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September 2009

New York has amended its Labor Law to increase the remedies and existing penalties against employers for failing to comply with statutory wage obligations and protecting employees against retaliation.

By Raising Existing Penalty Levels, Extending Liability and Shifting Burdens of Proof, New York Increases the Stakes for Wage and Hour Violators

By Theo E.M. Gould

Responding to claims that increased wage recovery efforts have resulted in more cases of retaliation against employees, New York has amended its Labor Law to increase protections against employee retaliation. The amendment also increases the remedies and penalties against employers for failing to comply with their statutory wage obligations.

Increased Penalties for Retaliation

The Labor Code amendment, which takes effect November 24, 2009, increases the minimum and maximum penalties that can be assessed by the New York State Department of Labor (NYSDOL) against employers that have retaliated against employees for exercising their rights under the Labor Law, including merely participating in a NYSDOL investigation. Examples of potential retaliation cited by the legislature in support of the legislation included job loss, work hour reductions, less favorable shifts, loss of benefits and reassignment of duties.

Currently, the New York Payment of Wages Law provides for both civil and criminal liability.¹ In this amendment, the minimum civil penalty for retaliation has been increased from \$200 to \$1,000 and the maximum civil penalty from \$2,000 to \$10,000.² Additionally, the amendment provides the NYSDOL with additional remedial powers to address retaliatory behavior. The NYSDOL may now order an employer to pay lost compensation to employees who experience retaliation in the workplace.

Corporate Liability

Highlighting that the number of limited liability companies in New York has “quadrupled in the past ten years,” the New York Legislature sought to correct a perceived deficiency in holding individuals responsible for acts of retaliation. In its previous form, an “employer” and the agents and officers thereof were liable for acts of retaliation.³ The amendment corrects a perceived inequity in the law by extending the definition of those who may be held liable for retaliation to officers and agents of limited liability companies and partnerships.

Liquidated Damages

Finally, the amendment changes the burden of proof for assessing liquidated damages in the event of a wage violation. Currently, an employer is liable for an additional 25% penalty equal to the total amount of wages owed in instances where the employer's failure to pay wages was proven to have been "willful."⁴ The amendment eliminates the current willfulness standard and replaces it with language that purports to conform New York law with the federal Fair Labor Standards Act.⁵ The statute now provides that liquidated damages are due on unpaid wages unless the employer proves a good faith basis for believing its wage underpayments complied with the law. However, the amendment does not alter the 25% cap on liquidated damages.

The amendment also clarifies that the NYSDOL may use an administrative proceeding against employers to collect minimum wage underpayments and liquidated damages. This clarification affirms that employees have multiple avenues of redress for alleged wage and hour violations.

Future Implications for Employers

This amendment reflects New York State's stated and ongoing intention to increase its enforcement of its wage and hour laws. In July 2009, New York Labor Commissioner M. Patricia Smith announced that since January 1, 2009, the NYSDOL's Division of Labor Standards had recovered \$10,560,000 in wages owed to 10,395 workers statewide due to minimum wage and other labor law violations.⁶ The above amendment is estimated to generate another \$75,000 in revenues for New York State. According to the amendment's legislative comments, it is not "uncommon" for employees to experience retaliation when they seek to recover unpaid wages or cooperate with the NYSDOL. Strengthening available remedies and liable parties certainly indicates a continuation of the NYSDOL's desire to pursue wage and hour violators.

Employers are reminded to be proactive in adhering to federal and local wage and hour laws and regulations. Affirmative steps such as guided workforce audits can greatly help to ensure compliance and avoid liabilities and penalties. In addition to the NYSDOL's own enforcement activity, individual and class action wage and hour lawsuits are commenced daily with striking similarity. Most of these suits involve the alleged misclassification of employees as exempt from overtime. Others concern the alleged misclassification of workers as independent contractors rather than as employees, or violations of tip credit rules or other regulations. Plaintiff law firms that specialize in such claims often file multiple lawsuits in a single day. At a minimum, these lawsuits highlight the fact that all employers, large or small, regardless of industry, are susceptible to similar wage and hour violations, which can come with a significant cost, even for unintended or technical infractions. Experience has demonstrated that certain simple steps can be useful to avoid or defend against such claims.

Furthermore, care should be taken in ensuring that otherwise innocent changes to employee schedules, duties, benefits or the like are not misconstrued as retaliatory behavior. Where an employer is aware that an employee has made an internal complaint or had contact with the NYSDOL, it may be advisable to consult with counsel prior to instituting any such changes in order to avoid retaliation claims. With increased enforcement, jurisdiction, penalties and liability, employers cannot afford to wait until the NYSDOL informs them that a violation exists.

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¹ N.Y. Labor Law §§ 190 *et seq.*

² N.Y. Labor Law § 215.

³ *Id.*

⁴ N.Y. Labor Law § 198.

⁵ 29 U.S.C.A. § 260.

⁶ Press Release, *New York State Announces Year-to-Date Recovery of More Than \$10.5 Million in Wages Owed to Workers Statewide, Reminds Employers Minimum Wage Increases to \$7.25/Hour Today; Department of Labor Will Strictly Enforce Wage Laws, New York State Department of Labor, July 24, 2009.*