labor Commissioner or the Commissioner begins an investigation, whichever is earlier, until the Commissioner issues a final order or otherwise concludes the investigation.

Either an employee or the Labor Commissioner may bring an action against an employer who fails to provide the newly-required wage information upon hire or each year thereafter. An employer may be liable for damages of $50 for each week of violation, plus costs and attorney's fees. If the recovery action is brought by an employee, damages will be capped at $2500, but there is no maximum if the action is brought by the Labor Commissioner.

Likewise, the Act permits an employee or the Labor Commissioner to bring an action against an employer who fails to provide the required statements with every wage payment. An employer may be liable for damages of $100 for each week of violation, plus costs and attorney's fees. A $2500 damages cap applies to actions initiated by employees. In both cases, an employer can assert as an affirmative defense that it timely paid all wages due or that it had a good faith belief that it was not required to provide the notice.

Significantly, the Act also amends the Labor Law to increase liquidated damages for failure to pay wages and to mandate that the Labor Commissioner *must* assess liquidated damages. Previously, a prevailing employee potentially could recover liquidated damages equal to 25% of a wage underpayment if the violation by the employer were willful (*i.e.*, there was no good faith reasonable basis for the failure to pay the wages found to be owed), and the Commissioner had the discretion, but not the obligation, to seek such damages. The Act increases the penalty to 100% of the wages due, unless the employer proves it had a good faith basis for believing it was in compliance, and requires the Commissioner to seek liquidated damages as well as the full underpayment and prejudgment interest. The Act also specifically provides that employees can recover all liquidated damages accrued during the six years prior to commencing a wage action.

In the case of employers who engage in repeated or egregious violations, a penalty may be assessed of double the total amount of wages owed. That is in addition to the liquidated damages of 100%, thus resulting in treble damages.

Liquidated damages (as well as other additional remedies) are also authorized in the event of retaliation against an employee who makes a good faith allegation of a wage payment violation. The Act amends Section 215 of the Labor Law to permit the Labor Commissioner to assess liquidated damages of up to $10,000 and to enjoin impermissible conduct and order reinstatement with back pay, or front pay instead of reinstatement. Notably, the liquidated damages, as well as a potential civil penalty of up to $10,000, are available against the employer or "any person" found to have engaged in impermissible retaliation. The Act also makes unlawful retaliation a Class B misdemeanor.

Increased criminal penalties apply to a failure to pay minimum wage and overtime and a failure to keep proper records, making the first offense a Class B misdemeanor (carrying a potential penalty of between $500 to $20,000 or one year in prison) and any subsequent offense within the following six years a felony. In addition, whereas previously the criminal penalties applied to corporations and their officers and agents, those provisions now apply to partnerships and limited liability corporations and their officers and agents as well.

Finally, the Act also contains posting requirements. The Act requires employers to post a notice of violation in the workplace. If a willful violation is found, then the employer must post the notice in a location visible to the public for a period of up to 90 days.

GOING FORWARD

In the current enforcement climate, employers should be vigilant about complying with wage laws. Armed with the new arsenal provided by the Act, the Department of Labor can be expected to increase enforcement actions, and such actions will proceed under the new mandate to assess liquidated damages and collect the full amount of any underpayment. Likewise, with the potential for large liquidated damages, employers can expect increased efforts by the plaintiffs' bar, a group that has been exceptionally active recently in bringing class claims against employers for alleged violations of federal wage/hour laws and for alleged violations of laws analogous to the Act in states other than New York.

Employers should review their payroll practices to analyze where changes will need to be made to comply with the Act's new requirements and should institute record-keeping procedures to comply with the Act. In addition, employers should carefully consider whether any independent contractor or exempt classifications are appropriate. Many employers already are aware that employee classifications have been the subject of increased scrutiny by state and federal agencies. The new Act threatens to up the ante by increasing potential criminal and civil liabilities if an employee is misclassified and has not been receiving the required notices or minimum wage and overtime payments.

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For further information regarding these issues, please contact J. Scott Dyer or Julie Levy of the Firm's Labor and Employment Group.

J. Scott Dyer
212-455-3845
jdyer@stblaw.com

Julie Levy
212-455-2569
jlevy@stblaw.com

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UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017-3954
+1-212-455-2000

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2550 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
1155 F Street, N.W.
Washington, D.C. 20004
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3119 China World Office 1
1 Jianguomenwai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo
Ark Mori Building
12-32, Akasaka 1-Chome
Minato-Ku, Tokyo 107-6037
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000