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Out of the Darkness, into the Shadows: The DLSE Further Modifies Its Interpretation of the California Wage Theft Prevention Act

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On April 12, 2012, the Division of Labor Standards Enforcement (DLSE) substantially revised its template notice form ("Notice") and once again amended its FAQs regarding an employer's obligations under California's Wage Theft Prevention Act (WTPA). Cal. Lab. Code § 2810.5; see www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html.¹ This ASAP explains the changes in the template notice and the FAQs.

Basically, the WTPA requires an employer to provide a Notice to an employee at the time of hire that identifies the employer, the employee's wage rates, the pay day schedule, and workers' compensation coverage information. The rather straightforward requirements of the statute became more complex when the DLSE issued its original template Notice and FAQs. Comments from the employer community have resulted in the FAQs being updated once previously, and have now resulted in a revised template Notice and a second revised set of FAQs.

The amount of information required in the revised template Notice form has been reduced substantially:

- The introductory paragraph and all but one of the concluding paragraphs regarding the scope and timing of the obligation to give the Notice which appeared in the original template Notice have been deleted.
- The description of the employer, now referred to as the "Hiring Employer," has been simplified.
- The prior need to list "any other business or entity [used] to hire employees or administer wages or benefits" has been simplified and reduced in scope by limiting the information to that needed to identify a "staffing agency."
- The obligation to identify whether an employee is employed pursuant to a written or oral agreement has been replaced by simpler inquiries as to whether and to what extent all wage rates are contained in a written agreement.
- The "Acknowledgement of Receipt" section has been made optional and has been simplified. The confusing references to the dates on which the Notice was "provided to employee & signed by employer representative" and was "received by employee & signed by employee" have been replaced with an undifferentiated reference to "date."

The changes in the Notice are reflected in the modification of the responses to FAQs 10, 19-21, and 23, and the addition of five new FAQs and responses, 26 through 30.

FAQs 10, 23: An Employer's Execution and an Employee's Acknowledgment of Receipt Are Now Optional

The template Notice and FAQs now make optional both the execution of the Notice by an employer and an employee's acknowledgement of receipt. Having an employee execute and return the Notice is recommended as it confirms the employer's compliance with the notice requirement.

FAQ 19: Examples of the Regular Rate of Pay to Be Stated in the Notice

Revised FAQ 19 provides guidance on the requirement that the dollar amount of all rates of pay that are fixed or ascertainable by calculation must be stated in the Notice. This FAQ adds to the previous answer five examples of how different types of pay may be listed in the Notice:

- Different measures of rates of pay "(e.g., \$9.00 per hour or \$.33 per box)" must be included in the Notice.
- A variable rate of pay, such as a commission, only need be described in general terms. The receipt of different amounts of wages in different pay periods does not mean the employee receives a variable rate of pay: "(e.g., in pay period #1, employee earns \$360 based on 40 hours @ \$9.00/hour and in pay period #2, earns \$270 for 30 hours @ \$9.00/hour – the rate of pay over both periods is a single rate of \$9.00/hour regardless of whether total wages varied over the two pay periods)."
- When an employee receives different types of pay, the Notice must reflect each type and basis of pay "(e.g., \$9.00/hour and commission of 5% of sales per each item sold by employee)."
- The Notice must contain basic information for calculating the employee's rate of pay: "(e.g., 10% commission for each item employee sells plus 2% shared bonus for department's monthly gross sales divided by number of employees in department)."
- When an employee receives commissions, bonuses, piece rates or the like that supplement an hourly rate of pay, the overtime rate must be stated as the arithmetic result of 1.5 times the hourly rate. A statement should also be added that the specified overtime rate is subject to upward adjustment: "(e.g., 'Overtime Rate: At least \$13.50/hour (1½ times regular rate) & \$18.00/hour (double time rate), subject to upward adjustment based upon earned commissions (10% of sales) and bonus (2% of department gross sales)')."

While the FAQs provide a relatively precise explanation as to how the overtime rate is calculated, it may not be possible in every instance to be equally precise. These examples demonstrate that employers will continue to be challenged in completing the Notice and in deciding, for all but straight hourly wage rates, how much information is required in a Notice.

FAQ 20: Notice Must Be Provided at the Time of Hire – Assuming "Time of Hire" Can Be Determined

The initial Notice must be provided "at the time of hire." Determining the exact time of hire is not easy, as exemplified by the FAQ. The FAQ provides a complicated and somewhat debatable analysis of when a "hiring" occurs.

In order to avoid the risk created by the uncertainty of the exact time of hire, employers are well advised to provide the Notice as early as possible in the hiring process. For employers that use written offers of employment, transmitting the Notice with the offer is prudent. The FAQs note that the latest the Notice must be provided to new hires is "the first day services are performed by the employee." The template, however, replaces "Date of Hire" with "Start Date."

FAQ 21: The Existence of a Written Agreement of All Rates of Pay

The template Notice no longer requires an employer to try to determine if an employee is engaged pursuant to an oral or written agreement (or an agreement that is part oral and part written). Instead, the template requires designation of whether a written agreement exists which provide the rates of pay.

If the response is "Yes," then the employer must indicate whether or not "all" of the rates of pay are contained in the written agreement. If

any wage rate is not specified in the agreement, then the answer must be “No.” Why a Notice is required when all of the applicable wage rates are set out in a written agreement is not clear.

New FAQ 26: “Legal Name” and Other “Doing Business As” Names

The employer must provide three types of information regarding its identity, including its full legal name containing, for example, “Inc.,” “Co.,” “Corp.,” or “LLC.” The employer must also provide any fictitious names of “DBAs” under which the employer does business. DBAs include any names filed in a fictitious business name statement pursuant to Business and Professions Code sections 17900 *et seq.* Finally, an employer must provide any “informal names” that are used to identify the employer. The FAQs do not explain exactly how the informal names are to be determined and how widely the informal name must be used to warrant inclusion in the Notice.

The uncertainty regarding what may comprise an “informal” name creates a risk that the names listed in a Notice may be over-inclusive or under-inclusive. An employer must also be sensitive to the consequences of identifying the employing entity – the identification of the employer may be used in contexts as diverse as identifying the appropriate defendant in a wrongful termination lawsuit to identifying the appropriate scope of picketing.

New FAQ 27: No Repeat Notices Are Required Because of the New Template if There Have Been No Changes in Covered Information

The DLSE’s revision of the template Notice does not require an employer to re-issue notice to employees who previously received Notices. New hires after April 12, 2012, must receive either the new DLSE template or a notice from the employer that provides the information set out in the revised DLSE template.

Although the second revised FAQs suggest that use of the revised template Notice may be mandatory (“For new hires made after the posting of the updated template on DLSE’s website, the newer posted version of the template *must* be used.” FAQ 27 (emphasis added)), the answer to FAQ 6 remains unaltered: “. . . employers can develop their own notices so long as they contain all the information required by the law, including all the information requested on DLSE’s template.”

As previously stated in the FAQs and section 2810.5(b)(1)-(2), an employer must provide a new Notice when any of the information in the Notice changes, unless that information is provided by a timely wage statement or within seven (7) calendar days through another legally required communication.

New FAQs 28-30: Notice Requirements for Staffing Agencies

The information to be provided with respect to third-party providers of employment services is substantially reduced by the new template. No longer is an employer required to state “whether the worksite employer uses any other business or entity to hire employees or administer wages or benefits.” In the DLSE’s revised template, this subject has been limited to a staffing agency checking the box which identifies itself as the employer. Staffing agencies must provide the information necessary to identify the client business to which the employee has been assigned to work. The purpose of this information is to allow an employee of the staffing agency to identify any other entity which may be liable for wage payments or workers’ compensation benefits. One helpful clarification provided by the FAQs concerns the party responsible for providing notice to employees of staffing agencies. If the staffing agency provides the Notice, then the client business need not provide a separate Notice.

If the staffing agency knows the client business at which the employee will be placed, it must be indicated in the Notice at the time of hire. If other placements are known at the time of initial placement, the staffing agency can list them in the Notice. While the guidance on this point is less than clear, it appears that subsequent placements are substantive changes to the information provided in the initial Notice and, therefore, require a new Notice to be issued, unless the updated information is provided on a timely wage statement or other communication required by law within seven (7) calendar days of the changes.

A recruiting service or simple payroll processing service continues not to be an employer that must provide a Notice to employees who are recruited or employees whose pay is processed.

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¹ For previous reports on the WTPA and its required Notice, see Christopher Cobey, Brian Dixon, Isela Pérez and Jose Macias, Jr., *California's New Wage Disclosure Notice and the Wage Theft Prevention Act of 2011*, Littler ASAP (Dec. 30, 2011), and Christopher Cobey and Jose Macias, Jr., *A Moving Target: The California DLSE Modifies Again Its FAQs on California's New Wage Notice Required for Hourly Employees*, Littler ASAP (Jan. 31, 2012), available at www.littler.com.