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Employers Should Be Aware of Recent Changes and Additions to Key D.C. Employment Laws

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Over the past several months, the District of Columbia has enacted a number of legislative initiatives that significantly modify existing D.C. employment laws and will impose substantial new burdens on employers who have employees or temporary employees in the District of Columbia. Below, we provide a guide to the most critical of these initiatives.

The Wage Theft Prevention Amendment Act of 2014

On February 26, 2015, the Wage Theft Prevention Amendment Act of 2014 (D.C. Act 20-426) ("the Act") will make dramatic changes to the District of Columbia's wage payment, minimum wage, and sick leave statutes (unless the current schedule for Congressional review for the Act is revised again).[1] The Act amends four pre-existing D.C. statutes: the Wage Payment and Collection Law ("WPCL"), D.C. Code § 32-1301, *et seq.*; the Minimum Wage Revision Act ("MWRA"), D.C. Code § 32-1000, *et seq.*; the Living Wage Act ("LWA"), D.C. Code § 2-220.01, *et seq.*; and the Accrued Sick and Safe Leave Act ("ASSLA"), D.C. Code § 32-131.01, *et seq.* The changes are designed to make existing D.C. wage laws even more employee-friendly by subjecting employers to new administrative requirements, higher evidentiary burdens, and more stringent financial and even criminal penalties in some instances where employers are found to have violated the law.

While we strongly encourage our clients to review the text of the Act (link here), the most important changes to current law are:

Expanded Coverage, Repeal of Employer Safe Harbor, and Increased Penalties Under the Wage Payment and Collection Law. The WPCL governs the timing of regular wage payments to employees and wage payments upon termination, suspension, and resignation. The Act expands coverage of the WPCL to include executive, administrative, and professional employees, all of whom were previously exempt from the WPCL.[2] Most notably, employers now have only *1 working day* after discharge to pay departing employees—both salaried and hourly—any wages due. The Act also eliminates a safe harbor provision from the WPCL that worked to the advantage of employers in the event of a bona fide dispute about the amount of money the employer owed. Under prior law, the employer fully complied with the Act by paying what it believed in good faith was owed, placing the burden on the employee to sue for any discrepancy; that provision has been eliminated. Finally, the Act also establishes misdemeanor criminal penalties for an employer's *negligent* failure to comply with the WPCL

or the LWA. The shortened payment period, the elimination of the safe harbor, and the imposition of *criminal* penalties demand every employer's immediate attention.

New Notice, Timekeeping, and Recordkeeping Requirements, and Increased Penalties Under the Minimum Wage Revision Act. The MWRA requires employers to pay a minimum wage and overtime to their nonexempt employees. The Act will now require employers to give written notice of certain information about their rights under MWRA, and mandates that the notice be provided in English and, to the extent that translated versions are provided by the Mayor, in each employee's primary language (if the employer knows what language that is) or any other language the employee requests.[3] Although there is still some ambiguity surrounding the MWRA revisions, the February 3 amendments suggest that this requirement applies to both exempt and non-exempt employees. The notice must not only be furnished to all new employees at the time of hire, but the employer must also provide the notice personally to each of its current D.C. employees within 90 days of the Act's effective date, and provide an updated notice whenever any of the required information changes. Employers must keep copies of the written notice, *signed and dated by both the employer and employee*, acknowledging receipt of the notice. The Act also requires for the first time that the employer record the "*precise*" *times* during the day that each nonexempt employee works (not just the number of hours worked), although the word "precise" is undefined. In addition, the Act increases fines and administrative penalties for both willful and negligent violations of the MWRA, including up to 6 months' imprisonment for a willful or second offense.

Imposition of Joint and Several Liability. For the first time, the Act imposes joint and several liability on general contractors and subcontractors, as well as temporary staffing firms and the employers to which they supply employees, for violations of the WPCL, MWRA, LWA and ASSLA. These provisions generally require subcontractors and staffing firms to indemnify general contractors and employers, unless certain conditions are met. Emergency amendments to the Act clarify that these changes will not alter pre-existing contracts with explicit provisions to the contrary.

More Muscular Retaliation Provisions. The Act imposes broad retaliation protections for any employee who has "made or is believed to have made a complaint to his or her employer, the Mayor, the Attorney General for the District of Columbia, any federal or District employee, *or to any other person* that the employer has engaged in conduct that the employee, reasonably and in good faith, believes violates any provision" of the WPCL, MWRA, or LWA (emphasis added). The retaliation amendments are full of ambiguities; the Act does not define, for example, the phrase "any other person." Significantly, the Act imposes a *presumption of retaliation* for any adverse action taken within 90 days of an employee engaging in any protected activity; that presumption may be rebutted only by "clear and convincing evidence that such action was taken for other permissible reasons."

New Enforcement Mechanisms and Penalties. The Act establishes a new, detailed investigation and enforcement scheme with an expedited administrative process for claims under the WPCL, MWRA, LWA and ASSLA, that may be triggered by employees in lieu of bringing a civil action (which is also available). The Act also provides that an employer's license to do business in the District can be denied or suspended in certain circumstances as a result of violations.

Given the substantial changes the Act will make to legal standards, the increased administrative requirements, and enhanced penalties, it will be imperative for employers to review and update their timekeeping and wage payment policies to ensure compliance with the Act. We will continue to monitor the status of the Act as the law is implemented, and as the many ambiguities become resolved in litigation or by administrative action.

The Accrued Sick and Safe Leave Act

Significant amendments to the District of Columbia's Accrued Sick and Safe Leave Act of 2008 are now fully in effect. The new amendments expand coverage under the Act, accelerate the ability of employees to access accrued leave of up to seven days per year, and strengthen the remedies available to employees. Although not all of the changes are listed here, employers should take particular note of the following key revisions:

Expanded Coverage. Under the amendments, "tipped" restaurant and bar employees are now covered, and are entitled to receive at least one hour of paid leave for every 43 hours worked, not to exceed 5 days per calendar year. The Act also now expressly applies to "indirect" employers (*e.g.*, employers who engage temporary workers or use a staffing agency), as long as the employer controls the wages, hours, and working conditions of their workers.

Accelerated Leave Accrual and Access. Although the amendments do not change the amount of leave employers must provide,[4] they do provide that employees begin accruing leave on their date of hire. Under the amendments, employees are also entitled to use their leave after only 90 days of employment.

Access To Leave Upon Reemployment. The amendments also address the leave entitlement of individuals who are subsequently rehired by a prior employer. Although the Act does not require employers to pay accrued leave as cash upon termination or resignation, the amendments provide that individuals reemployed by the same entity may be entitled to access the leave they had accrued prior to departing; employees who are rehired within one year may access all prior accrued leave. Employees rehired after one year are treated as new employees for leave accrual and use purposes, and cannot access leave previously accrued.

Enhanced Anti-Retaliation Provisions. The amendments significantly bolster the Act's anti-retaliation provisions. Now, if an employer takes any adverse action against an employee within 90 days of an employee engaging in any form of protected activity, that temporal proximity alone creates a rebuttable presumption that the employer has violated the Act; the employer must then prove that it had a legitimate basis for the adverse action. Protected activity under the Act includes such things as complaining to the employer, filing a complaint with the District's Department of Employment Services ("DOES"), filing a civil complaint alleging any violation of the Act, informing "any person" (an undefined phrase) about the employer's alleged violation of the Act, and cooperating with DOES or any other entity's investigation or prosecution of any violation of the Act.

Recordkeeping Procedures. All employers in the District must now retain for a period of 3 years any records documenting hours worked and any paid leave taken by employees. If an issue arises as to an employee's entitlement to leave, an employer's failure to maintain or

retain these records as required by the Act creates a rebuttable presumption that the employer has violated the Act.

DOES has published a revised "Official Notice" reflecting these amendments that all employers in the District are required to post. A copy of that notice is available here on the DOES website.

The amendments are ambiguous, and are filled with undefined terms; much remains to be determined regarding the reach of these new requirements. Nonetheless, employers should review their current leave policies and practices to ensure compliance with the Act.

Ban the Box Legislation

The District of Columbia's Fair Criminal Record Screening Act went into effect on December 17, 2014. Commonly referred to as the "Ban the Box" legislation, the new law prohibits employers from inquiring into a job applicant's criminal background until after the employer has made a conditional offer of employment. The new restriction applies to nearly every employer with 11 or more employees in the District (*see exceptions below*). The Ban the Box bill changes existing law by doing the following:

Prohibited Inquiries—No Criminal Records Questions Until a Conditional Offer is Made. Under the new law, an employer may not make an inquiry about or require an applicant to disclose or reveal an arrest, a criminal accusation that is not currently pending or did not result in conviction, or a criminal conviction, until after making a conditional offer of employment.

Limited Exceptions For Certain Positions. The law does not apply where a federal or District law or regulation would affirmatively require the employer to consider an applicant's criminal history for the purposes of employment. The law also does not apply when an employer is specifically looking to hire individuals with criminal histories, and exempts employers that provide programs, services, or direct care to minors or vulnerable adults.

To Rescind an Offer Based on the Results of a Background Check, D.C. Employers Must Follow Six Steps. Under the new law, an employer may only withdraw a conditional offer made to an applicant for a "legitimate" business reason. To determine whether a business reason is "legitimate," the employer must actually consider each of 6 specified factors:

The specific duties and responsibilities necessarily related to the position sought or held by the applicant;

Whether the prior conviction will bear on the applicant's fitness or ability to perform a duty or responsibility of the position;

The time elapsed since the criminal offense;

The applicant's age at the time of the offense;

The frequency and seriousness of the offense; and

Any information produced by the applicant or on his or her behalf regarding his or her rehabilitation and good conduct since the offense.

Applicants May Request Their Records. If an applicant believes his or her application was rejected or a conditional offer was rescinded because of a criminal record, and the applicant communicates this belief to the employer, the employer must provide a notice that advises the applicant of his or her opportunity to file an administrative complaint with the D.C. Office of Human Rights. Within 30 days of the rescinded offer or adverse action, the applicant may request that the employer provide the applicant with a copy of all of the records procured by the employer in considering the applicant, including any criminal records. The employer must then fulfill the request within 30 days.

Enforcement and Penalties. Only the District's Commission on Human Rights may bring a charge against an employer; there is no private right of action. An individual must file a complaint to the District's Office of Human Rights within one year of the alleged incident. If the Commission finds a violation has occurred, it may impose fines of at least $1,000 and as much as $5,000, depending on the size of the employer's workforce. Half of the civil penalty amount will be awarded to the successful complainant.

Employers should update their job application forms and review their hiring process to ensure compliance with the new restrictions on conducting background checks.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:

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1 The D.C. Council passed emergency amendments to the Act on December 2, 2014, and again on February 3, 2015, clarifying several ambiguities in the language of the original Act.

2 The February 3 amendments clarify that the WPCL provision requiring employers to pay employees at least twice a month still does not apply to exempt employees.

3 The Act states that the mayor will make available a sample template of the notice within 60 days of the Act's effective date.

4 Accrual of paid leave is determined by a variety of factors, including type of business, the number of employees an employer has, and the number of hours each covered employee works. With the exception of the "tipped" restaurant and bar employees discussed above, the District uses a sliding scale to determine the amount of leave employers must provide: (1) employers with 100 or more employees must provide 1 hour of paid leave for every 37 hours worked, not to exceed 7 days per calendar year; (2) employers with between 25-99 employees must provide 1 hour of paid leave for every 43 hours worked, not to exceed 5 days per calendar year; and (3) employers with less than 25 employees must provide 1 hour of paid leave for every 87 hours worked, not to exceed 3 days per calendar year.