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New District of Columbia Law Greatly Expands Remedies for Wage Law Violations and Places New Notice Requirements on Employers

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By Brian W. Steinbach

On September 19, 2014, Mayor Vincent C. Gray signed the "Wage Theft Prevention Amendment Act of 2014" ("Act") (D.C. Act 20-426). The Act generally broadens the coverage of, and expands the notice requirements, means of enforcement, retaliation protections, and available remedies under, several District of Columbia wage laws. In particular, the laws affected by the Act are the Wage Payment and Collection Law ("WPCL"), D.C. Code §32-1301, *et seq.*; the Living Wage Act ("LWA"), D.C. Code §2-220.01, *et seq.*; the Minimum Wage Revision Act ("MWRA"), D.C. Code §32-100, *et seq.*; and the Accrued Sick and Safe Leave Act ("ASSLA"), D.C. Code §32-131.01, *et seq.*

Notably, for the first time, business licenses and permits can be denied or suspended for the failure to comply with these laws, and liens can be placed on both real and personal property for amounts owed. The increased penalties and enforcement mechanisms follow an amendment in 2013 that already increased the potential recovery for employees to the amount of lost wages plus liquidated damages of 10 percent per working day or three times the amount of unpaid wages (whichever is smaller). The Act thus reflects a continued and overall effort to strengthen the remedies and increase the penalties when employers fail to pay workers the amount owed. The Act, by its terms, applies to violations occurring after October 1, 2014, but does not become effective until the end of a Congressional review period, likely to expire sometime in late November 2014 (depending on when it is formally transmitted), and publication in the *District of Columbia Register*.

The Act contains considerable detail, particularly as to a new administrative enforcement procedure and the amount of possible fines. However, the following changes are of particular note for employers:

- Deletion of the WPCL's former exclusion of executive, administrative, or professional (exempt) employees.

- Addition of new provisions to both the WPCL and the MWRA that:

(1) make general contractors and subcontractors jointly and severally liable to a subcontractor's employees for violations of the WPCL, LWA, ASSLA, and MWRA, and require subcontractors to indemnify their general for anything a general has to pay due to a subcontractor's violation, unless the violation occurred because the general failed to timely pay the subcontractor; and

(2) make a temporary staffing firm and the employer to which it provides employees jointly and severally liable for violations of the WPCL, LWA, ASSLA, and MWRA, with provisos that both must first be given at least 30 days' notice before filing a claim and that the temporary staffing firm must indemnify the employer unless otherwise agreed to by the parties.

- Deletion of a provision in the WPCL providing that, in the event of a bona fide dispute as to the amount owed, payment of the amount conceded due constituted compliance with its wage payment requirements.

- Addition of a new requirement under the MWRA requiring employers to provide each employee at hire a written notice, in *both English and the employee's primary language*, stating:

  - the name of the employer and any "doing business as" names;

  - the physical address of the employer's main office or principal place of business, and a mailing address;

  - the employer's telephone number;

  - the employee's rate of pay and the basis of that rate (by the hour, shift, day, etc.), allowances claimed as part of the minimum wage (tips, meals, lodging), rate of or exemptions from overtime pay, the Living Wage (or exemption from it), and the applicable prevailing wages;

  - the regular payday; and

  - any other information that the mayor considers material and necessary.

  The same information must be provided to all current employees within 90 days after the Act becomes effective. *Copies signed and dated by the employer and the employee must be retained as proof of compliance*. The mayor is supposed to make available a sample template within 60 days after the Act becomes effective. (There are slightly modified requirements for temporary staffing firms that require this notice at the time of initial interview or hire but recognize that the specific rate and payday and the client employer's information may not be available immediately.)

- The mayor is directed to provide, within 60 days of the effective date of the Act, a new summary of the MWRA for posting.

- MWRA recordkeeping requirements that now include a mandate to record the precise time worked each day, not simply the hours worked.

- Repeal of a regulation that allowed new hires to be paid the lower federal minimum wage for the first 90 days.

- Establishment of broad protections against retaliation for anyone making or believed to have made a complaint to any agency or person of a violation of the WPCL, LWA, or MWRA; initiating or being about to initiate a proceeding; providing information regarding a violation, investigation, or proceeding; testifying or being about to testify; or otherwise exercising rights under the Act. *Most notably, the Act establishes a presumption of retaliation for any adverse action taken within 90 days of engaging in protected activity, which may be rebutted only by "clear and convincing" evidence that the action was taken for other permissible reasons*. Remedies include back pay, other equitable relief, attorneys' fees, and civil penalties, through either a civil action or an administrative complaint.

- Deletion of a provision in language recently added to ASSLA that had conditioned a new exclusion of employees in the building and construction industry covered by a collective bargaining agreement on the existence of an express waiver in the collective bargaining agreement; the exclusion in this industry is now automatic (in other industries, collective bargaining agreements cannot waive less than three paid leave days).

- Establishment of misdemeanor criminal penalties for both negligent and criminal failures to comply with the WPCL or LWA and an increase in the potential fines (previously only willful violations were misdemeanors); also, revisions to the criminal penalties under the MWRA to allow fines for both willful and negligent violations, but imprisonment only for a willful violation committed after a prior conviction;

- Revision and general increases in administrative penalties for violations of the WPCL, LWA and MWRA, including specific penalties under the MWRA for violating record-keeping, payroll record inspection, notice, and itemized wage statement requirements, and the allowance of multiple penalties for violation of more than one statutory provision.

- Expansion of the scope of civil actions under the WPCL to include claims under the MWRA, LWA, and ASSLA as well as the WPCL; expansion of the definition of "similarly situated" employees in representative actions to include any employees alleging one or more violations that raise similar questions as to liability, even if the claims seek differing amounts of damages or job titles/classifications differ in ways unrelated to their claims; allowance of injunctive relief; and clarification that a three-year statute of limitations applies for all claims for unpaid wages or liquidated damages under all four statutes, but with tolling while an administrative complaint is pending.

- Provision for treble liquidated damages in a civil action under the MWRA, but which allows a court in a civil action under the MWRA to award less than treble liquidated damages if the employer shows good faith and reasonable grounds for belief that it was not violating the Act and promptly paid the full amount claimed to be owed.

- Establishment of a very detailed new administrative enforcement scheme for claims under the WPCL, MWRA, LWA, and ASSLA that includes the filing of a complaint; specific time deadlines for processing the complaint; the right to request a formal hearing within 30 days of an initial determination, or if an initial determination is not made within 60 days, within 60 days thereafter; equitable remedies that include liquidated damages, attorneys' fees, and costs; and specific provisions for enforcement of remedies ordered. These administrative remedies are in addition to criminal, civil, or other remedies established by law. Investigations will likely be handled by the Office of Wage-Hour, with a formal hearing by the existing Office of Administrative Hearings. Of particular note are the following remedial provisions:

    - When an administrative complaint is filed, an employer will be sent a written notice to employees stating that an investigation is being conducted and providing information on how employees may participate; the notice must be posted for at least 30 days.

    - If the employer does not comply with an administrative order or conciliation agreement, either the District or the complainant may record a lien and sue for enforcement; in addition, the District can assess a late fee of 10 percent per month, *require posting a public notice of failure to comply, and suspend business licenses*. Both penalty amounts and the original award automatically become liens on the real estate and personal property of the person who owes them on the day following the due date for payment, enforceable through the procedures for tax collection.

    - An application for any license to do business will be denied if, during the previous three years, the applicant admitted liability or was found liable of committing or attempting to commit a *willful* violation of the WPCL, MWRA, LWA, ASSLA, or any other law regulating the payment of wages. (It is unclear if this also applies to license renewals.)

    - A license to do business will be suspended (on 30 days' notice) if the licensee has failed to comply with an administrative order or conciliation agreement until proof of full compliance is provided.

    - No license or permit can be issued or renewed if the applicant owes any past due fines, penalties, or past due restitution on behalf of an employee due to a violation of the WPCL, MWRA, LWA, or ASSLA.

What Employers Should Do Now

Although the precise effective date of the Act is uncertain, as soon as possible, District of Columbia employers should do the following:

- In light of the strengthened penalties, particularly the possible license denials/suspension, review all pay procedures to make sure that they are in compliance with all District of Columbia wage payment requirements, including the recently increased minimum wage requirements, tip credit provisions, Living Wage rates for government contractors, and sick leave under the ASSLA, including the timely payment of all amounts due and swift resolution of any disputes. This includes paying most discharged employees by the next day and paying voluntarily departing employees within seven days or by the next regular payday, whichever is *sooner*. Also make sure that exempt employees are timely and properly paid.

- If necessary, revise record-keeping as of October 1, 2014, to record the precise time worked each day, not simply the hours worked.

- If applicable, effective October 1, 2014, cease paying new hires at the lower federal minimum wage.

- Prepare for compliance with the new notice requirements for both new and existing employees.

- Particularly in light of the 90-day presumption of retaliation, make sure that all managers and supervisors do not take any form of retaliation against employees complaining of any possible violation of the wage laws and that any actions taken within 90 days of a complaint are fully justified.

- If you are a temporary staffing firm, review the indemnification provisions in your contracts with your clients.

- Monitor the District of Columbia's Department of Employment Services wage and hour compliance website for the form of notice that D.C. employers will need to provide to all new employees and all existing employees within 60 days of the effectiveness of the Act, as well as the new MWRA notice.

In addition, District of Columbia employers may wish to take note of other recent D.C. legislation, including:

- A bill enacted earlier this year that broadened the applicability of the D.C. Accrued Sick and Safe Leave Act (for more details, see the Epstein Becker Green *Act Now* Advisory "Amendments to the District of Colombia's Accrued Sick and Safe Leave Act of 2008"), and

- The recent "Fair Record Screening Amendment Act of 2014" (for more details, see the Epstein Becker Green *Act Now* Advisory "District of Columbia's Ban-the-Box Legislation").

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