

April 4, 2011

Reminder and Update
The New York State Wage Theft Prevention Act

The New York State Wage Theft Prevention Act's April 9, 2011 effective date is rapidly approaching. As we explained in our January client alert, the new law requires employers to adhere to stringent requirements regarding wage and hour notification, employees' wage statements and retention of records. Accordingly, we wanted to remind our clients to take steps to comply with the Act and also highlight several requirements that were recently clarified by the Director of Strategic Enforcement of the New York State Department of Labor, Labor Standards Division.

1. The Act requires that new hires receive a Notice and Acknowledgment in English and their primary language as of April 9, 2011. However, employers have until February 1, 2012 to issue the Notice and Acknowledgment to current employees. All employees must begin receiving wage statements that comply with the Act's requirements by April 9, 2011.
2. The NYSDOL has not yet issued templates that comply with the Act's Notice and Acknowledgment requirements. The Director of Strategic Enforcement confirmed that the templates will likely be issued this week. However, according to the Director, if the templates are not issued prior to April 9, 2011, the Department will not take enforcement action with respect to the Notices until the templates are available. Initially, the templates will be issued in English, Spanish, Chinese, and Korean. The Director suggested that templates will subsequently be issued in additional languages as well. However, for now, if the NYSDOL does not issue a template in the primary language identified by the employee, the employer will be in compliance with the Act if the employee receives a Notice and Acknowledgement in English-only.
3. To comply with the "primary language" requirement, employers should acquire this information prior to distribution of the Notices. However, it is essential that this inquiry be handled carefully to avoid potential concerns

747 Third Avenue
New York, N. Y. 10017
Tel: 212-758-7600
www.cfk-law.com

relating to national origin discrimination. We recommend that you discuss this process with counsel before proceeding.

4. The law is unclear regarding whether Notices issued to exempt employees must explicitly include the basis for each employee's exemption. The Director of Strategic Enforcement has stated, however, that while the NYSDOL recommends that employers include the basis for the exemption on the form because it is "best practice", the NYSDOL will not require employers to do so.
5. According to the Act, each employee must annually receive a Notice & Acknowledgment form by February 1, regardless of the employer's fiscal calendar. The Act also provides that employees must receive notice of any subsequent wage change 7 days before the change is implemented, *unless* the change is reflected in the employee's wage statement. Notably, the Director of Strategic Enforcement suggested that employers should provide employees with 7 days advance notice, either verbal or written, *even if* the change is reflected in the employee's wage statement.
6. Employers will be in compliance with the Act if the Notice and Acknowledgment is distributed and retained in *electronic form only* if the process adheres to the following requirements:
 - i. The employer must ensure that the employee has access to a computer and the ability to access and view the form free of charge. If the process requires the employee to print out the form to sign it, the employer must ensure that the employee has access to a printer and the ability to print free of charge.
 - ii. The Notice must be in a format that the employee is able to view at the computer that he/she has access to.
 - iii. Affirmative steps are required of the employee to acknowledge receipt of the notice. The employer must ensure that the form of the acknowledgment is sufficient to guarantee that the employee has received and reviewed the notice, and that the employee is aware that his/her actions have legally significant consequences. For more specific examples of an acceptable electronic

acknowledgment, we recommend contacting counsel.

- iv. The Notice & Acknowledgment must be retained electronically for at least 6 years.
- 7. Time and payroll records must also be retained the requisite 6 year period and doing so electronically is acceptable. Time records must show the hours worked for each employee, including exempt employees. Notably, the Director of Strategic enforcement suggested that the NYSDOL would not make enforcing time record requirements for exempt employees a high priority.
- 8. Although the Act requires employers to issue the Notification & Acknowledgment to employees by February 1 of each year, the Act does not require employees to return the form within a specified time period. We recommend, however, that employers set a specific time frame within which employees return their Acknowledgment. (If that employer-selected deadline is not met, the employer retains the right to discipline.)

If you have any questions about the content of this advisory, please contact Toniaanne Florentino or Rebecca Fischer at (212) 758-7600.

This Advisory is intended for informational purposes only and should not be considered legal advice. If you have any questions about anything contained in this Advisory, please contact Collazo Florentino & Keil LLP. All rights reserved. Attorney Advertising