



STATE WAGE THEFT PREVENTION LAWS

I. General

New York and California, and at least 16 other states, have enacted laws requiring private employers to provide specific information to employees concerning the manner in which their wages will be calculated and paid (collectively, the “Wage Theft Prevention Laws”). The Wage Theft Prevention Laws apply to all private-sector employers, regardless of size, and require them to make certain written disclosures to newly hired employees. In addition, New York law requires annual updates, and California law requires written disclosure within 7 calendar days of changes in the information contained in the initial disclosures.

Form offer letters or employment agreements commonly used by employers do not contain these required disclosure items. Employers should update their form offer letters or employment agreement to comply with the Wage Theft Prevention laws.

This Client Memo summarizes the information that private-sector employers in New York and California must include in their offer letters or employment agreements.

II. New York Requirements

New York’s Wage Theft Prevention Act requires all private-sector employers to provide to every employee, regardless of exempt status, at the time of hire and between January 1 and February 1 of each year and within 7 days of a change if the change is not listed on the employee’s pay stub for the following pay period, a written notice of the basis for the employee’s wage. Such notice must include:

- The employee’s rate or rates of pay (including overtime rate of pay if non-exempt);
- The basis of the wage payment (*e.g.*, per hour, per shift, per week, piece rate, commission, or otherwise);
- The employer’s regular payday;

- Any allowances the employer intends to claim as a part of the minimum wage such as tip, meal and lodging allowances;
- The employer's name and any "doing business as" names used by the employer;
- The employer's telephone number and physical address of its main office or principal place of business and, if different, the employer's mailing address; and
- Any other information as the New York Labor Commissioner deems material and necessary.

These written notice requirements are not waivable under New York's Wage Theft Prevention Act (in other words, employers cannot require employees to waive these requirements). Additionally, the obligation to provide the annual written notice of wage rates applies regardless of whether any of the information from previous years has changed.

New York's Wage Theft Prevention Act requires employers to obtain a signed and dated acknowledgment of the notice from each employee and requires employers to retain copies of the notice and accompanying acknowledgment for a period of 6 years. The notice can be given electronically, but there needs to be a system where the employee can acknowledge the receipt of the notice and print out a copy of the notice. If the employee refuses to sign or acknowledge the notice, the employer should still give the notice to the employee and note the employee's refusal on its copy of the notice.

New York's Wage Theft Prevention Act does not require the use of any particular forms; however, the New York State Department of Labor (NYDOL) has issued various template notices.¹ Additionally, if an employee's *primary* language is not English, employers are required to provide the written notice of wage rates both in English and in the employee's primary language, *provided* that the NYDOL offers a translation of the form in that language. Currently, the NYDOL provides dual language translations in Chinese, Haitian Creole, Korean, Polish, Russian and Spanish.

Increased penalties for wage violations: Employers that do not comply with New York's Wage Theft Prevention Act's requirements are subject to enhanced fines and may in certain circumstances be subject to criminal prosecution. Under the new law, liquidated damages are increased from 25 to 100 percent of the wages due. For a failure to provide an employee with any required wage notice, an employer may be fined \$50 a week, up to \$2,500; for a failure to provide an employee with the proper wage statement or paystub, the employer may be fined \$100 a week, also up to \$2,500. Notably, the new law also creates a private right of action for wage violation cases: suits alleging that an employer failed to disclose the wage rate or provide wage statements may be brought either by the Commissioner of the Department of Labor, or by the complaining employee. The new law also introduces a penalty for failure to pay any

¹ The NYDOL template notices can be found at <http://www.labor.ny.gov/formsdocs/wp/ellsformsandpublications.shtm>.

judgment in a timely fashion — when an un-appealed judgment remains unpaid for 90 days, the amount of the judgment will automatically increase by 15 percent.

The new law does allow affirmative defenses based on an employer's complete and timely payment of wages or reasonable, good-faith belief that it was not required to provide a wage notice or wage statement. The new law authorizes potential criminal penalties against partnerships and limited liability corporations that fail to pay wages (under the previous law, those penalties may only be applied to corporations), and the criminal penalties for failure to pay the minimum wage and overtime compensation have been greatly enhanced. A first offense may result in fine of up to \$20,000 and up to a year in prison; a second offense may include the same penalties and be regarded as a felony conviction. Failure to maintain payroll records for minimum wage workers carries a \$5,000 fine or year's imprisonment for a first offense; a second conviction carries a \$20,000 fine, imprisonment for up to one year and one day, and a felony conviction. Importantly in this regard, *each* day's failure to maintain the proper records counts as a separate offense.

Furthermore, the new law strengthens the pre-existing prohibition against retaliating against employees who file complaints regarding wage notice or payment violations. First, the law extends protection to complaints made reasonably and in good faith, rather than solely to those which result in actual violations being found. Second, the law protects employees who have not in fact reported any violations, but who the employer believes to have done so. The law also grants the Commissioner of Labor court-like authority to penalize retaliation violations. In addition to assessing fines against an employer, if s/he concludes is guilty of retaliation, the Commissioner may enjoin conduct by the employer and may assess liquidated damages of up to \$10,000. The law also grants the Commissioner authority to take any legal action necessary, including administrative action, against employers who fail to pay wages. The Commissioner also has authority to increase assessed damages by 15 percent if an employer does not fulfill an order to comply within 90 days of the order becoming final.

All New York private-sector employers that routinely use form offer letters and employment agreements should update such forms to include the information required by New York's Wage Theft Prevention Act, or include as part of their new hire paperwork the form notices developed by the NYDOL for compliance with this law. These forms are available in Chinese, Haitian Creole, Korean, Polish, Russian and Spanish, in order to meet the legal requirement that notice be given in each employee's primary language. New York private-sector employers that choose to instead include the information required by New York's Wage Theft Prevention Act in their form offer letters and employment agreements will need to offer translations to prospective or existing employees whose *primary* language is Chinese, Haitian Creole, Korean, Polish, Russian or Spanish. In addition, employers that use written offers of employment that do not require execution by the prospective employee should amend such forms to include a signature line for the newly hired employee.

III. California Requirements

The California Wage Theft Prevention Act of 2011 is significantly different from the New York Wage Theft Prevention Act in that it requires notices be given only to non-exempt employees. Private-sector employers are required to notify new, non-exempt employees of:

- The rate or rates of pay (*e.g.*, per hour, per shift, per day, per week, salary, piece, commission, or otherwise);
- The basis of wage (including overtime rate of pay if non-exempt);
- Any allowances taken as part of the minimum wage (*e.g.*, tips, meal and/or lodging deductions);
- The employers' regular payday;
- 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, a mailing address;
- The telephone number of the employer;
- The name, address, and telephone number of the employer's workers' compensation insurance carrier; and
- Any other information the California Labor Commissioner deems material and necessary.

The law also requires that employers notify existing non-exempt employees, in writing, of any change to the information set forth in the above-described new-hire notice within 7 calendar days after the time of the change, unless the changes are reflected on a wage statement or other written document otherwise issued to the affected employees within 7 calendar days of the change. The California Labor Commissioner is empowered to add to the required disclosures.

Notices must be given in the language that the employer normally uses to communicate employment-related information to the employee. The California Department of Industrial Relations (CDIR) has developed forms containing the required notices in English, Spanish, Chinese, Korean, Vietnamese and Tagalog.² To ensure compliance with the law, and in light of the California Labor Commissioner's ability to add to the required disclosures, we recommend employers use the DIR's form, rather than attempt to comply with this new law by amending their form offer letters and employment agreements. Copies of signed notices should be retained in employee personnel files.

IV. Other States

In addition to New York and California, Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Louisiana, Maryland, New Hampshire, North Carolina, Pennsylvania, South Carolina, Utah, and West Virginia have enacted similar legislation. Employers in those jurisdictions should

² The CDIR notice forms can be found at http://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html.

review their forms of offer letter and employment agreement to ensure compliance with all applicable requirements.

To discuss these matters further, please contact our attorneys.

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