

More Wrinkles in the Wage Theft Act



Carolyn Rashby and Joe Mascovich

On Jan. 1, California's Wage Theft Prevention Act of 2011 (A.B. 469) took effect, requiring employers to provide written wage disclosures to certain new hires and employees. And with only two days to go in 2011, the California Labor Commissioner finally published a disclosure template and FAQs on the new law. While the guidance is welcome, it raises more questions about employers' compliance obligations under the act than it answers.

WHAT THE LAW REQUIRES

The Wage Theft Prevention Act adds new Labor Code §2810.5 to require employers to provide nonexempt employees with a written wage disclosure at the time of hire. The notice requirements do not apply to employees who are exempt from overtime, to public employees, or to employees covered by a valid collective bargaining agreement that provides premium rates for overtime and a regular rate of at least 30 percent more than the state minimum wage.

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The new hire notice must contain certain specified information, in the language the employer normally uses to communicate with the employee, including:

- The employee's rate or rates of pay and basis thereof.
- Whether the employee will be paid by the hour, shift, day, week, salary, piece, commission, or otherwise.
- The rates for overtime.
- Allowances, if any, the employer claims as part of the minimum wage, including meal or lodging allowances.
- Designated paydays.
- The employer's name and any "doing business as" names used by the employer.
- The physical address of the employer's main office or principal place of business, and a mailing address, if different.
- The employer's telephone number.
- The name, address, and telephone number of the employer's workers' compensation insurance carrier.
- And any other information the labor commissioner deems material and necessary (see below for additional information the labor commissioner is requiring).

In addition to providing new hire notices, an employer must notify an employee in writing of any changes to information in the disclosure, within seven calendar days of making the change. This continuing notice requirement appears to effectively extend this new law to all employees, not just to new hires who initially receive the written disclosure. The notice update can be made by way of the employee's regular wage statement (such as when a wage rate changes), another notice that is required by law, or by other written notice of the specific change.

NEW HIRE NOTICE TEMPLATE

The labor commissioner has issued a template, available on its website, that employers may use to make the required

disclosure. The template includes information that is in addition to the specific information required by the statute. While an employer may use its own form for the disclosure, it must include all of the information in the labor commissioner's template. The additional information is:

- The employee's name and hire date.
- The business form of the employer (sole proprietor, corporation, limited liability company, or partnership, and whether the employer is a staffing agency (PEO or temp agency)).
- The name and contact information for any entity or business the employer uses to administer wages or benefits, with the exception of recruiting services or payroll processing services. For employers that use multiple entities to administer various types of benefits, this requirement could prove burdensome, both as to the initial notice and updated notices when any of the information changes.
- Whether the "employment agreement" is oral or written. It is worth noting here the difficulties with the terminology of this new requirement. It is unclear whether the labor commissioner is only referring to an agreement as to wages, or more generally to any type of written or oral agreement between the employer and employee (a written employment contract, a confidentiality agreement, an arbitration agreement, or other type of employment agreement). Furthermore, if the employment is at-will, the requirement to check either box could prove confusing.
- The workers' compensation policy number, or for self-insured employers, the certificate number. Because workers' comp policy numbers often change upon renewal, employers may be forced to send out updated disclosures or change notices on an annual basis.
- The name and signature of the "employer representative" providing the notice and the date notice is provided.
- The name and signature of the em-

ployee and the date the notice was received and signed.

The template also includes introductory and concluding information on the Wage Theft Prevention Act and the new disclosures; employers preparing their own forms should be certain to incorporate this language into their forms. The template has been published in English, Spanish, Chinese, Korean, Vietnamese and Tagalog.

LABOR COMMISSIONER ISSUES FAQs

The labor commissioner has also published FAQs that clarify some aspects of the new hire notice requirement. The following comments are noteworthy:

- The written disclosure should be presented in a single document and should not be combined with offer letters or other documentation. The labor commissioner takes the position that employees should not have to “piece together” the required information from several documents or pages in a manual.

- An employer may provide the notice electronically, although the employee must be able to acknowledge receipt of the notice and print out a copy.

- In the circumstance where the employer changes an employee’s rate of pay, a complete new notice is not required, provided the change is an increase and the employee’s pay stub will reflect the new rate. The labor commissioner cautions, however, that decreases in wage rates may not be made through a pay stub notice because they can occur only on a prospective basis.

- If multiple wage rates apply to an employee, the notice must specify all rates, although pay stubs need reflect only the rates used for the pay period involved.

- Employers should obtain an employee’s written acknowledgement of receipt of the disclosure and should retain in

their records both the acknowledgement and a copy of the notice.

- If an employee refuses to sign the disclosure, the employer should still provide the employee with the notice and then note the refusal on the employer’s copy.

- Employees cannot waive the notice requirement.

One other aspect of the FAQs deserves mention. When initially posted, the FAQs stated that the notice must be given to all existing employees as well as new hires, even though this plainly expanded the statutory requirement providing only for new-hire notices. Shortly thereafter, however, the labor commissioner revised the FAQs to omit this statement. While the labor commissioner’s initial statement was erroneous, it may signal that the labor commissioner will soon expressly state that an employer must give the required full disclosures to all affected employees whenever it makes a change to any of the items that must be included in the new hire disclosure.

SUGGESTIONS FOR COMPLIANCE

Employer groups are already mounting challenges to the new template and FAQs to the extent that they impose burdensome new requirements, include vague and ambiguous terminology, and fail to properly explain the provisions of the act. In addition, the labor commissioner’s authority to impose the additional disclosure requirements, without going through proper rulemaking channels, is in question. While these issues are being sorted out, employers should be certain to provide the disclosure to new hires and provide an updated notice or paystub to a current employee if any information changes. Here are some compliance suggestions:

- While the new law specifies that the

disclosure should be provided at the time of hire, it does not define when that is. To avoid disputes, employers should consider providing the notice at the time an offer is made, rather than waiting for the employee’s first day of work.

- Regarding the requirement that the employer check a box indicating whether the employment agreement is oral or written, employers should consider, if applicable, adding a statement to the disclosure that the employment is at will.

- As mentioned above, employers are free to develop their own disclosure forms. However, the form must include all of the information that is on the labor commissioner’s template.

- Employers should keep a copy of each signed disclosure on file, preferably in the employee’s personnel file.

- Employers should ensure that wage rates and other information in payroll systems and on wage statements are consistent with the information in the new hire disclosure.

- Finally, the law does not specify any penalties for noncompliance, but PAGA penalties may apply.

For more information on other provisions of the Wage Theft Prevention Act, see *New Compliance Obligations for Businesses* (The Recorder, Nov. 28, 2011).

Authors’ note: As this article went to press, the Labor Commissioner issued 10 new FAQs, responding to questions employers have had regarding compliance with the Wage Theft Prevention Act. The additional FAQs discuss what it means to provide the notice at the time of hire and what information must be included on the new hire notice regarding rates of pay, overtime rates, prevailing wages and more. The full FAQs are available at <http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html>.