Proskauer

Wage Theft Prevention Alert: New York Employee Annual Notices and New California Law Take Effect January 1, 2012

November 10, 2011

During this past year, there has been an increased effort at the state and federal levels to ensure that employers are classifying and paying workers correctly. New York State and, recently, California have enacted laws requiring employers to provide written notices to new hires (with certain exceptions in California) and, in New York's case, to all employees annually as well, regarding the rate and basis of their compensation. Each state also has heightened its penalties for an employer's failure to pay employees appropriately and/or timely issue the required written notices.

New York's Private Employers Must Issue Annual Employee Notices between January 1 and February 1, 2012.

In just a few weeks, for the first time, all private sector employers in New York State will be required to provide each of their New York employees (including executives, managers and supervisors) with the annual Notice mandated by the New York State Wage Theft Prevention Act (the NYWTPA). As described in our December 2010 and March 2011 client alerts, employers mustissue the annual Notice between January 1 and February 1, 2012. (December 2010: New York's Wage Theft Prevention Act Increases Employer Obligations and Penalties; March 2011: Update on NYS Wage Theft Prevention Act). Given end-of-the-year obligations and schedules, we recommend that employers begin finalizing their plans for preparing and distributing the annual Notices.

Don't Ignore New York's Notice Requirements

The requirements for the annual Notice track those that apply to the Notices employers have been required to provide to each new hire since April 9, 2011. The annual Notice for *each* employee must include, among other things, certain information about the employer, the employee's regular rate(s) of pay, basis of pay, whether the employer intends to claim allowances against the minimum wage, the employer's regular pay day and, if applicable, the employee's overtime rate(s) of pay and basis of pay. Employers are required to issue the Notice in English *and*, with exceptions, the primary language identified by the employee. In addition, the amendments made to the New York Labor Law specify that certain items must appear on each employee's Wage Statements (pay stubs). Consequently, it also is important that your company's Wage Statements be in compliance to avoid the penalties set forth under the NYWTPA.

The New York State Department of Labor (NYSDOL) has issued several different versions of a Notice form in English and translated them into Chinese, Haitian Creole, Korean, Polish, Russian and Spanish. Accordingly, employers currently are required to issue a dual language Notice only to employees who identify one of those languages as their primary language. Employers are *not* required to use the NYSDOL templates, and we have assisted many employers in adapting the templates to the realities of their compensation practices, as well as advised employers concerning the mechanics of providing such Notices electronically, where practicable (and lawful) to do so. Along with providing the Notice, employers should obtain a signed, dated Acknowledgement from each employee, certifying that s/he received the Notice in his or her primary language, as appropriate. Employers must retain a copy of each Notice and the Acknowledgement for six (6) years.

Employers who fail to comply with the New York Notice and Wage Statement requirements face penalties and actions by individual employees and/or the NYSDOL. As described in our client alerts, the amendments to the New York Labor Law subject employers to civil penalties for Notice and Wage Statement violations, increase criminal and civil penalties for employers who fail to compensate employees appropriately, provide for prejudgment interest and 100% liquidated damages, and expand the types of businesses subject to criminal penalties to include partnerships and limited liability corporations and their officers and agents.

Don't Forget about the Termination Notice Requirement Established by N.Y. Labor Law §195

New York employers are reminded that they also are required to provide each employee terminated from employment with a writing sent within five (5) working days of the termination informing the employee of the *exact* date of the termination and the *exact* date of the cancellation of the employee benefits connected with the termination. This written notice is in addition to the notices employers must provide to employees about unemployment and Consolidated Omnibus Budget Reconstruction Act (COBRA) benefits.

Effective January 1, 2012, Employers have New Notice Obligations for California Workers

As we reported in our October 25, 2011: California Enacts New Round Of Employee-Friendly Laws, California recently enacted legislation requiring employers to issue Notices to certain newly hired employees and increased the scrutiny directed at independent contractor relationships in an effort to clamp down on the misclassification of workers and address the loss of state and federal tax revenues.

California Employers Must Provide New Hire Notices to Most Non-Exempt Employees

California has enacted its own Wage Theft Prevention Act, which becomes effective on January 1, 2012. Unlike the requirements under New York's WTPA, the California law only requires employers to issue notices to new hires who are non-exempt employees *and* not covered by a valid collective bargaining agreement. (New York law requires notices to all private sector employees, regardless of whether they are exempt, non-exempt, high level managers/officers and/or covered by a collective bargaining agreement.) The California law requires that the Notice be issued at the time of hiring. (The NYSDOL has indicated that the Notice required by the NYWTPA be provided *before* the employee actually commences work *and* annually thereafter.)

Like the Notice required under New York law, the California Notice must include, among other things, the name of the employer; the employer's physical and mailing addresses; the employee's rate(s) of pay; the basis of pay; applicable overtime rate(s); the allowances, if any, claimed as part of the minimum wage; and the employer's designated regular pay day. However, unlike the NYWTPA, the California law also requires employers to include the name and contact information for their respective workers' compensation carrier on the Notice. A new or amended written Notice must be issued within seven (7) days when any of the information on the Notice changes, *unless* the change is reflected on a timely wage statement or in another writing required by law.

The Act requires the California Labor Commissioner to make available a template that complies with the requirements of the Notice. We are told the Labor Commissioner is in the process of generating the required template Notice, in addition to other administrative guidance that we anticipate will be issued in or about mid-December, 2011. Stay tuned for Proskauer updates on these developments.

New California Laws Regulating the Workplace Require Attention

Employers should be aware that the recent California legislation also added other requirements impacting the workplace, including heightened penalties for employers who are found to have "willfully" misclassified a worker as an independent contractor. It is worth noting that the new legislation defines a "willful misclassification" as "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor."

Noteworthy, and subject to certain exceptions (e.g., licensed attorneys), the law imposes joint and several liability upon any person who “knowingly advises” an employer to treat a worker as an independent contractor who is later found to be an employee.

Additional changes in California law restrict, with certain exceptions, employers from requesting credit reports for applicants and employees, and require that by January, 2013, all commission agreements be memorialized in a written contract with the employee. For several years now, the New York Labor Law has required that employers have signed written commission agreements with New York employees.

Employee or Worker? IRS & USDOL Clamp Down on Misclassification

As we discussed in our September 27, 2011: DOL, IRS, and 11 States Enter Agreement to Work Together against Misclassification, there also has been an increased federal focus on the misclassification of workers as independent contractors and consultants. This fall, the U.S. Department of Labor (USDOL) and the Internal Revenue Service (IRS) signed a memorandum of understanding to improve the agencies' coordination of efforts to combat employee misclassification, identify workers entitled to overtime and better improve compliance and education. Eleven states, including Connecticut, Illinois, Massachusetts and New York, have entered into similar arrangements with the USDOL and IRS. While the IRS has, simultaneously, established a Voluntary Classification Settlement Program to provide certain amnesty relief to employers who come forward and agree to reclassify misclassified workers as employees, that program does not shield employers from actions under ERISA, the FLSA, state tax authorities, or state unemployment insurance and workers' compensation laws.

Recommendations

In light of the recent federal and state initiatives focusing attention on worker misclassification, independent contractor relationships, and transparency in the manner by which employers pay their employees, best practices dictate the following:

- Prepare now for New York and California’s Notice and Wage Statement requirements;
- Employers should review their independent contractor relationships with individual workers and consultants, as well as the classification status of their employees as exempt or non-exempt from overtime, to ensure workers have been reasonably classified under relevant laws;
- Personnel making classification determinations should be knowledgeable about the factors that apply under federal and state laws and/or seek advice from counsel;
- In addition, prudent employers may want to adopt a policy governing the use of independent contractors in their workplaces in an effort to ensure a uniform, company-wide approach to this issue.

If you have any questions about employee classifications, independent contractor relationships or state and federal requirements, please contact your Proskauer relationship attorney or any of the attorneys listed in this client alert.

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