Recent Updates to California's Wage Theft Protection Act

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On April 12, 2012, California's Division of Labor Standards Enforcement ("DLSE") made important changes to its Frequently Asked Questions ("FAQs") regarding The Wage Theft Protection Act (the "Act") and additionally revised its template notice form ("Notice"). The FAQs can be found in their entirety at http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html and the revised Notice can be found at http://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf.

The Act's purpose is to provide employees with information that relates to the employee's wage rates, pay schedule, information about the employer, and other pertinent data, around their time of hire and/or start date (which will be discussed further below). For more information on the Act in general, see "California's Latest Compliance Requirement for Newly-Hired Non-Exempt Employees: The Wage Theft Protection Act," which is available on Dorsey's website at http://www.dorsey.com/EU_CA_WageTheftProtectionAct_Feb2012/.

The updated Notice and FAQs provide employers with additional guidance so that they can fully comply with the Act, as well as some important changes.

Importantly, employers who have provided the old template notice form to their employees need not provide the revised Notice form to those employees, so long as the information based on the earlier template remains the same. However, if there are changes to the information provided in the earlier template which would also impact information required in the newer template, the employer must within seven (7) calendar days of the change provide notice using the updated template.

One of the recent changes made to the Act is that the "Acknowledgement of Receipt" section of the Notice is now *optional*. This section of the Notice is meant to be signed by the employer and employee to show that the appropriate Notice was given to the employee. While having both the employer and employee sign this section may provide assurance that the Notice was provided by the employer and received by the employee, it is up to the employer's discretion whether they wish to require this acknowledgement.

Additionally, the point at which the Notice is required to be given to employees has been slightly amended. While DLSE recommends that the Notice be given to employees "at the time of hiring," the Notice has been updated to indicate that the employee's start date is the latest time at which the employer can lawfully give the Notice to the employee. The FAQs define the start date as "the first day services are performed by the employee."

Further, the Notice no longer requires designation of whether the employment agreement is written or oral. Rather, the Notice requires designation of whether a written agreement exists which provides for the rate, or rates, of pay. If a written

agreement does exist which provides for the rate, or rates, of pay, then the employer must indicate whether or not all rates of pay and bases thereof are contained in that written agreement.

The updated FAQs provide additional 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. These examples include:

- Variable rates of pay may be described in general terms. Additionally, the receipt of varying amounts of total compensation in different pay periods does not mean the employee receives a variable rate of pay. An example of this given by the FAQs is that if in the first pay period an employee earns $360 based on 40 hours at $9.00 per hour and in the second pay period the employee earns $270 for 30 hours at $9.00 per hour, the rate of pay over both periods is a single rate of $9.00 per hour regardless of whether total wages varied over the two pay periods.
- Different rates of pay, such as $9.00 per hour or $0.33 per box, must be included in the Notice.
- The Notice must contain basic information for calculating the employee's rate of pay. The FAQs provide an example, stating "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 different types of pay, the Notice must reflect each type of pay as well as each basis. As an example, the FAQs state that a proper Notice might say "$9.00/hour and commission of 5% of sales per each item sold by the employee."
- When an employee receives bonuses, commissions, or other income that supplements an hourly pay rate, the overtime to be paid must be stated as the numerical result of 1.5 times the hourly rate, or whatever multiplier the employer uses for overtime, and a statement must also be added that the specified overtime rate is subject to an upward adjustment when other specified forms of wages are earned during the applicable pay period. The FAQs provide an example, stating "Overtime Rate: At least $13.50/hour (1 ½ 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)."

Under the new FAQs added April 12, 2012, an employer is required to provide not only its full legal name, but also any names under which the employer does business as (also commonly referred to as "DBAs") and any "informal names" the employer uses to identify the company.

The new FAQs also discuss special Notice requirements for staffing agencies. The updated Notice requires staffing agencies to check a box stating that they are, in fact, a staffing agency. Importantly, recruiting services and "simple payroll processing service[s]" are not considered to be staffing agencies under the Act. When an employer uses a staffing agency to fill positions, the employer need not provide the employee with a Notice if the staffing agency provides the required Notice with information regarding the employer's business first. If a staffing agency knows the business where the employee is to be placed, the staffing agency *must* provide the business's information in the Notice no later than the employee's start date. If a staffing agency does not know where the employee will be placed, or if there are any changes to the employee's placement, a new Notice must be

issued, unless the updated information is provided on an itemized wage statement, timely pay stub furnished in accordance with Labor Code 226, or is provided in another writing required by law. Regardless of how the employee is notified of the change in employment circumstances, the updated information must be provided to the employee within seven (7) calendar days of the change.

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