A Timely Analysis of Legal Developments

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New York Labor Law Section 195.1 requires employers to obtain signed acknowledgements of receipt from newly hired New York employees that those employees have received written notice of their pay rate and pay day and if applicable, their overtime rate, before commencing work.

Revised New York State Notice of Pay Rate Requirements Forces Employers to Consider Whether and Why New Hires May Be Overtime-Exempt

By Lisa M. Brauner, Bruce R. Millman and Jean L. Schmidt

In a previous Littler ASAP, employers were alerted that, effective October 26, 2009, New York Labor Law section 195.1 requires employers to obtain written acknowledgment from new hires that they have received written notice of their regular pay day, pay rate, and, if applicable, overtime rate, before commencing work.[1] The acknowledgment must conform to requirements established by the Commissioner of Labor. However, employers have struggled to comply because the New York State Department of Labor (DoL) has repeatedly changed course. This ASAP updates employers on the latest (though perhaps not the last) of these developments.

The DoL has now issued various Model Notices, Guidelines, and Instructions that introduce several significant changes to the section 195.1 notice requirements:

- Most importantly, employers must now identify the *specific overtime exemption(s)* justifying their claim that a new hire is exempt from overtime under federal and state overtime regulations. While this is perhaps the most significant change, the requirement is *not* contained in the statute. It is set forth in the DoL's newly issued Instructions.
- Employers claiming that an employee is outside the definition of *employee* in New York's Minimum Wage Act must identify the applicable minimum wage exemption on the notice form (a requirement also not found in the statute).
- The DoL's "Model Notices" solicit other information not mandated by the statute itself, some of which (such as an employer's tax identification number) appears to be unrelated to the forms' purpose and which an employee would have no need to know.
- It is now clear that employers may develop their own section 195.1 Notice and Acknowledgment forms as "no particular form is required." However, they may create their own forms only so long as the "required information" is given. Unfortunately, the DoL provides no guidance as to what information is "required"

and what information in its "Model Notices," if any, including some of the items identified in the bullet points above, might be optional.

- Employers no longer need to certify that the notice is given under penalty of perjury. This removes an impediment to providing the notice and acknowledgment electronically. However, the DoL's "Model Notices" still include a space for the name, title and signature of the person who prepared the notice. Again, this information is not required by the law itself, and it is unclear whether this is "required information."
- The DoL requires employers to retain the signed acknowledgment for six years. While this instruction is not contained in the law, it is consistent with DoL Wage Orders that require employers to keep payroll records for six years and with New York's statute of limitations on claims for unpaid wages and/or overtime.

These new requirements follow a tortured history. Many employers initially adopted their own form of section 195.1 notice, because the DoL had not published any requirements or guidance as late as two weeks after the statute's effective date. When the DoL finally did so in November 2009, it caused consternation and confusion by *mandating* that employers use a specific form that failed to account for the many different ways that employees may lawfully be paid in New York, and failed to address exempt employees.

After Littler Mendelson and others pointed out these and other problems to the DoL, the DoL advised that employers could use their own forms. But then it failed to issue its new "Model Notice" forms, Guidelines and Instructions for several more weeks. And still many unanswered questions remain, including:

1. Does the DoL have legal authority to impose notice requirements upon employers beyond those mandated by the statute itself, such as the requirement that employers specify the basis for an employee's overtime exemption;
2. Was the DoL required to undertake a formal rulemaking process under New York's Administrative Procedure Act before adopting requirements, regardless of whether those requirements fall within or extend beyond section 195.1's mandates;
3. Must an employer provide information sought in the DoL's "Model Notices" where that information is not reasonably necessary to the purposes of the section 195.1 notice, particularly if it is information not normally shared with employees or the public, such as the employer's tax identification number/FEIN; in other words, what information is "required" and what is not;
4. What penalties will the DoL seek or be able to obtain for an employer's failure to abide by section 195.1's mandates or the DoL's own requirements; will each individual failure constitute a separate incident or violation; will technical violations or unintentional errors be treated as seriously as intentional ones; and
5. Must an employer issue a new Notice and Acknowledgment to an employee if it subsequently discovers that a form contains erroneous information; will there be penalties for failing to correct an erroneous form; is there a "safe harbor" for employers who later make corrections to a notice upon discovering an error.

Observations and Recommendations to Employers

Some employers may find it burdensome that the new notice requirements force them to specify why a new hire is exempt from overtime; but this may actually prevent potential liability. The requirement comes at a time of increased scrutiny of employee misclassification by federal and state agencies and a tidal wave of class action and collective action litigation targeting the misclassification of employees as exempt from overtime, which have led to frequent multi-million dollar judgments and settlements.[2]

Determining *whether* an employee is exempt from overtime pay under state and federal regulations and identifying the *specific* overtime exemption(s) that applies is not a ministerial function that can be haphazardly delegated to or performed by a payroll clerk or human resources manager. Such a determination will likely require input from the hiring person or other appropriate manager, human resources, and legal counsel. Similarly, determining whether a new hire is excluded from the definition of "employee" under New York's Minimum Wage Act and what minimum wage exemption applies to that new hire also will likely require consultation with legal counsel.

Employers should keep in mind that the written notice and acknowledgment mandate of section 195.1 is separate and distinct from the requirement of New York Labor Law section 191.1(c) ("Section 191.1(c)") that commissioned salespersons have a written employment contract specifying the details of how commissions are earned and how the salesperson will be paid upon termination. The DoL's Guidelines indicate, however, that the written statement required by Section 191.1(c) will satisfy an employer's obligations under Section 195.1 if: (1) it meets all of Section 191.1(c)'s requirements; (2) it states whether the salesperson is eligible for overtime pay and if not, provides the specific applicable overtime exemption; (3) it notifies the eligible salesperson of the method of calculating his/her overtime rate of pay (including commissions as part of the regular rate); (4) it notifies the salesperson of his/her designated pay day or method for determining when the salesperson will be paid; (5) it is acknowledged in writing as received by the employee; and (6) it is retained by the employer for six years. The DoL's Section 195.1 Model Notices do not appear to include all of the information required by Section 191.1(c), making it unlikely that completion of one of the DoL's Model Notice forms alone would satisfy Section 191.1(c).

Employers who prefer to use the DoL's Model Notices should also consider adding certain statements, such as a reminder that employment is at-will, or that the employer retains the right to change an employee's pay rate or pay day so long as it complies with the law.

An employer who anticipates a substantial amount of travel for a newly hired non-exempt employee might also consider establishing a separate pay rate for that travel and including written notice of that pay rate (as well as the rate of pay for other work) in its section 195.1 notice. New York employees may be entitled to travel pay (perhaps at overtime rates) during certain times under state law or regulations, even if they would not be entitled to such pay under federal law.

Finally, employers based outside of New York State must take note of the DoL's new notice and acknowledgment requirements if they have New York employees.

Conclusion

Employers are now free to create their own notice and acknowledgment forms or use sample forms prepared by their legal counsel that meet section 195.1's statutory requirements and fit the contours of their specific compensation plans. But properly completing the section 195.1 notice and acknowledgment form requires careful consideration by employers, before a newly hired employee starts working.

Employers may wish to consult with legal counsel before creating their own notice/acknowledgment forms, and are encouraged to seek guidance in filling out the forms, especially those for exempt employees, or for other special situations, such as where an employee is paid at more than one rate, receives a fixed salary for fluctuating hours, or is entitled to overtime on commissions or bonuses.

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[1] Government agencies and school districts are exempt from the law.

[2] An employer who improperly fails to pay overtime to its New York employees may be liable for the unpaid amounts going back six years, liquidated damages equal to the unpaid amount for three years, as well as the employees' attorneys' fees. Collective and class action wage and hour claims have become the most frequently filed employment law cases in New York.