



Alert

Labor & Employment Client Service Group

To: Our Clients and Friends

January 28, 2010

New York Department of Labor Provides Forms for Compliance with Amended Law; Exempt Employees Must be Notified of Exemption in Writing

As described in our [earlier alert](#), New York Labor Law section 195.1 now requires written notice to employees of their regular and overtime pay rates and their pay dates. This notice must be delivered before an employee commences work, and employers must retain written acknowledgement of this notice for six years.

The New York State Department of Labor (“DOL”) provided a model form in October 2009 to assist employers in complying with this new requirement. However the form contemplated only those employees who receive a single hourly rate of pay and who are eligible for overtime pay.

The DOL now has issued [guidelines](#), [instructions](#), and model forms that contemplate a broad variety of compensation arrangements. In addition to the [original form](#), there now are forms for employees 1) [exempt](#) from overtime pay requirements, 2) who are paid [multiple hourly rates](#), 3) who received a [fixed salary](#) for fewer than forty hours of work per week, 4) who are paid a salary for [varying hours](#), day rate, piece rate, flat rate or other non-hourly pay, and 5) who receive the [prevailing rate](#) for public works projects.

Notably, the guidelines require that the notice to exempt employees must state the specific exemption that applies. While nothing in Labor Law 195.1 calls for employers to communicate this information, it states that the employees’ acknowledgement of notice must “conform to any requirements established by the commissioner with regard to content and form.” Therefore, whether or not they use the DOL form, employers of exempt employees must identify in writing the relied-upon exemption prior to the employee’s commencement of work. Our calls to the DOL’s Labor Standards Division, which enforces New York laws concerning minimum wage, hours worked, and payment of wages, confirm this requirement.

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The DOL's guidelines state that employers are not required to use these forms. But employers must provide written notice with all required information, the employee must receive a copy, and employers must retain a signed acknowledgement for six years.

The guidelines also reference Labor Law 191.1(c), which requires that the payment terms for commissioned salespersons be in writing. The guidelines state that the new Section 195.1 requirements will be met if the notice used to satisfy Section 191.1(c) is kept for six years, and advises 1) whether the salesperson is eligible for overtime pay, and if not, the applicable exemption, 2) the method of calculating applicable overtime pay, 3) the designated pay day or method for determining when pay is due.

The DOL's forms and guidelines state that "most employees" are eligible for overtime pay, and that "a few occupations" are exempt from state and federal overtime pay requirements. Most employers rely on the "white collar" exemptions (applicable to executive, administrative, and professional employees) in determining that overtime pay is not required. Other exemptions are available, including those applicable to outside salespeople and computer professionals. The identification of an appropriate exemption requires a fact-intensive analysis, and care should be used in making this determination.

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For further information, contact Bryan Cave LLP's [Labor and Employment Client Service Group](#).