

DLSE Updates California Wage Theft Prevention Act FAQs

Despite the DLSE's effort to provide guidance to employers on compliance with the act, questions remain.

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California's new Wage Theft Prevention Act (WTPA), California Labor Code § 2810.5, which went into effect on January 1, 2012, continues to generate questions, despite the publication of multiple versions of Frequently Asked Questions (FAQs) regarding employer requirements.

The WTPA requires employers to provide all new nonexempt hires with written notice of specific information. Morgan Lewis's prior LawFlash outlining the requirements of the new statute can be found online at http://www.morganlewis.com/pubs/LEPG-LF_CAWageTheftPreventionActTakesEffect_30dec11.pdf.

The WTPA required California's Labor Commissioner to prepare a template of the written notice, which the Division of Labor Standards and Enforcement (DLSE) issued on December 29, 2011, just before the law went into effect. A copy of the template is available online at http://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html.

The DLSE's notice template generated numerous questions from employers as to practical implementation as well as the broad scope of the template, which included information not required by the law itself. The DLSE published FAQs on December 30, 2011, which the DLSE revised on January 3 and then again on January 23. The revised FAQs address some of the many inquiries that the DLSE has received in connection with its original FAQs and wage notice template. The revised FAQs can be found online at <http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html>.

Below are highlights of the revised FAQs as well as responses to FAQs by employers that have been generated by the WTPA, the notice template, and the DLSE's FAQs.

Q1. Who must receive a notice under the WTPA?

Although the WTPA requires that a notice be given only at the time of hire and within seven days after a change in information, the DLSE now states that it would be a "best practice" to also provide the notice to **current employees**. The notice need not be provided to exempt employees or to employees covered by union contracts that include certain wage and hour terms as specified in the statute. (See DLSE FAQ #2, 3.)

Q2. Should the DLSE’s WTPA notice template be used as written? Are any modifications allowed?

Although employers are not statutorily required to use the DLSE’s notice template, it is advisable to do so to ensure compliance with the WTPA. The notice must be provided in a stand-alone form and may be provided electronically so long as there is a method for the employee to acknowledge receipt and print the notice. Although the DLSE acknowledges that employers are not required to use its notice template, it states that the employer’s form must “contain all the information required by the law, including all of the information requested on the DLSE’s template.” (See DLSE FAQ #6, 7, 9.) This guidance warns against **eliminating** information included in the notice template.

Because FAQ #6 permits employers to tailor the notice, however, some additions to the template should be acceptable and may be advisable. Some examples of possible additions are the following:

- The notice template inquires whether there is a written or oral employment agreement. Adding a disclaimer reminding employees that they are employed at will may be appropriate.
- In the “Wage Information” section of the template, if employees are subject to commission plans, employers should check the “Other” box and state something like the following: “Incentives pursuant to written plans.” The new FAQ #18 now appears to mandate this because it provides that, if there is a separate document that contains formulas or calculations, it should be referenced in the notice.
- If employees have variable pay, employers should add a line in the “Overtime Rate(s) of Pay” section about “potential additional amounts in compliance with applicable law.” The new FAQ #19 now appears to require this.

Q3. What procedures should be followed if an employee has multiple pay rates?

The DLSE states that all applicable rates must be provided in the notice. The information may be provided in a separate sheet that is attached to the notice. The notice must contain a clear reference to an attachment in the “Rate(s) of Pay” line. (See DLSE FAQ #12.)

Q4. Does “the rate or rates of pay” required on the notice require inclusion of other compensation for work performed?

According to the DLSE, “pay” is not limited to a time-based or piece-based measure of compensation but includes all rates fixed or ascertained by calculation. Further, the DLSE considers “pay” to be synonymous with “wages.” Therefore, if a rate is fixed by hour, commission, piece rate, or a combination thereof, each such rate must be provided in terms of a money value and basis for earning such rate (e.g., \$10 per hour). If the rate is determined by some other method of calculation, specific formulas need not be included, but the employer is required to state all rates of compensation and the basis of pay (e.g., “\$10 per hour, plus commissions of ___% of sales closed during prior month”). If there is a separate document that contains formulas/calculations, it should be referenced in the notice. (See DLSE FAQ #18.)

Q5. Can the employer simply state on the notice that the overtime rate is a multiplier (1.5 times or double) of the regular rate of pay?

The DLSE’s position is that if an employee receives only an hourly pay rate, which is something that is “known and determinable,” the employer must state the specific overtime rate in terms of a money

value—e.g., if the regular hourly rate is \$10, the overtime rate should be stated as “\$15 (time and one-half) after 8 hours and \$20 (double time) after 12 hours.” However, if the employee receives other types of pay in addition to the hourly rate, such as supplementary commissions or bonuses, the employer must state the overtime rate in terms of a money value for the hourly rate and also indicate that such specified overtime rate is subject to upward adjustment. For example, if the regular hourly rate is \$10, the overtime rate should be stated as “\$15 (time and one-half) after 8 hours and \$20 (double time) after 12 hours, plus potential additional amounts in compliance with applicable law.” (See DLSE FAQ #19.)

Q6. When does a “hire” occur for the purpose of providing the required notice to an employee?

The DLSE states that the employer “must provide the notice to new hires reasonably close in time to the inception of the employment relationship, whether it is created under a unilateral contract (commencing only upon performance by an employee) or a bilateral/executory contract (commencing upon acceptance of an offer of employment made by an employer).” Based on this language, it appears appropriate to provide the notice after all contingencies on a contingent offer are satisfied or by the first day of work (along with “new hire” paperwork). (See DLSE FAQ #20.)

Q7. Why does specification of a written agreement require that a box be checked to indicate whether it is written or oral? Does this information affect the employment at-will doctrine?

The notice template includes a provision asking employers to check a box indicating whether the employment agreement with the employee is written or oral. According to the DLSE, indicating whether an employment agreement is written or oral has no legal effect on Labor Code § 2922 (which contains the presumption of at-will employment). The DLSE states that the purpose of this question is to make “clear to the employee whether the full terms and conditions of employment are contained in a writing or based upon oral terms.” The DLSE states that this designation has nothing to do with whether or not an employee is “at will” under California law. (See DLSE FAQ #21.)

Employer responses or modifications that may be appropriate for this portion of the notice include the following:

- If the company provides a written offer letter with at-will language, check the “written” box on the DLSE notice template.
- Expressly define the written employment agreement as the agreement governing only pay rates.
- Check both the oral and written boxes if applicable, or add a third box indicating that both an oral and a written agreement govern wages and other terms and conditions.
- Add a reminder that employment is at will, notwithstanding any acknowledgement of a written employment agreement.

Q8. If workers’ compensation policy information is required on the notice, does any change in policy carrier or policy number require that a new notice be issued to every employee?

No. If a workers’ compensation policy number changes, this does not require a new notice to be issued because this change can be provided through the posting of a new workers’ compensation notice that is required under Labor Code §§ 3550-3551. (See DLSE FAQ #22.)

Q9. When providing information regarding the regular payday, can an employer simply state “bimonthly, biweekly,” etc., rather than a specific date?

The employer is *not* required to provide a specific date. The notice should include the regular day(s) of the month when wages will be paid in addition to the measure of time between paydays (e.g., 1st and 15th of every month; 1st and 2nd Friday of every month; each Friday of every month). (See DLSE FAQ #24.)

Q10. Who must sign the acknowledgement of the notice on behalf of the employer?

The DLSE’s notice template includes a section for the employee to acknowledge receipt of the notice. A space is included for an “employer representative” to also sign and provide the date on which the employee was given the notice. According to the DLSE, “[t]he employer representative may be any person the employer has authorized to sign the acknowledgment.” (See DLSE FAQ #23.)

Q11. If the employer has multiple office addresses, which one should be included on the notice? The company headquarters? The office where the employee works?

The WTPA requires that the notice include “[t]he physical address of the employer’s main office or principal place of business, and a mailing address, if different,” as well as the employer’s telephone number. The address that constitutes the company’s headquarters—not necessarily the location where the employee works—appears to be the appropriate address.

Conclusion

The ambiguities in the WTPA, the DLSE’s notice template, and the FAQs, as well as the open question of whether the notice template exceeds legislative intent, will continue to generate confusion—confusion that could lead to litigation. However, there currently is no indication that the DLSE has any plans for additional revisions to the FAQs or the notice template. Thus, employers should make their best efforts to understand and comply with the new law and the notice template in its current form.

For more information regarding the topic discussed, please contact any of the following Morgan Lewis attorneys:

Irvine

Anne M. Brafford	949.399.7117	abrafford@morganlewis.com
Carrie A. Gonell	949.399.7160	cgonell@morganlewis.com
Barbara J. Miller	949.399.7107	barbara.miller@morganlewis.com

Los Angeles

John S. Battenfeld	213.612.1018	jbattenfeld@morganlewis.com
Barbara A. Fitzgerald	213.612.7208	bfitzgerald@morganlewis.com

Palo Alto

Tram-Anh T. Frank	650.843.7585	tfrank@morganlewis.com
Carol R. Freeman	650.843.7520	cfreeman@morganlewis.com
Daryl S. Landy	650.843.7561	dlandy@morganlewis.com

San Francisco

Rebecca Eisen	415.442.1328	reisen@morganlewis.com
Eric Meckley	415.442.1013	emeckley@morganlewis.com

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