

**Milbank**

January 16, 2012

# Trusts & Estates Department Alert

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## NEW WAGE NOTICE REQUIREMENTS UNDER NEW YORK LAW

This alert describes important new wage notice requirements applicable to employers in New York. On April 9, 2011, the **New York Wage Theft Prevention Act** (“**WTPA**” or the “**Act**”) went into effect. The Act, which has little to do with the actual theft of wages, amended existing notice of wage rate requirements and expanded the civil and criminal remedies that are available when employers fail to comply with these provisions.

All private sector employers in New York are covered. If you have employees who work in other states, they are not covered.

Key provisions of the WTPA and important related areas of concern for New York employers are highlighted below. As of April 9, 2011, employers were required to give all new hires in New York a notice that is described below. These notices must also be given every January to **ALL** employees commencing in January 2012.

### Notice Requirements

1. Notices must be given to both exempt and non-exempt employees and must contain the following information:
  - The employee’s rate(s) of pay;
  - The basis of the employee’s rate(s) of pay (e.g. by the hour, shift, day, week, salary, piece, commission, or other);
  - Whether the employer intends to claim allowances as part of the minimum wage, including tip, meal, or lodging allowances, and the amount of any allowances;
  - The employee’s regular pay day;
  - The name of the employer and any “doing business as” names used by the employer;

Please feel free to discuss any aspect of this alert with your regular Milbank contacts or with any of the members of our Trusts and Estates Group, whose names and contact information are provided herein.

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- The physical address of the employer's main office or principal place of business, and a mailing address if different; and
  - The employer's telephone number.
2. Employers can develop their own Notices as long as they contain all the information required by the Act. Notices may be included with letters and/or employment agreements provided to new hires, **BUT** the information must be on its own form. We generally advise attaching the Notice form to the employee's offer letter or employment agreement.

**Milbank has created forms that can be completed electronically. Please feel free to contact one of the individuals listed on the last page to obtain the forms.**

3. In a significant change from the previous notice requirements, employers are not required to state the basis for an exempt employee's exemption from overtime requirements (e.g. executive/managerial, professional, administrative, etc.). Instead, this information is "**optional**". Nonetheless, we encourage all of our clients to speak to us about the exempt/non-exempt classification process.
4. Notices need to be given in a worker's primary language if the New York Department of Labor ("NY-DOL") provides notice templates in that language. Employers must obtain an affirmation that each employee has accurately identified their primary language.

The NY-DOL currently provides notice templates in Chinese, Haitian-Creole, Korean, Polish, Russian and Spanish. If the worker's primary language is not included in the templates provided by the NY-DOL, the Notice need only be provided in English.

5. Notices are now required at the following times:
- At the time of hire; and
  - **Yearly between January 1 and February 1**  
**The first yearly Notices must be distributed in 2012. Distribution at any other time will not comply with the law.**
6. Notice is not required where there is an increase in a wage rate and the new rate is shown on the next Wage Statement. But employees must be notified in writing seven days before any reduction in a wage rate is implemented. Employers in the hospitality industry, however, need to give a new Notice every time a wage rate changes.
7. Notices can be provided electronically as long as there is a system where the employee can acknowledge the receipt of the Notice and print out a copy.
8. Notices must be retained for six years and be available to the NY-DOL upon request.
9. NY Labor Law already requires commissioned salespersons to receive and sign for a copy of their commission agreement. The NY-DOL advises that this agreement should be attached to the Notice, and a copy of each document kept by the employer.
10. The Act imposes the following penalties for non-compliance with the Notice requirements:
- Failure to provide a Notice within 10 business days of any employee's initial date of employment can result in a penalty of \$50.00 per week per employee.

- The maximum amount an individual worker can recover if he/she commences an action against his/her employer is \$2,500.00. However, an action brought by the Labor Commissioner is not subject to this cap.
- Costs, attorneys' fees and injunctive relief are also available.

## Wage Statement Requirements

1. In addition to the Notices, Wage Statements must be given with each payment of wages that include: wage rates, hours worked, gross wages, allowances and deductions taken, net wages paid and the name, address and phone number of the employer, as well as the beginning and ending date for the period covered by that payment. Overtime rates and hours must also be included if applicable. Employees may also request a written explanation of how wages are computed.

**Employers need to work with their payroll service to ensure this information is provided.** This information may be provided electronically, but employees must be able to access their Wage Statements on a computer provided by the employer and be able to print a copy for their records.

2. The Act imposes the following penalties for non-compliance with the Wage Statement requirements:
  - \$100.00 per week per employee if a proper Wage Statement is not given.
  - The maximum amount an individual worker can recover if he/she commences an action against his/her employer is \$2,500.00. However, an action brought by the Labor Commissioner is not subject to this cap.
  - Costs, attorneys' fees and injunctive relief are also available.

## Retaliation

1. Retaliation is not permitted against an employee who complains or testifies about conduct the employee reasonably and in good faith believes violates the Labor Law, even if the employee is mistaken. Retaliation is any action that negatively affects an employee, such as discharge, suspension, transfer to another shift, reduction in wages or hours, that is done because the employee engaged in a protected activity. Even threatening an employee can be considered retaliation.
2. Employers and their agents can be fined up to \$10,000 and assessed another \$10,000 in liquidated damages for engaging in retaliation. They can also be directed to pay the employee's attorneys' fees. The NY-DOL may also seek reinstatement of the worker and/or compensation for lost wages. A violator of this provision may also be found guilty of a Class B misdemeanor.

## Expanded Corporate Liability and Other Increased Penalties

1. Criminal and monetary penalties may be assessed against any employer that does not properly pay the wages of its employees in accordance with the New York Labor Law, including minimum wage and overtime requirements. In addition, the officers and agents of any corporation, partnership or limited liability company who knowingly permit a violation of the New York Labor Law by failing to properly pay employee wages may be individually liable. Each underpayment to an employee in any week constitutes a separate offense.
  - A first time violation is a misdemeanor with up to a \$20,000 fine and up to a year in prison for each offense.

- Repeat offenses within six years can incur additional fines up to \$20,000 and a felony conviction.

While *corporate* employers, officers and their agents previously faced criminal liability for knowing violations, the Act extends this liability to officers and agents of partnerships and limited liability companies as well.

2. When an employee proves that he/she has been underpaid in violation of the New York Labor Law, the Labor Commissioner and the courts have limited discretion in determining what damages to award the employee:
  - At a minimum, employers will be liable for the full amount of the underpayment, plus costs, reasonable attorneys' fees and prejudgment interest. Employees are further entitled to up to double the amount of underpayment, unless the employer establishes a good faith basis to believe that its underpayment was in compliance with the law.
  - Repeated or "willful or egregious" violations can result in an additional fine of double amount of wages, benefits or wage supplements found to be due.
3. An employer that violates the wage payment or minimum wage provisions of the New York Labor Law may be required to post documentation that explains the violations in areas visible to employees for up to one year and, where the violation is willful, for up to 90 days in an area visible to the general public.

This alert was prepared by Milbank's employment law practice. For further information, please contact either Jane L. Hanson (212-530-5512) or Tom Santoro (212-530-5181).

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*Attorneys in Milbank's employment law practice work closely with clients of the Trusts & Estates group on a wide range of issues relating to employment law, including employment counseling, litigation in federal and state courts and before governmental agencies, and mediation and arbitration. Clients include financial institutions, hedge funds and high net worth individuals.*