

December 2011

California's New Wage Disclosure Notice and the Wage Theft Prevention Act of 2011

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UPDATE: On January 3, 2012, the Labor Commissioner changed the FAQs on this notice requirement to clarify that the notice does not need to be given to current employees except under certain circumstances. The Labor Commissioner did so by simply deleting the following sentence formerly in the answer to FAQ 2: "The notice should be given to all current employees and then to all new employees at the time of hire."

California's Wage Theft Prevention Act of 2011 ("WTPA" or "Act")¹ takes effect on the first day of next year – January 1, 2012. The WTPA is one of half a dozen new laws that affect an employer's wage payment obligations. The WTPA amended five existing statutes within the California Labor Code, and created five new statutes in the same code.² All are discussed below.

Labor Code Section 2810.5 – Wage Notice for Certain Non-exempt Employees

The most important of the Act's new statutes is Labor Code section 2810.5, which requires employers to give new employees and, in other circumstances, current employees a particularized notice about their wages and other employment-related information. The wage notice requirement, which will take effect on January 1, 2012, will affect most of the more than eight million California employees who are entitled to receive overtime.

Which Employees Must Receive A Wage Notice?

The new statute specifically requires that all employees hired on or after January 1, 2012, receive the notice except:

- An employee directly employed by the state or any political subdivision thereof, including any city, county, city and county, or special district.
- An employee who is exempt from the payment of overtime wages by statute or the Wage Orders of the Industrial Welfare Commission.
- This exception covers employees properly classified under the wage laws as professional, executive, or administrative, outside salespersons, and some members of an employee's family, and can cover some employees such as those in particular occupations who receive

more than half their compensation in commissions, truck and other drivers (including taxi cab drivers), broadcasting industry employees, irrigators, and motion picture projectionists.

- An employee who is covered by a valid collective bargaining agreement (CBA) if the CBA “expressly provides for:”
 - wages;
 - hours of work;
 - working conditions of the employee;
 - premium wage rates for all overtime hours worked; and
 - a regular hourly rate of pay for those employees of not less than 30 percent more than the state’s minimum wage.³

The Labor Commissioner has taken the position in its “Frequently Asked Questions” (FAQs) that the wage notice must be provided to **all current** employees on January 1, 2012, as well as new employees.⁴ The Labor Commissioner’s position that notices must be provided to **current** employees is highly debatable given the absence of such a specific requirement in the statute. The statute only states that “an employer shall notify his or her employees in writing of any changes to the information set forth in the notice” within specified time periods. Given the sizeable penalties that can be imposed for non-compliance, employers are well advised to consult with their employment counsel as to this important issue.

What Information Must the Wage Notice Contain?

According to the statute, a wage notice must contain at least eight categories of information⁵:

- The rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable.
- Allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances.
- The regular payday designated by the employer in accordance with the requirements of the Labor Code.
- The name of the employer, including any “doing business as” (“dba”) 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 telephone number of the employer.
- The name, address, and telephone number of the employer’s workers’ compensation insurance carrier.
- Any other information the Labor Commissioner deems material and necessary.

What Additional Information Must Be Included in the Wage Notice?

The Labor Commissioner has issued a template wage notice form that employers may use and has issued 15 frequently asked questions (FAQs) about the required notice.⁶ The posted version of the Labor Commissioner’s template form includes many additional items of information not specified in section 2810.5. However, the statute provides the Labor Commissioner with authority to include in the template form “[a]ny other information the Labor Commissioner deems material and necessary.” Accordingly, employers should assume until further notice that all of the information on the Labor Commissioner’s template form should be included and completed on any version of the form which is used.⁷ The information included on the Labor Commissioner’s form that is not set out in the statute includes:

- Hire date and position.
- Business form of employer – corporation, partnership and the like.
- The identity of any other entities used to hire employees or administer wages or benefits, excluding recruiting services or payroll services.

- Whether the employment agreement is oral or written.
- The workers' compensation policy number or certificate number for permissible self-insurance.
- The name and signature of the employee and the date the notice was received and signed.
- The name and signature of the employer representative providing the notice and the date notice is provided.
- An introductory paragraph and several concluding paragraphs which describe the terms on which Wage Notices must be provided.

What Form of Wage Notice Must Employers Use?

Employers may use the Labor Commissioner's form of notice or their own form of wage notice, as long as their form contains all the required information specified in section 2810.5(a)(1)(A)-(H) and the Labor Commissioner's template form.⁸ However, the Labor Commissioner's FAQs state that the wage notice must be given to employees as a separate form.⁹ Employers may wish to add to their form, if appropriate, a reiteration that employment with the entity will be, or is, "at will."

When and for How Long Must Eligible Employees Receive A Wage Notice or An Updated Notice?

New employees must receive the wage notice "at the time of hiring."¹⁰ As the statute does not reference an employee's first day of work as the date on which notice is provided, it would be prudent for employers to provide the notice at the time offers of employment are made.

As noted above, the Labor Commissioner's FAQs state the very debatable proposition that all current employees must be provided a wage notice on January 1, 2012. The statute may well be read to require current employees only be provided timely notice of any changes in any of the required categories of information that occur after January 1, 2012. Notice must be provided within seven days of any changes in the required categories of information, unless either (1) all changes are reflected on a timely wage statement furnished in accordance with Labor Code section 226, or (2) notice of all changes is provided in another writing required by law within seven days of the changes.¹¹ Note that some of the information included in the form that may change is not normally included on a pay stub such as the name, address, telephone number of the employer's workers' compensation insurer and the applicable policy number.

There is no stated duration for the requirement that employees receive updated information. The Labor Commissioner's FAQs do make clear that an employee may not waive the wage notice requirement.¹²

How Much Wage-related Information Must Be Included in the Notice?

One of the most important questions about the wage notice is the amount of detail that must be provided about when a wage rate applies to an employee's work. The statute requires the wage notice to show "[t]he rate or rates of pay and basis thereof, whether paid by the 'hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable.'"¹³ The Labor Commissioner's form provides only a blank for an overtime rate, with no explanation of when overtime will be paid, which suggests that no such explanation is necessary. The Labor Commissioner's FAQs support that conclusion. The FAQs state that if an employee may be paid at multiple hourly or piece rates, all such rates must be included in the notice.¹⁴ However, "[o]nly the rates used to determine a worker's pay need be shown on the wage statement for that period."¹⁵ This interpretation suggests very little need to be said about the "basis" of how day rates, piece rates and commissions¹⁶ must be paid. The statute could be interpreted to require something more in the way of the basis on which wages are paid. Employers may wish to consult with their counsel on this less-than-certain subject as well.

In What Languages Must the Wage Notice Be Provided?

All notices to employees must be provided "in the language the employer normally uses to communicate employment-related information to the employee."¹⁷ What this means will vary from one employer to the next. During the bill's evolution through the legislative process, a provision requiring that an employer must provide the notice in English and the employee's primary language was eliminated. However, an

employer that normally communicates employment related material in a language other than English should also provide the WTPA notices in that language. The Labor Commissioner will be providing template wage notices in Spanish, Chinese, Korean, Vietnamese and Tagalog as they are completed by the agency.¹⁸

Can the Notice Be Given Electronically?

According to the Labor Commissioner's FAQs, the wage notice can be given electronically. To do so, there must be "a system where the worker can acknowledge the receipt of the notice and print out a copy of the notice."¹⁹

What If An Employee Refuses to Sign the Notice?

The Labor Commissioner's FAQs do provide practical advice about how to address an employee who refuses to sign the wage notice. In such a case, the employer should note the employee's refusal on the employer's notice and provide a copy of that notice to the employee.

What Are the Consequences of An Employee Signing the Wage Notice?

The Labor Commissioner's form notice states that "[t]he employee's signature on this notice merely constitutes acknowledgment of receipt." This statement is helpful, as it helps avoid creating a contractual obligation on the part of the employer. However, an employer that wishes to obtain an employee's assent to a credit against the minimum wage must do so through a separate agreement with the employee.²⁰

What Are the Penalties for Noncompliance with Section 2810.5?

The wage notice law provides no specific civil penalty. Hence, the default penalties contained in section 2699 (f)(1) and (2) of the Private Attorneys General Act (PAGA) apply. If, at the time of the alleged violation, the employer employs one or more employees, section 2699(f)(2) provides for a civil penalty of one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

What Significant, Unanswered Questions Are There About the Wage Notice Form?

What does it mean for an employee to be employed pursuant to the "oral" or "written" agreement for which the Labor Commissioner's form provides check boxes? The Labor Commissioner's form assumes that employees are employed pursuant to an oral or a written agreement. In fact, most employees are employed pursuant to an agreement which is in part oral and in part written. The initial offer of employment, work schedule and specific job duties are often oral agreements. The employee handbook and benefit plans are typically provided in written form. In such a case, checking both boxes may be appropriate.

What is meant by the reference in the Labor Commissioner's form to businesses or entities that "administer wages or benefits?" It is not clear whether those terms would include, for example, third party administrators of benefit plans. The disclosure of such information with respect to ERISA-regulated benefit plans is comprehensively regulated by federal law.²¹ Similarly, the terms "worksite employer," "recruiting service," and "payroll processing service" as used in the form are uncertain.

Other New Provisions of the WTPA Applicable to Private Employers

- New Labor Code section 1197.2 increases sanctions for wage violations by imposing new civil and criminal penalties against noncompliant employers.

An employer who willfully fails to pay a final court judgment or final order issued by the Labor Commissioner for wages due to an employee who has been terminated or who quits within 90 days of the date that the judgment was entered or the order became final may be charged with a misdemeanor, provided the employer had the ability to pay the amount of the judgment or order.

In addition, civil penalties may be assessed. The maximum penalties under this new provision vary depending on the amount of wages owed.

- If the total amount of wages due is less than \$1,000, the employer may be subject to a fine of \$1,000 to \$10,000, or imprisonment in county jail for up to six months.
- If the total amount of wages due is more than \$1,000, the employer may be subject to a fine of \$10,000 to \$20,000, imprisonment in county jail for six months to a year, or both.

The civil and criminal penalties available under this new provision are for each offense. In addition, if an employer fails to pay wages to more than one employee, the total amount of wages due to all employees will be aggregated for purposes of determining the level of the fine and the term of imprisonment.

- New Labor Code section 1194.3 allows an employee to recover attorney's fees and costs that are incurred in enforcing a court judgment for unpaid wages under the Labor Code.
- New Labor Code section 1206 provides that, notwithstanding any other provisions of law, the Labor Code establishes minimum penalties for failure to comply with wage-related statutes and regulations. Some California cities, for example, have greater penalties for failure to comply with wage-related statutes and regulations.

Existing Statutes Amended by the WTPA Applicable to Private Employers

- Amended Labor Code section 1174 extends the time an employer is required to maintain payroll records from two years to three years. In addition, an employer may not prevent an employee from maintaining a personal record of his hours worked.
- Amended Labor Code section 240 extends the time required for an employer who commits a violation of this section, or who fails to satisfy a judgment, to maintain a bond from six months to two years. In addition, if the employer fails to post a bond, the Labor Commissioner may require the employer to provide an accounting of assets.
- Amended Labor Code section 243 provides that a bond posted by an employer convicted of a second violation of this section will be payable for wages, interest, or damages. In addition, the Labor Commissioner may also require that the employer provide an accounting of assets. An employer who fails to provide a requested accounting is subject to additional sanctions.
- Amended Labor Code section 1197 provides that an employer who fails to pay the required minimum wage must pay restitution to the employee in the amount of unpaid wages in addition to a penalty or penalties.

Recommendations to Employers

- Task an individual or position with the responsibility to confirm that the enterprise is complying with the requirements of section 2810.5 for all non-exempt employees to whom the requirements apply.
- Review what, if any, existing notifications, such as the pay stubs or wage statements required by Labor Code section 226 will provide the update information required by section 2810.5, and whether that information is provided within the deadlines specified in section 2810.5.
- Task an individual or position to confirm, at least at the outset, that the information provided on new and existing hourly employees' pay stubs or wage statements is identical to, and does not conflict with, the information given on the wage notice.
- For those employees receiving the notice who are employed at will, add a sentence to the notice reconfirming that status.
- Task an employee to monitor the Labor Commissioner's website for possible issuance of additional FAQs.

Contact your employment counsel with any questions concerning compliance with the requirements of Labor Code section 2810.5, or the balance of the WTPA.

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¹ The full text of the WTPA, Assembly Bill 459, is available at: www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0451-0500/ab_469_bill_20111009_chaptered.html.

² California's WTPA was patterned on a similar law which took effect in New York in April 2011. See Barbara Hoey and Gary D. Shapiro, *Lame Duck Reform: New York's Wage Theft Prevention Act*, Littler ASAP (Jan. 7, 2010).

³ Cal. Lab. Code § 2810.5(c)(1)-(3). In 2012, the state's minimum wage will be \$8.00 per hour; 30 percent more than the minimum wage will be \$10.40 per hour. Note the reference is to the "state" minimum wage, as some jurisdictions have higher minimum wages (e.g., San Francisco's minimum wage is \$10.24 per hour starting January 1, 2012). Note also that the requirement that an employee who is covered by a collective bargaining agreement be paid 30% more than the state's minimum wage is not set out in the Labor Commissioner's template form.

⁴ California Division of Labor Standards Enforcement, *Frequently Asked Questions (FAQ) Wage Theft Protection Act of 2011 – Notice to Employees* ("FAQ"), available at www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html. (Last accessed Dec. 30, 2011). FAQ 2 states that "[t]he notice should be given to all current employees . . ." The same FAQ specifies that employees of charter schools, private schools, and not-for-profit corporations are covered by the notice requirements.

⁵ Cal. Lab. Code § 2810.5(a)(1)(A)-(H).

⁶ Available at www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html.

⁷ An early version of the bill included the provision: "When providing the notice to an employee, the employer shall obtain from the employee a signed and dated acknowledgment, in English and in the primary language of the employee, of receipt of the notice, which the employer shall preserve and maintain for three years. The acknowledgment shall include an affirmation by the employee that the employee accurately identified his or her primary language to the employer, and that the notice provided by the employer to the employee was in the language so identified, and shall conform to any additional requirements established by the Labor Commissioner with regard to content and form." This provision was deleted before the final version of the bill passed.

⁸ FAQ 6 states that "[e]mployers should keep a record of the notices provided to their employees."

⁹ FAQ 7 states that "[e]mployees should not be required to piece together the information from several separate documents or pages of a manual."

¹⁰ Cal. Lab. Code § 2810.5(a)(1).

¹¹ Cal. Lab. Code § 2810.5(b)(1)-(2). See also FAQ 11.

¹² FAQ 8.

¹³ Cal. Lab. Code § 2810.5(a)(1)(A).

¹⁴ FAQ 13.

¹⁵ FAQ 13.

¹⁶ Amended Labor Code section 2751 will require all California employees who are paid commissions to be provided with written commission plans effective January 1, 2013.

¹⁷ Cal. Lab. Code § 2810.5(a)(1).

¹⁸ FAQs 4, 5.

¹⁹ FAQ 9.

²⁰ FAQ 10.

²¹ *Farr v. US WEST, Inc.*, 58 F.3d 1361, 1365 (9th Cir. 1995) (ERISA preempts state laws that create disclosure requirements).