

FEBRUARY 22, 2011

## **New York Wage Theft Prevention Act Effective April 12, 2011:**

Currently, under the New York Labor Law Section 195 and guidelines issued by the New York State Department of Labor, every employee hired after October 26, 2009 must receive from his or her new employer a written notice at the time of hiring (before any work is performed) that contains the employee's regular rate of pay, overtime rate of pay, if applicable, and regular pay day(s). For employees who are exempt from overtime pay, the written notice must state the exemption that applies (for example, administrative, professional or executive).

In December 2010, former Governor David Patterson signed into law the Wage Theft Prevention Act ("WTPA") which will take effect on April 12, 2011, and amends the New York Labor Law (including Section 195 described above). Specifically, the WTPA provides, among other things, that:

1. An employer must provide each employee with a **written notice** that contains the following information:
  - (a) The employee's rate(s) of pay and the basis thereof (whether paid by the hour, shift, day, week, salary, piece, commission or other method);
  - (b) Any allowances, if any, claimed as part of the minimum wage (including tip, meal or lodging allowances);
  - (c) The employee's regular pay day;
  - (d) The employer's name;
  - (e) Any "doing business as" name(s) used by the employer;
  - (f) The physical address of the employer's main office or principal place of business (and mailing address, if different);
  - (g) The employer's telephone number; and
  - (h) Any other information that the Commissioner of Labor deems material and necessary.
2. The employer must provide this written notice to each employee **at the time of hiring, as well as on or before each February 1<sup>st</sup> of each subsequent year** of the employee's employment.
3. The written notice must be **in English and in the language identified by each employee as the primary language** of such employee.
4. Each time that the employer provides such written notice to an employee, the employer must obtain from such employee a signed and dated **acknowledgement** of receipt of the written notice. This acknowledgement must be in English and in the language identified by such employee as his or her primary language.
5. The employer must preserve and maintain the acknowledgement for **six (6) years**.
6. The acknowledgement must include an **affirmation** by the employee that the employee accurately identified his or her primary language to the employer, and that the written notice provided to the employee was in the language so identified.
7. The Commissioner will provide **templates** that comply with the WTPA's written notice and acknowledgement requirements. Each such template will be dual-language, including English and one (1) additional language. The Commissioner will determine, in his or her sole discretion, which languages to include. When an employee identifies a language for which a template is not available from the Commissioner, the employer can provide a written notice and acknowledgement in English.

8. An employer must provide its employees with **written notification of any pay-related change at least seven (7) calendar days prior** to making such change unless the change is reflected on a wage statement (as described below).
9. An employer must provide each employee with a **wage statement**, with every payment of wages, which contains the following information: (a) the dates of work covered by that payment; (b) the employer's name; (c) the employee's name; (d) the employer's address and telephone number; (e) the rate(s) of pay and the basis thereof (as described above); (f) any allowances, if any, claimed as part of the minimum wage and net wages; and (g) for non-exempt employees, the regular hourly rate(s) and overtime rate(s) of pay, and the number of regular and overtime hours worked.
10. An employer must maintain and preserve for **six (6) years** contemporaneous and accurate payroll records that reflect, among other things, the information contained in the wage statement.

In addition, the WTPA significantly increases penalties for an employer's violations of wage requirements including an increase in liquidated damages where an employer does not have a good faith basis for its failure to comply with the Labor Law. The WTPA also provides penalties for an employer's failure to provide the written notices set forth above, and criminal penalties for an employer's failure to pay minimum wages or overtime compensation. Furthermore, the WTPA increases protections against retaliation for employees who complain about violations of the New York Labor Law.

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**United States Supreme Court Rules That Retaliation Can Extend to a Co-Worker Closely Associated with the Complaining Party**

Recently, in *Thompson v. North American Stainless, LP* (No. 09-291 January 24, 2011), the United States Supreme Court held that Title VII's protections against retaliation can extend to a co-worker who is closely associated with an employee who has complained about discrimination. In *Thompson*, the petitioner, Eric Thompson, and his fiancé were both employees of North American Stainless, LP ("NAS"). Three weeks after the U.S. Equal Employment Opportunity Commission notified NAS that Mr. Thompson's fiancé had filed a charge of gender discrimination, NAS terminated Mr. Thompson's employment. After the U.S. District Court for the Eastern District of Kentucky and the U.S. Court of Appeals for the Sixth Circuit denied Mr. Thompson's retaliation claims on the grounds that he had not engaged in any statutorily protected activity either on his own behalf or on behalf of his fiancé, the U.S. Supreme Court granted certiorari to consider the breadth of Title VII's anti-retaliation provision.

In reversing the decisions of the lower courts, the Supreme Court reaffirmed its earlier ruling, in *Burlington N. & S.F.R. Co. v. White* (548 U.S. 53 (2006)), that "Title VII's antiretaliation provision prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" While finding that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired, the Supreme Court declined to identify a fixed class of relationships for which third-party reprisals are unlawful. Rather, the Supreme Court stated that firing a close family member would almost always constitute retaliation, and "inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize." Instead, the Supreme Court instructed that "the significance of any given act of retaliation will often depend upon the particular circumstances" and that "[g]iven the broad statutory text and the variety of workplace contexts in which retaliation may occur, Title VII's antiretaliation provision is simply not reducible to a comprehensive set of clear rules." Finally, the Supreme Court held, among other things, that Mr. Thompson can proceed with his retaliation claims because, as a "plaintiff with an interest 'arguably [sought] to be protected by [Title VII]," he is a "person aggrieved with standing to sue" within the meaning of Title VII. Accordingly, Mr. Thompson "falls within the zone of interests protected by Title VII" and "[h]urting him was the unlawful act by which the employer punished [his fiancé]."

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## **United States Court of Appeals for the Second Circuit Holds That Temporal Proximity Between an Employee’s Discrimination Complaint and Subsequent Termination Does Not, Standing Alone, Constitute Retaliation**

In *El Sayed v. Hilton Hotels Corporation, et al.* (2d Cir. December 17, 2010), the United States Court of Appeals for the Second Circuit held that temporal proximity between an employee’s complaint of discrimination and subsequent termination from his or her employment does not, without more evidence of retaliation by the employer, constitute a violation of Title VII’s anti-retaliation provision. In *El Sayed*, Mr. El Sayed was terminated approximately three weeks after he complained that a co-worker made a discriminatory comment to him about his national origin. Thereafter, Mr. El Sayed brought a retaliation claim against his employer in the U.S. District Court for the Southern District of New York. In response, his former employer asserted that Mr. El Sayed was terminated because one month prior to his termination, it learned that Mr. El Sayed had omitted certain prior employment history from his employment application (which Mr. El Sayed later admitted), and such misrepresentation was grounds for dismissal under the employer’s policies. The Southern District accepted this legitimate and non-discriminatory reason for Mr. El Sayed’s termination and dismissed his claims.

In affirming the Southern District’s decision, the Second Circuit held that by “demonstrating temporal proximity between his complaint and his discharge, El Sayed arguably established a prima facie case of retaliation under Title VII. However, under [relevant legal authorities], the prima facie case establishes only a rebuttable presumption of retaliation.” The Second Circuit further held that while the temporal proximity of events may give rise to an inference of retaliation for the purpose of establishing a case of retaliation under Title VII, Mr. El Sayed had not met his burden of demonstrating that his employer’s proffered reason for his termination (namely, that he had misrepresented himself on his employment application) was pretextual. The Second Circuit concluded that “a plaintiff must come forward with some evidence of pretext in order to raise a triable issue of fact,” and that Mr. El Sayed “produced no evidence other than temporal proximity in support of his charge that the proffered reason for his discharge was pretextual.”

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If you have any questions regarding the foregoing or would like to receive copies of the statutes or cases referenced herein, please contact:

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