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## NEW YORK AMENDS THE WAGE THEFT PREVENTION ACT

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Significant changes to the landmark 2010 Wage Theft Prevention Act (WTPA) are coming in the new year. The WTPA originally set forth additional administrative burdens and penalties for employers to contend with under the New York Labor Law (NYLL), including annual rate of pay forms, changes to pay checks and additional financial penalties. Since the WTPA's enactment, the employer-community has sought amendments to it that would ease some of the associated administrative burdens. The employer-community's efforts have come to fruition, although not without other costs.

In June 2014, the New York legislature approved legislation (S.5885-B/A.8106-C) that amends the WTPA by eliminating the annual pay notice requirements and increasing penalties for violations of the WTPA, among other things. The New York legislature waited the remainder of the year to present the bill to Gov. Cuomo for his review and signature, finally doing so on December 17, 2014. Once signed into law, the legislation will become effective 60 days thereafter. Unfortunately, this will not help employers who shortly will be required to provide annual WTPA notices by January 31, 2015, however, this amendment will eliminate future annual WTPA notices. There is additional legislation currently being contemplated that would make the WTPA amendments effective immediately, as well as modify the DOL's revised enforcement mandate. However, as of the date of this writing, those proposals have not come to fruition. Below is a summary of the key provisions of the bill presented to the Governor on December 17, if signed into law, which is expected to occur within the next few days:

### Annual Notice of Pay Requirement Repealed

One of the key provisions of the new legislation is the elimination (starting in 2016) of the requirement that every employer issue a notice of pay form each January to all of its New York employees. Employers must, however, continue to issue required pay notices to all new hires as well as to employees affected by any rate of pay change. Furthermore, employers must continue to provide detailed wage statements with each employee paycheck as has been required since the enactment of the WTPA.

### Penalties for Failure To Provide Wage Notices Increased

While the repeal of the WTPA's annual pay notice provision is welcomed, as it eliminates a burdensome administrative requirement, the new legislation also increases potential penalties for employers who violate the remaining WTPA provisions. Failure to provide required pay notices now incurs a \$50 per day penalty (previously \$50 per week), up to a maximum of \$5,000 per employee (previously \$2,500), while failure to provide proper wage statements will cause a \$250 per day penalty (previously \$100 per week), up to a maximum of \$5,000 per employee (previously \$2,500).

### Successor Organizations Liable for Wage and Hour Violations

The new law would also amend the NYLL to impose liability on "successor" businesses – those companies that either purchase entities that previously committed labor law violations or otherwise take over such entities' operations. Under the new law, where any such successor entity's operations involve substantially the same work and

working conditions, under substantially the same supervisors and processes, and include largely the same products and customers, liability attaches to the successor organization for any wage and hour violations caused by the predecessor entity.

#### **New York Department of Labor Civil Penalties Raised and Notification of Violations Required for Contractors**

The new law also doubles the civil penalties that may be issued by the Department of Labor (DOL) for violations of the NYLL. Currently, the DOL can assess civil penalties assessed up to \$10,000. The new law increases this amount to \$20,000. In addition, construction industry contractors and subcontractors will also be required to notify their employees of any wage and hour violations issued by the New York DOL or a court. This notification must be attached to employee paychecks at all worksites and must be in a form to be dictated by the New York DOL.

#### **DOL Enforcement Requirements and WTPA Enforcement Account**

The modified law would also require that the New York DOL, when investigating an alleged wage an hour violation, review the entire six-year statute of limitations period on the claim asserted. Any additional administrative and enforcement costs created by this change will be offset by a new special revenue account called the "Wage Theft Prevention Enforcement Account," which is to be funded through the financial penalties collected from employers.

#### **Top Ten Limited Liability Company Members Liable Personally for Wage and Hour Violations**

The legislation would also close a loophole for New York Limited Liability Company (LLC) members. Under the New York Business Corporation Law, the top ten shareholders (in percentage of ownership) of a New York corporation can be jointly and severally liable for wage and hour liability owed by the corporation. There is no corresponding provision for LLCs. The legislation closes this loophole. Plaintiffs would, however, be required to provide

notice to individual members within a specific timeframe under the law prior to seeking personal liability. Moreover, each LLC member found liable under the law may seek contribution from other LLC members for their proportionate share.

These proposed changes to the NYLL are likely to embolden plaintiffs' attorneys, increasing the stakes if, and when, litigation (or a New York DOL investigation) ensues under the revised statute. Employers should expect to continue to see lawsuits for highly-technical violations of the NYLL and should train all managers and other employees who handle their payroll practices about the importance of keeping accurate payroll records in accordance with the law.

For now, employers must send out the WTPA notices by December 31, 2014, to all employees affected by the December 31 minimum wage increase. Further, as set forth above, the amendments will become effective 60 days after they are signed into law by the governor, which means that the amendments are not effective until late February 2015, at the earliest. While we have been told that there is legislation pending that would make the amendments effective immediately after the governor signs the bill, thereby eliminating the 60-day waiting period, this additional piece of legislation has yet to be passed by the Legislature, much less sent to the governor for signature. Therefore, in order to avoid the draconian penalties under the WTPA, it would be prudent for employers to send out notice of pay forms to all employees in January, as it is too costly to do otherwise.

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