



New York State Department of Labor
David A. Paterson, Governor
M. Patricia Smith, Commissioner

December 18, 2009



Re: Request for Opinion
Labor Law §195(1)
RO-09-0135

Dear [REDACTED]:

This letter is written in response to your letter dated September 29, 2009 in which you request an opinion as to the recent amendment of Section 195(1) of the Labor Law taking effect October 26, 2009. The six questions raised in your letter are addressed individually below.

1. *Can you confirm that these requirements apply only to new hires on or after October 26, 2009?*

Section 195(1) of the Labor Law, effective October 26, 2009, provides as follows:

Every employer shall...(1) notify his or her employees, in writing, *at the time of hiring* of the rate of pay and of the regular pay day designated by the employer in accordance with section one hundred ninety-one of this article, and obtain a written acknowledgement from each employee of receipt of this notice. Such acknowledgement shall conform to any requirements established by the commissioner with regard to content and form. For all employees who are eligible for overtime compensation as established in the commissioner's minimum wage orders or otherwise provided by law or regulation, the notice must state the regular hourly rate and overtime rate of pay. (Emphasis added)

As you can see, Section 195(1) requires notification "at the time of hiring." Accordingly, the requirements in that section only apply to new hires on or after the effective date of October 26, 2009. Furthermore, in enacting the recent amendment to Section 195(1) the Legislature expressly states that "this act shall take effect on the ninetieth day after it shall have become a

law and shall apply to all employees hired on or after such date.” (L. 2009, Ch. 270, §2.) Accordingly, the new requirements apply only to new hires on or after October 26, 2009.

- 2. Are employees who are exempt from the minimum wage and overtime requirements also exempt from the requirements of Section 195 of Article 6? If not, then can the notice requirement as to these employees be satisfied by disclosing weekly or biweekly salary along with the designated pay day?*

In 2008, the Court of Appeals, in answering a certified question from the Second Circuit Court of Appeals, held that an employee’s status as an executive and an “exempt” employee, even a very well compensated one, does not remove her from the definition of “employee” in Article 6 of the Labor Law unless otherwise removed. (*See, Pachter v. Bernard Hodes Group, Inc.*, 10 N.Y.3d 609.) While several sections in Article 6 remove categories of employees from that section’s coverage (e.g. Section 192), Section 195 applies to all “employees” regardless of their status as exempt from minimum wage and overtime pay.

With regard to the second part of your question, it must be noted that nothing in Section 195(1) requires that the employee be provided notice of his or her hourly rate of pay; rather it just requires that the employee be given notice of “the rate of pay.” Accordingly, the notice requirements may be satisfied by disclosing the weekly or biweekly salary, and the number of hours for which it is intended to cover, along with the designated pay day. For more information on the content of the written notice and written acknowledgement required by Section 195(1), consult the Department of Labor’s website. For employees that are not covered by the State or Federal overtime pay requirements, notification of such shall be deemed to satisfy the notification requirements in Section 195(1).

- 3. ...[F]or employees who may be paid at two or more hourly rates, or may be paid an hourly rate plus additional compensation, such as various forms of production related expenses, how does the employer comply with these [Section 195(1) particular requirements? Will it be permissible for employers to make these disclosures in some type of formulaic explanation?*

Please consult the materials and forms provided on the Department of Labor’s website:

<http://www.labor.state.ny.us/workerprotection/laborstandards/workprot/lshmpg.shtm>

- 4. Does the acknowledgement [required in Section 195(1)] have to be maintained in paper form or can it be created and stored in electronic format? If an electronic format it permissible, can the employee acknowledge receipt of the notice by checking an electronic box, i.e. electronic signature? Can the required notice be furnished in electronic format in order to avoid unnecessary paper usage? If the employer chooses to use paper, or is required to use paper, for either or both the notice and the acknowledgement, does the employer have to provide duplicate copies of either document for the employee to retain?*

As you can see from above, Section 195(1) specifies that the notice required therein must be provided "in writing" and that the acknowledgement obtained from each employee of receipt of the notice be "written" in accordance to the requirements as to content and form set forth by the Department. It is the position of this Department that the notice and acknowledgement may be provided to the employee electronically so long as the following conditions are met:

- The employer must ensure that the employee has access to a computer with printing capabilities so that the employee is able to access and print a copy of the notice of the time of hire and at any time throughout the employment relationship. No employee may be charged any fee, directly or indirectly, for access to, or printing of, a notice pursuant to Section 195(1).
- The notice must be in a format that the employee is able to review at the computer in which he/she has access. (e.g. web page, word processing document, etc.)
- Affirmative steps are required by the employee to acknowledge receipt of the notice. The employer must ensure that the form of the acknowledgement is sufficient to guarantee that the employee has received and reviewed the notice, and that the employee is aware that his/her actions have legally significant consequences.
- Examples of sufficient forms of acknowledgment include, but are not limited to the following:
 - An acceptable electronic signature under the State Electronic Signature and Records Act. (NYS Technology Law §301 *et seq.*) For further guidance on the adequacy of an electronic signature under that Act, please refer to the guidelines and regulations promulgated by the New York State Chief Information Officer and Office of Technology Electronic Signatures and Records Act (ERSA).
 - An electronic response through email containing a notification of pay rate which positively states that the employee acknowledges receipt of the notice. However, evidence of mere receipt of such notification is insufficient.
 - In instances in which an employee is provided notice through a "hiring terminal," like those commonly seen in large retail establishments for which employees may fill out job applications, or an employer internet page, acknowledgement may be provided instantaneously so long as the employee is required to affirmatively indicate receipt of the notice.
 - Through a scanned or faxed image of the signed notice and acknowledgement.

With regard to your question regarding whether employers are required to provide duplicate copies of the notice and/or acknowledgement form, please be advised that employers

are only required to provide a written, duplicate copy of the notice form, not the acknowledgement, since nothing in Section 195(1) requires that a written copy be provided. It is worth noting that a copy of the notice form must be provided to the employee free of charge.

5. *How long after the "time of hiring" does the employer have to furnish the required notice and obtain the acknowledgment? Can this be done in connection with new employee orientation/training when other required paper work is completed; even though this may take place days after the hiring decision is made?*

Since Section 195(1) expressly requires that the employee be provided notice "at the time of hiring," an employer may not provide such notice after the time of hiring.

6. *Can you confirm that no additional notice and acknowledgment is required when an employee's rate of pay is changed subsequent to the time of hiring?*

While nothing in Section 195(1) requires the employer provide written notice or obtain an acknowledgement of receipt of notice for subsequent changes in pay, please be advised that Section 195(2) provides that "[e]very employer shall notify his employees of any changes in pay days prior to the time of such changes." Although no written requirement exists in Section 195(2) similar to that contained in Section 195(1) discussed above, copies of written notice and acknowledgement provided are helpful as proof of an employer's compliance with the requirements of Section 195(2).

This opinion is based on the information provided in your letter dated September 30, 2009. A different opinion might result if the circumstances outlined in your letter change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By:



Jeffrey Shapiro
Associate Attorney

JGS:MP

cc: Carmine Ruberto