

**KTA CLIENT ALERT**  
**New Jersey Wage Theft Act<sup>1</sup>**  
**August 27, 2019**

On August 6, 2019, New Jersey adopted a new set of comprehensive employment laws, entitled the *New Jersey Wage Theft Act* (“WTA”), most of which became effective immediately. The WTA significantly increased liability imposed upon employers, as it now allows for treble<sup>2</sup> damages and criminal penalties for employers and employee managers who violate New Jersey’s wage and hour laws. The WTA also increases penalties on NJ employers and provides greater protections for employees who claim retaliatory conduct by his or her employer. Moreover, with respect to employee allegations of retaliatory conduct within 90 days of such action, the WTA presumes the employer to have engaged in unlawful retaliation and shifted the burden of proof from the employee to the employer to establish the employer’s innocence. If successful, the employee is entitled to (i) job reinstatement; (ii) liquidated damages; (iii) lost wages; and (iv) attorneys’ fees.

The WTA affords employees greater ability and incentive to report and bring claims against their employers (and their managers) for many types of wage and hour violations, including the failure to pay the full amount of wages owed (including “off the clock” work), unpaid overtime, and for misclassifying employees as either exempt or as independent contractors. The WTA also extends the statute of limitations for bringing claims to six (6) years from two (2). With increased penalties and the ability for employees to collect attorneys’ fees, the exposure to New Jersey employers will now be far greater than in most states which simply follow the federal Fair Labor Standards Act. New York and New Jersey have similar statutes, but the WTA creates far more potential liability to employers.

The WTA also requires employers to provide to each current and newly hired employee a notice of employee rights under NJ’s Wage and Hour Laws. The notice also must explain how to file claims. The NJ Dep’t. of Labor and Workforce Development is currently preparing a model notice for use by NJ employers.

We recommend that all New Jersey employers audit their practices to ensure that there are no violations, including its methods for recording the hours each employee worked. Where a company has been in business for a long period of time and/or has a significant number of employees, damages for systemic violations can be substantial, in extreme cases causing insolvency and personal liability for owners, officers and directors. Given on

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<sup>1</sup>Thanks to Christopher Shanahan, Esq. for contributing to the preparation of this article.

<sup>2</sup> The amount of the unpaid wages plus 200% of such wages.

the seriousness of these penalties and the potential for employee-based litigation claims, Kudman Trachten Aloe is available to assist clients with implementing proper protocols and to conduct an appropriate audit to ensure compliance.

### **Penalties**

Most significantly, if an employer is found to have committed a violation of the WTA, an employee may seek liquidated damages in an amount equal to the unpaid wages owed plus 200% of such wages, together with associated collection costs and legal fees. Employers also face increased civil fines. The first offense will result in a fine of \$500 plus 20 percent of wages owed and \$1,000 plus 20% of the wages owed for each subsequent offense.

One of the only positives of the WTA from an employer's perspective is that it allows for a good-faith defense to liquidated damages for first time violations. In order to do so, an employer must establish (1) that the action or omission was an inadvertent error made in good faith; (2) it had reasonable grounds for believing that the act or omission was not a violation; and (3) it admits to the violation and pays the amount owed within 30 days of notice of the violation.

Further, the WTA provides for criminal penalties. Employers and any corporate officer or employee found responsible for a wage violation may be found guilty of a disorderly person's offense. It applies to employers or employees who knowingly fail to pay the full amount of wages that are agreed upon or required by law. In addition, for the first violation, employers face fines of \$500 and/or imprisonment of up to 10 to 90 days; and subsequent violations with a fine of up to \$2,000 and/or imprisonment of 10 to 100 days.

The WTA also allows for increased audit rights. The New Jersey Department of Labor ("DOL") has the right to audit any employer within 12 months after receipt of notification of a potential violation. The WTA also empowers the DOL in certain instances to revoke an employer's license or ability to work in the state of New Jersey until the correct wages are paid.

Lastly, starting on November 1, 2019, employers convicted of violating the WTA on two or more occasions can now be found guilty of the crime of "pattern of wage nonpayment," which is a third-degree offense.

### **Joint and Several Liability & Successor Entities**

Employers and any labor contractors providing employees to the employer are now to be held joint and severally liable, thus making them both liable for any WTA violations. The WTA further expands the definition of employer to include any successor employer and imposes a rebuttable presumption that an employer is a successor entity if it meets certain criteria. This expanded definition has significant impact on acquisitions of NJ companies, placing acquirors in the position of having to enhance due diligence efforts around hour and wage law compliance and any retaliation claims.

An acquiror of a NJ company may be deemed an “employer” and therefore incur successor liability for the targets liabilities under the WTA if the target and acquiror share at least two of the following:

1. Perform similar work within the same geographical area;
2. Occupy the same premises;
3. Have the same telephone or fax number;
4. Have the same email address or Internet website;
5. Employ substantially the same work force, administrative employees, or both;
6. Utilize the same tools, facilities or equipment;
7. Employ or engage the services of any person or persons involved in the direction or control of the other; or
8. List substantially the same work experience.

This definition is far broader than the traditional concept of successor liability and will require heightened diligence. In addition, employers could find themselves liable for the employment practices of their labor contractors in certain circumstances.

The statute defines an employer to include not only the entity but also “the officers of a corporation and any agents having the management of that corporation.”

#### **Record keeping Obligations**

The statute now provides that “[u]pon the presentation of sufficient evidence of a violation of this section, the fact finder may infer that an employer who fails to present employee records, as required pursuant to State wage, benefit and tax laws, employed the complainant for the period of time, and owes the amount of wages, as alleged in the complaint, unless the employer demonstrates good cause for the failure to present employee records.” This means where there is a violation of the statute, the burden is on the employer to show the actual hours worked, and the failure to meet that obligation means that the allegations in the complaint would be sufficient without further evidence. This makes it critical for every employer to have adequate records and systems for tracking the amount of time employees actually worked.

#### **Conclusion**

The new provisions of the WTA create significant exposure for employers and will likely lead to increased litigation. We recommend employers implement new policies and procedures to ensure compliance with the WTA. The regulations can be burdensome, and in many instances, employers are unaware that their practices may violate the states wage and hours law. It is important to maintain proper documentation and periodically perform self-audits to ensure all employers are classified correctly and to identify any potential violations. Kudman Trachten Aloe LLP is here to assist in ensuring compliance with all aspects of the WTA.

If you have any questions on these matters, please contact Paul H. Aloe at (212) 868-1888 or [paloe@kudmanlaw.com](mailto:paloe@kudmanlaw.com) or Barry A. Posner at (212) 868-0174 or [bposner@kudmanlaw.com](mailto:bposner@kudmanlaw.com).

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