



dlse issues revised faqs regarding required wage notice

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The California Wage Theft Prevention Act (WTPA), which became effective on January 1, 2012, requires private-sector employers to provide a written wage notice "at the time of hiring" to nonexempt employees (excluding most employees who are covered by a collective bargaining agreement.). The notice must contain specific information identified by the legislature, as well as other information deemed "material and necessary" by the Labor Commissioner (DLSE). In late December 2011, the DLSE issued a notice template that appeared to go well beyond the scope of the WTPA. Moreover, earlier this month, the DLSE issued frequently asked questions (FAQs) making clear its position that ALL of the information contained in its template is required. (We more fully addressed the WTPA in our last alert issued on January 24, 2012.)

In an apparent effort to address concerns expressed by the employer community about, and to clear up some of the ambiguities created by, the template and original FAQs, on January 25, 2012, the DLSE published revised FAQs. Unfortunately, the new FAQs still raise significant questions and concerns. (Evidencing the care taken by the agency with respect to these FAQs, the DLSE erroneously refers to the new law as the "Wage Theft **Protection** Act of 2011.") Below are the highlights of these new FAQs.

When Must Notice Be Provided: The WTPA requires that the wage notice be provided at the "time of hiring." According to the DLSE, the "time of hiring" is when the employment relationship is established and is not necessarily the first day of work. Specifically, after a muddled discussion of "unilateral" and "bilateral" contracts, FAQ 20 states that the "time of hiring" may be when the employee accepts an offer of employment, enters into an employment agreement with the employer, or commences work. However, the DLSE also notes that, since the notice must be provided to "employees" (who by definition are persons already employed), it further states that the notice must be provided "reasonably close" to the time of the inception of the employment relationship.



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Thus, without any clear guidance from the DLSE, employers should endeavor to provide the notice upon acceptance of employment or in no event later than on the first day of work.

Must Notice Be Provided to Current Employees: Although the statute requires that the notice be provided only to covered employees hired on or after January 1, 2012, FAQ 2 states that "it would be a best practice for employers not only to provide the notice to new hires, but also to current employees." As this is only an advisory statement, employers may choose to ignore it.

Rates of Pay: The WTPA requires the wage notice to include all rates of pay, the basis for payment (such as by the hour, shift, day, week, salary, piece commission, or otherwise), and any overtime rates. With respect to the overtime rates, FAQ 19 expressly states, "Simply stating the multiplier for overtime (e.g., 1 1/2 and/or double the regular rate)" is not sufficient. Thus, where the employee's wages are paid only at a single hourly rate, that hourly rate (e.g., \$8 per hour) and the applicable overtime rates (e.g., \$12 and \$16) must be specified. However, if an employee also receives other compensation beyond the straight-time hourly rate that would be included for purposes of calculating overtime (e.g., pay differentials, commissions, or bonuses), then the employer also must specify that additional compensation. The DLSE provides the following example:

"\$10.00 per hour, plus commissions of ___% of sales closed during prior months."

Moreover, because the overtime rate will vary depending on how much additional compensation is earned, the DLSE states that, where additional compensation is paid, the employer may provide the applicable overtime rate based on the employee's straight-time hourly rate and then indicate that the specified overtime rates are subject to upward adjustment when the other types of compensation are earned during the pay period.

Regular Payday: FAQ 24 makes clear that the notice need not include the specific days, months, and years of its paydays. Rather, the notice simply may specify the regular day(s) of the month when wages are paid and how often they occur. For example, the employer could state that wages are paid on the 1st and 16th of every month; every other Friday of every month; or every Thursday.

Whether "the Employment Agreement" Is Oral or Written: The most troublesome and controversial section of the DLSE's template is its requirement that employers check whether the "employment agreement" is oral or written. The WTPA does not require this information to be provided, and many employers have struggled with how to respond with respect to an at-will employee. With respect to this issue, the DLSE again makes confusing and contradictory statements. On the one hand, the DLSE (clearly admonishing employer groups who have raised questions about this unnecessary and confusing requirement) states that every employee is subject to either a written or oral employment agreement:

"This information is one of fact – ***either a written agreement or oral agreement exists***. Providing this information on the notice makes it clear to the employee whether the full terms and conditions of employment are contained in a writing or based upon oral terms."



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FAQ 21 (emphasis added). On the other hand, the DLSE contradicts the above statement by also noting that the obligation to pay wages exists "**even where an employment contract in fact does not exist.**" (FAQ 20.) Further, despite the concerns expressed by employers, the DLSE asserts that identifying whether the employment agreement is written or oral "has nothing to do" with "at will" employment and "indicating whether an employment agreement is written or oral on the notice has no legal effect on Labor Code 2922." (Of course, the presumption of at-will employment contained in Labor Code 2922 may be overridden by an oral, written, or implied agreement.)

Although there is still disagreement in the employer community as to how best to respond to this question, where an employee is subject to a written employment agreement for a specified term, it would likely be appropriate to check "written." Similarly, if the employee is employed pursuant to an integrated written at-will employment agreement (which may be contained in an acknowledgment of receipt of an employee handbook or offer letter), it may be best to check "written" and add a notation that the employment is subject to a written at-will agreement. If there is no written agreement, an employer may want to check "oral," but still note that the notice does not affect the at-will nature of the employment relationship. Employers are advised to address this issue with experienced employment counsel.

Changes in Workers' Compensation Policy Information: The WTPA requires an employer to identify its workers' compensation carrier on the wage notice. In addition, the DLSE requires that the policy number also be included. Further, under the WTPA, an employer must notify its employees in writing of any changes to the information set forth in the notice within seven calendar days after the time of the changes, unless (1) all changes are reflected on a timely wage statement/paystub (which complies 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. Thus, while rate changes reflected on paystubs will not need to be specified in a new notice, employers have asked whether changes regarding workers' compensation carriers or policy numbers will need to be conveyed by distribution of new wage notices.

Fortunately, in FAQ 22, the DLSE explains that change to a workers' compensation carrier or policy number does not trigger a new notice requirement because the employer must post this information pursuant to Workers Compensation Act (Labor Code Section 3550). (It should be noted, however, that, despite the DLSE's reliance on the workers' compensation posting, Labor Code Section 3550 does NOT require employers to provide the workers' compensation policy number. For this reason, it may be advisable to include the policy number on the posting.)

If you have any questions regarding this alert, please contact the authors or any other member our Labor & Employment department.