

VENABLE[®]LLP

Employment Law Update

DC, Maryland, and Virginia

May 6, 2015

9:00 a.m. – 10:30 a.m.

Venable LLP
575 7th Street, NW
Washington, DC 20004





Employment Law Update: DC, Maryland, and Virginia

Everything You Need to Know about the Supreme Court Pregnancy Decision, New Local Employment Laws on Wage Theft, Pregnancy, Ban the Box, Marijuana, Social Media, and the DC Zip Code Project – In 90 Minutes

9:00 – 9:10 a.m.

Introduction

Douglas B. Mishkin, Esq. | Venable LLP
Partner, Labor and Employment Practice Group

9:10 – 9:20 a.m.

DC Wage Theft Amendment

Sandi Pessin Boyd, Esq. | Venable LLP
Associate, Labor and Employment Practice Group

9:20 – 9:30 a.m.

DC Sick and Safe Leave Act and MD Parental Leave

Kishka F. McClain, Esq. | Venable LLP
Partner, Labor and Employment Practice Group

9:30 – 9:40 a.m.

Young v. UPS and DC Protecting Pregnant Workers Fairness Act

Douglas B. Mishkin, Esq. | Venable LLP
Partner, Labor and Employment Practice Group

9:40 – 9:50 a.m.

Ban-the-Box

Sandi Pessin Boyd, Esq. | Venable LLP
Associate, Labor and Employment Practice Group

9:50 – 10:00 a.m.

DC Prohibition of Pre-Employment Marijuana Testing Act

Kishka F. McClain, Esq. | Venable LLP
Partner, Labor and Employment Practice Group

10:00 – 10:10 a.m **Update On VA Employee Privacy: Social Media**

Kishka F. McClain, Esq. | Venable LLP
Partner, Labor and Employment Practice Group

10:10 – 10:20 a.m **DC Zip Code Project**

Ronald W. Taylor, Esq. | Venable LLP
Partner and Maryland Labor and Employment Practice Group Head
and
Sandi Pessin Boyd, Esq. | Venable LLP
Associate, Labor and Employment Practice Group

10:20 – 10:30 a.m **Questions and Discussion**

Speakers



Douglas B. Mishkin, Esq.
Venable LLP

Partner, Labor and Employment
Practice Group

Doug Mishkin is a partner in Venable's Labor and Employment Group with over 30 years of experience litigating on behalf of businesses and nonprofits. He focuses on litigating about and counseling on theft of trade secrets and breach of noncompetes, with significant experience as well in discrimination, harassment, wage and hour, and employment contract disputes. Mr. Mishkin is a trained mediator, and both represents clients and has served as a mediator. For over 25 years, he has served on the George Washington University Hospital Ethics Committee, where he has participated in drafting policies regarding infectious disease in the workplace.

An experienced trial attorney, Mr. Mishkin has represented clients in state and federal courts across the country. He frequently handles matters in proceedings initiated by the Equal Employment Opportunity Commission and human rights agencies.

Prior to joining Venable, Mr. Mishkin co-chaired the employment law practice at an international law firm for over 15 years. In 1992, he served on President Bill Clinton's transition team for the Equal Employment Opportunity Commission. He has been interviewed on National Public Radio's "All Things Considered" and the CBS "Early Show."



Sandi Pessin Boyd, Esq.
Venable LLP

Associate, Labor and Employment
Practice Group

Sandi Pessin Boyd is an associate in Venable's Labor and Employment Group, where she represents public and private sector clients in employment litigation and counseling. She has worked on a variety of matters including discrimination, harassment, retaliation, employee benefits, labor organizing, and compliance with wage and hour law claims.

Ms. Boyd is an active participant in Venable's pro bono program and has been recognized on the District of Columbia Bar's 2012 Capital Pro Bono High Honor Roll. Ms. Boyd has successfully defended several non-profit organizations against employment discrimination litigation in both state and federal court, and has provided advice to non-profit organizations on preventing employment lawsuits, lawful termination, and complying with DC, Maryland, and federal law.

Speakers



Kishka F. McClain, Esq.
Venable LLP

Partner, Labor and Employment
Practice Group

Kishka McClain is a litigator and negotiator focusing her practice on employment discrimination matters. Ms. McClain also advises clients regarding compliance with federal laws and provides solutions to clients regarding their healthcare and prescription drug costs. Ms. McClain has represented clients in the education, government contracting, retail and healthcare industries.

Ms. McClain represents and counsels clients in all aspects of employment law and has successfully represented management in the defense of age, race, gender, religion and disability discrimination cases in state and federal courts, and administrative charges before the EEOC and local agencies. Ms. McClain routinely conducts internal investigations of employment discrimination claims and has obtained satisfactory settlements of claims. Ms. McClain has trial experience, including serving as second-chair in a federal jury trial successfully defending a national university against allegations of sexual harassment, retaliation and breach of contract by a former visiting professor and serving on the trial team in a state-level jury trial defending a national retail pharmacy in a wrongful death claim. Ms. McClain has also managed appeals in both the federal appellate courts and the United States Supreme Court.



Ronald W. Taylor, Esq.
Venable LLP

Partner and Maryland Labor and
Employment Practice Group Head

Ron Taylor heads Venable's Maryland Labor and Employment Practice Group. Mr. Taylor advises and defends employers nationwide on occupational safety and health issues and on a wide variety of labor and employment law matters, including wage and hour, privacy, non-compete, collective bargaining, employment discrimination, disability, and wrongful discharge.

Mr. Taylor's clients include a broad array of private, public, and non-profit businesses of all sizes located throughout the United States. With nearly 30 years of experience, he has been consistently identified as one of the most recognized Maryland labor and employment lawyers, and noted for his sound judgment and ability to achieve great results for his clients, as well as for his extensive experience in occupational safety and health law.



Agenda

- Introduction
- DC Wage Theft Amendment
- DC Sick & Safe Leave Act & MD Parental Leave
- *Young v. UPS* and DC Protecting Pregnant Workers Fairness Act
- Ban-the-Box
- DC Prohibition of Pre-Employment Marijuana Testing Act
- Update on VA Employee Privacy: Social Media
- DC Zip Code Project



Background on Minimum Wage and Overtime Law

- Federal and DC law on minimum wage and overtime
- What bothers DC Department of Employment Services:
 - Misclassification of employees as exempt
 - Failure to record and pay overtime hours
- What the DC Wage Theft law does *not* change:
 - Compliance with FLSA is compliance with DC wage hour law
 - Exempt employees don't get overtime
 - Employers don't need to track exempt employee time

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DC Wage Theft Amendment Act

- DC Wage Theft Amendment Act Amends:
 - Minimum Wage Act Revision Act of 1992
 - Accrued Sick and Safe Leave Act of 2008
 - Living Wage Act of 2006

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DC Wage Theft Amendment Act

- Overview of New DC Wage Theft law:
 - New notice requirement
 - New posting requirement
 - New record-keeping requirements
 - Increased penalties
 - Joint and several liability for general contractors and temporary staffing firms



DC Wage Theft: New Notice Requirement

- **The New Notice Requirement:** Employers are required to provide written notice to all current and future employees that contains:
 - The name of the employer and any "doing business as" names used by the employer
 - The physical address of the employer's main office or principal place of business, as well as a mailing address, if different
 - The telephone number of the employer
 - The employee's rate of pay and the basis of that rate, including by the hour, shift, day, week, salary, piece, and/or commission
 - Any allowances claimed as part of the minimum wage, including tip, meal, or lodging allowances
 - Overtime rate of pay and exemptions from overtime pay
 - The living wage and exemptions from the living wage
 - The applicable prevailing wages
 - The employee's regular payday designated by the employer
- **Compliance Deadline:** All new employees must receive this notice immediately. All current employees must receive a copy of this notice by **May 27, 2015**



DC Wage Theft: Posting Requirement

NOTICE OF HIRE - EMPLOYMENT STATUS AND ACKNOWLEDGMENT OF WAGE RATE(S)

Section 1: General Information

Section 2: Company Information

Section 3: Employee Information

Section 4: Employment Status

Section 5: Acknowledgment

TEMPORARY STATUS FORMS NOTICE OF HIRE - EMPLOYMENT STATUS AND ACKNOWLEDGMENT OF WAGE RATE(S)

Section 1: General Information

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DC Wage Theft: Notice Template

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DC Wage Theft: New Penalties

■ New Penalties:

- Liquidated damages equal to treble the amount of unpaid wages for violations of the Wage Payment Act
- Denial of a business license for 3 years for willful violations and suspension of a business license for failure to comply with administrative orders or conciliation agreements within 30 days of issuance
- Negligent Violations: \$2,500 for a first offense, and \$5,000 for each subsequent offense per affected employee
- Willful Violations: \$5,000 and/or imprisonment of up to 30 days for a first offense, and up to \$10,000 and/or imprisonment up to 90 days for subsequent offenses
- Misdemeanor liability and fines for employers who negligently fail to comply with this Act or the Living Wage Act

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DC Wage Theft: FAQ

■ Notice Requirement

- Will additional languages be provided?
- Can employers provide employees the notice electronically?
- Is an electronic signature sufficient?
- What if an employee refuses to sign the notice?

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DC Amended Sick and Safe Leave Act

- 2013 Amendments took effect 2014
 - Expanded definition of employees protected by the Act
 - Strengthened remedies and procedures available to employees under the Act
 - Established an outreach program to inform the public about the Act
- Revised poster available on DOES website



MD Parental Leave Act

- Effective October 1, 2014
- Covers small employers in Maryland
- Provides unpaid leave for birth/adoption
- Job restoration rights
- Intersection with FMLA



Young v. United Parcel Service, Inc.

- Pregnancy Discrimination Act: treat pregnancy like other short-term disabilities
- UPS: accommodate short-term disabilities from on-the-job activity, not off-the-job
- Supreme Court: “Why, when the employer accommodated so many, could it not accommodate pregnant workers as well?”
- What this means for you:
 - Wait and see
 - Treat pregnancy as well as you treat any short-term disability?



DC Protecting Pregnant Workers Fairness Act

- Pregnancy must be reasonably accommodated
- This is beyond the federal Pregnancy Discrimination Act
- Accommodate where ability to perform job is limited by:
 - Pregnancy
 - Childbirth
 - Related medical condition
 - Breastfeeding
- Accommodate employees who spend 50% of working time in DC
- Other jurisdictions include Maryland



DC Ban-the-Box: Who Is Included?

- Includes:
 - All public and private employers who employ 11 or more employees in DC
- Excludes:
 - Any facility or employer that provides programs, services, or direct care to minors or vulnerable adults;
 - Positions where a federal or DC law or regulation requires consideration of an applicant's criminal history;
 - Positions designated by the employer as part of a federal or DC program designed to encourage employment of those with criminal histories
 - The DC courts



DC Ban-the-Box

- PROHIBITED:
 - Asking about arrests or criminal accusation that did not result in a conviction or pending during the application process
 - Asking about criminal history prior to conditional offer of employment through application forms, interviews, or criminal history checks



DC Ban-the-Box

- PERMITTED:
 - An employer can ask about an applicant's criminal convictions *after* making a conditional offer of employment
 - An employer can withdraw an offer after learning about an applicant's criminal history if the employer has a "legitimate business reason" and takes certain factors into account



17

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DC Ban-the-Box: Withdrawal of Offer

- Factors that must be considered in rescinding an offer because of criminal history:
 - The specific duties and responsibilities of the position
 - The bearing of the criminal offense on the applicant's fitness or ability to perform the job
 - The time that has elapsed since the offense
 - The age of the applicant at the time of the offense
 - The frequency and seriousness of the offense
 - Any information provided by the applicant to show that s/he has been rehabilitated



18

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DC Ban-the-Box: Claim of Discrimination

- Applicant Request for Records:
 - Within 30 days of an applicant's request, an employer must provide to an applicant:
 - A copy of all records procured by an employer in consideration of the applicant
 - A notice advising the applicant of his or her right to file an administrative complaint with the D.C. Office of Human Rights



MD Ban-the-Box: Montgomery County

- Montgomery County: Effective January 1, 2015, all employers (including private employers) with 15 or more full-time employees in the County are prohibited from inquiring about arrests, accusations of crime, or criminal convictions until the conclusion of the first interview, unless the applicant voluntarily discloses the information



MD Ban-the-Box: Montgomery County

- Exceptions:

- Does not apply where the prohibited inquiries are expressly authorized by an applicable federal, state, or county law or regulation
- Does not apply to the Montgomery County Police Department, the Montgomery County Fire and Rescue Service, or the Montgomery County Department of Corrections and Rehabilitation
- Employers that provide programs, services, or direct care to minors or vulnerable adults
- Employers hiring for a position that requires a federal government security clearance



MD Ban-the-Box: Prince George's County

- Prince George's County: Effective January 20, 2015, all employers (including private employers) with 25 or more full-time employees are prohibited from inquiring or gathering information about an applicant's criminal history prior to the conclusion of the first interview. If an employer rescinds an offer based on an applicant's criminal history, the employer is required to notify the applicant in writing, and provide the employee with certain information



MD Ban-the-Box: Prince George's County

- Exceptions:

- Does not apply where the prohibited inquiries are required or expressly authorized by an applicable federal, state, or county law or regulation
- Does not apply to public safety agencies in Prince George's County or to positions that, in the judgment of the County, have access to confidential or proprietary business or personal information, money or items of value, or involve emergency management
- Employers that provide programs, services, or direct care to minors or vulnerable adults



MD Ban-the-Box: Baltimore

- Baltimore: Employers who employ 10 or more full-time employees in the City of Baltimore cannot inquire about or require an applicant to disclose criminal history prior to a conditional offer of employment

- Exceptions:

- Inquiry or other action that is required or expressly authorized by an applicable federal, state, or city law or regulation
- Facilities providing programs, services, or direct care to minors or vulnerable adults



VA Ban-the-Box: Who Is Included?

- Governor issued Executive Order 41 implementing “ban-the-box” for all state agencies, boards, and commissions
- The Order also encouraged private employers and state government contractors to adopt similar practices



VA Ban-the-Box

- Prohibited:
 - Questions related to convictions and criminal history will be removed from state employment applications
- Permitted:
 - A criminal history background check will be permitted after a candidate:
 - Signs a waiver
 - Has been found otherwise eligible for the position
 - Is being considered for a specific position



VA Ban-the-Box

- Applicants who refuse to sign the authorization for release of criminal history may have their applications removed from consideration
- The Order does not create a new cause of action for aggrieved individuals



Ban-the-Box: Private Employers

Md. – City of Baltimore	Washington, D.C.	Md. – Montgomery County	Md. – Prince George's County
<ul style="list-style-type: none"> • Effective Date May 15, 2014 • At least 10 full-time employees • No inquiry about criminal history until after a conditional offer of employment. 	<ul style="list-style-type: none"> • Effective Date Dec. 11, 2014 • At least 11 full-time employees • No inquiry about criminal history until after a conditional offer of employment. 	<ul style="list-style-type: none"> • Effective Date Jan. 1, 2015 • At least 15 full-time employees • No inquiry about criminal history until after the conclusion of the applicant's first interview. 	<ul style="list-style-type: none"> • Effective Date Jan. 20, 2015 • At least 25 full-time employees • No inquiry about criminal history until after the conclusion of the applicant's first interview.



DC Prohibition of Pre-Employment Marijuana Testing Act

- Reaction to Ballot Initiative 71
- Permits:
 - 21 and over
 - 2 oz personal use
 - 6 plants at principal residence
 - Transfer 1 oz to another
 - Use or sell drug paraphernalia
 - NOT to sell marijuana



DC Prohibition of Pre-Employment Marijuana Testing Act

- DC Council Bill
 - Would prohibit employers from testing prospective employees for marijuana use as part of the application procedure, unless otherwise required by law
 - “Prospective employee” is any individual who applies for employment with you
 - Must wait to test until after conditional offer of employment



DC Prohibition of Pre-Employment Marijuana Testing Act

- Who is covered?
 - “Employer” means any person, firm, corporation, partnership, stock association, agent, manager, representative, foreman, or any other person having control or custody of any place of employment or of any employee
 - The term “employer” shall include a District government or quasi-governmental agency and an entity established pursuant to interstate compact
 - The term “employer” shall not include the United States government or its agencies
(DC Code 32-1101(6))



31

DC Prohibition of Pre-Employment Marijuana Testing Act

- What are the exceptions?
 - Employees must still comply with your appropriate workplace drug policies
 - Employers need not permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or at any time during employment
 - *Does not interfere with federal contractor obligations*



32

Update on Virginia Employee Privacy: Social Media

- Will become Va. Code 40.1-28.7:5
 - Generally prohibits employers from requesting or requiring applicants or employees to turn over their social media account usernames and passwords
 - Protects applicants and employees from discipline or termination if they refuse
 - Takes effect July 1, 2015



Update on VA Employee Privacy: Social Media

- Who is covered?
 - An individual, partnership, association, corporation, legal representative, receiver, trustee, or trustee in bankruptcy doing business in or operating within this Commonwealth who employs another to work for wages or salaries or on commission and shall include any similar entity acting directly or indirectly in the interest of an employer in relation to an employee
 - Any unit of state or local government
 - Any agent, representative, or designee of a person or unit of government that constitutes an employer



Update on VA Employee Privacy: Social Media

- What can't we do?
 - Request or require access to a “social media account”
 - Take action against or threaten to discharge, discipline, or otherwise penalize a current employee for refusing
 - Fail or refuse to hire a prospective employee for refusing



Update on VA Employee Privacy: Social Media

- Broad Definition of “Social Media Account”
 - “Social media account” means a personal account with an electronic medium or service where users may create, share, or view user-generated content, including, without limitation, videos, photographs, blogs, podcasts, messages, emails, or website profiles or locations



Update on VA Employee Privacy: Social Media

- Not "Social Media Accounts" under the law:
 - Accounts opened by an employee at the request of an employer
 - Accounts provided to an employee by an employer, such as the employer's email account or other software program owned or operated exclusively by an employer
 - Accounts set up by an employee on behalf of an employer
 - Accounts set up by an employee to impersonate an employer through the use of the employer's name, logos, or trademarks



Update on VA Employee Privacy: Social Media

- What doesn't the law prevent?
 - May still view publicly available content
 - Not liable for inadvertent receipt of username or password, as long as you don't use it
 - May still request if required to comply with federal, state, or local laws, rules, or regulations
 - May still request if relevant to a formal investigation or related proceeding of employee's violation of law or written company policy, but only for that limited purpose



DC Zip Code Project

WHAT IS THE PROJECT?

- Effort to “educate” employers about laws enforced by the DC Department of Employment Services (DOES)
- Office of Wage and Hour, Worker’s Compensation, Occupational Safety & Health
- Laws include Wage Theft Prevention Amendment Act effective 2.26.15, OSHA, and other wage-related laws



39

DC Zip Code Project

WHAT “DOES” THE PROJECT DO?

- Inspectors will inspect businesses in targeted zip codes to determine compliance with applicable laws
- Priority will be given to inspections of construction, food service, home health care, daycare, and retail employers
- If inspectors find violations, inspectors will note and will provide copy of these findings
- Inspectors will provide compliance information
- DC Office of Wage and Hour Compliance will possibly follow up on noted violation within 30 days



40

DC Zip Code Project

WHAT WILL INSPECTORS LOOK FOR?

- **DC Wage and Hour Requirements:**
 - Posters not placed in a conspicuous place
 - Wage Theft Prevention Amendment Act Notice
 - Living Wage Poster (when applicable)
 - Minimum Wage Poster
 - No Accrued Sick and Safe Leave Poster

- **DC Occupational Safety and Health Requirements:**
 - OSHA 3165 (Job Safety and Health – It’s the law! – English poster)
 - OSHA 3167 (Job Safety and Health – It’s the law! – Spanish poster)
 - OSHA Fact Sheet (optional)

- **DC Workers' Compensation Requirements:**
 - Notice of Compliance Poster
 - Insurance Carrier listed on Compliance Poster
 - Proof of Coverage Form (when applicable)
 - Claim Forms – 7; 7A; 8 (optional)



GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services

THIS IS TO ACKNOWLEDGE THAT A PRELIMINARY INSPECTION BY THE DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES WAS CONDUCTED AT:

(Company Name & Address)

(Date)

THE FOLLOWING ARE THE RESULTS OF THE PRELIMINARY INSPECTION. THIS IS NOT A NOTICE OF VIOLATION, BUT AN ADVISORY NOTICE TO ENSURE COMPLIANCE.

- DC Office of Wage-Hour** Material Provided?
- Posters are not in a conspicuous place: _____ N/A
 - No Wage Theft Prevention Amendment Act Notice: _____ YES/NO
 - No Living Wage Poster (when applicable): _____ YES/NO
 - No Minimum Wage Poster: _____ YES/NO
 - No Accrued Sick and Safe Leave Poster: _____ YES/NO

- Federal & DC Occupational Safety & Health**
- No OSHA 3165 English Poster: _____ YES/NO
 - No OSHA 3167 Spanish Poster: _____ YES/NO
 - No OSHA Fact Sheet (optional): _____ YES/NO

- DC Office of Workers' Compensation (Private Sector)**
- No Notice of Compliance Poster: _____ YES/NO
 - No Insurance Carrier listed on Poster: _____ N/A
 - No Proof of Coverage Form (when applicable): _____ YES/NO
 - No Worker's Compensation Form – 7; 7A; 8 (optional): _____ YES/NO

By signing this document, I acknowledge receipt of this advisory notice and that I have received information regarding compliance requirements with Federal Labor Standards and the District of Columbia Labor Laws and regulations. The District of Columbia Department of Employment Services enforces the DC Labor Laws and regulations.

Print Name/Position _____ Signature _____

Delivered by: _____ Date _____
DOES Representative

OFFICE OF WAGE-HOUR
400 Massachusetts Avenue, NE • Suite 400 • Washington, DC 20002 • Office: (301) 475-0880 • Fax: (301) 475-6444
DOES Notice of Preliminary Inspection Form, 6/17/05



DC Zip Code Project

WHAT ISSUES ARE RAISED?

- Although the first visit is a “preliminary inspection,” if violations are found this could lead to a more invasive inspection in the future and penalties
 - The 4th Amendment protects businesses against unreasonable search and seizures
 - Absent consent, businesses can require inspectors to present a warrant prior to allowing entry to search the non-public areas of the business
 - DOES inspectors will likely not be aware of an employer’s right to not consent to a search
- The project seeks to enforce requirements over which DOES lacks enforcement authority



DC Zip Code Project

WHAT SHOULD EMPLOYERS DO?

- **Ensure you have all the required posters posted**
- **Review records for potential violations**
- **Decide whether you want to admit inspectors, and come up with a plan for surprise visits**
- **Inform employees about what to do if an inspector comes to the door**



contact information

YOUR VENABLE TEAM

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April 30, 2015

Please contact any of the authors below if you have questions regarding this alert.

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Honors and Awards:

Labor & Employment (Maryland - Band 1), *Chambers USA*, 2014



Ranked in *U.S. News-Best Lawyers "Best Law Firms,"* 2011-2015



Tier 1 Employment Law - Management (National; Baltimore; DC)

Tier 1 Labor Law - Management (Baltimore; DC)

Tier 1 Litigation - Labor & Employment (Baltimore)

Report on Last Night's DOES "Business Stakeholders Meeting" on DC Wage Theft Act

Last night we participated in the "Business Stakeholders Meeting" convened by the leadership of the District of Columbia's Department of Employment Services (DOES) as part of its public education campaign regarding the Wage Theft Prevention Amendment Act of 2014 (Act). Based on a lively question-and-answer session, we can report:

- **The Notice of Hire Template.** You do not need to use the DOES template of the "Notice of Hire – Employment Status and Acknowledgement of Wage Rate(s)." The DOES is encouraging employers to modify the template or create their own forms to suit the particulars of their own organizations. The DOES simply wants employers to convey the information required by the Act.
- **Electronic Notification.** We asked: "If an employer posts the required information in an employee's electronic personnel folder or sends an email to an employee with a link to that notice, and the system records that the employee has accessed the notice, does that record of access by the employee satisfy the Act's requirement of a 'signature' by the employee acknowledging receipt?" The DOES said: Yes.
- **Federal FLSA and DC Law.** The DOES template notice lists only the administrative, professional and executive exemptions. We asked whether compliance with the federal Fair Labor Standards Act's scheme of exemptions, including exemptions not expressly identified in the Act (e.g., highly compensated, computer professional), satisfies the Act. The DOES said: Yes.
- **Precise Time-Keeping.** We asked whether compliance with the federal FLSA's "rounding" regulations (29 CFR 785.48(b)) satisfies the Act's requirement of precise time-keeping. The DOES said: Yes.
- **The "Zip Code Project."** The DOES is continuing to knock on employers' doors. We have raised with the DOES our concerns about this project and hope to have more to report in the near future.

If you have any questions, please feel free to contact the authors of this report.

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NOTICE

DISTRICT OF COLUMBIA

DEPARTMENT OF EMPLOYMENT SERVICES

Labor Standards Bureau

Office of Wage-Hour

The Wage Theft Prevention Amendment Act of 2014

The Wage Theft Prevention Amendment Act of 2014 (WTPAA) has an effective date of February 26, 2015. The law includes provisions to enhance applicable remedies, fines, and administrative penalties when an employer fails to pay earned wages, to provide for suspension of business licenses of employers that are delinquent in paying wage judgments or agreements, to clarify administrative procedures and legal standards for adjudicating wage disputes, to require the employer to provide written notice to each employee of the terms of their employment, and to maintain appropriate employment records.

Requirements

Written Employment Notice:

As an employer of the District of Columbia, upon hire, you are required to provide a notice to employees of their employment. Also, within 90 days of the effective date of WTPAA, every employer shall furnish each employee with an updated written notice containing the information required. As proof of compliance, every employer shall retain copies of the written notice furnished to employees that are signed and dated by the employer and by the employee acknowledging receipt of the notice. *(There are additional requirements for temporary staffing firms.)*

This notice must include:

- 1) The name of the employer and any “doing business as” (DBA) names used by the employer
- 2) The physical address of the employer’s main office or principal place of business, and a mailing address if different
- 3) The telephone number of the employer
- 4) The employee’s rate of pay and the basis of that rate, including:
 - a. Rate by the hour, shift, day, or week (whichever is applicable)
 - b. Salary, Piece Rate, or commission (whichever is applicable)
 - c. Any allowances claimed as part of the minimum wage, including tip, meal, or lodging allowances
 - d. Overtime rate of pay or exemptions from overtime pay
 - e. Living wage or exemptions from the living wage
 - f. Any applicable prevailing wages
- 5) The employee’s regular payday designated by the employer

The Mayor shall make available for employers a sample template of the notice within 60 days of the effective date of the Wage Theft Prevention Amendment Act of 2014. (**Immediate Notice to new employees is required regardless of the template release date.**)

Wage Payment Liability:

- When the employer is a subcontractor and has failed to pay an employee any wages earned, the subcontractor and the general contractor shall be jointly and severally liable to the subcontractor's employees for violations of this Act, the Living Wage Act, and the Accrued Sick and Safe Leave Act.
- When a temporary staffing firm employs an employee who performs work on behalf of or to the benefit of another employer pursuant to a temporary staffing arrangement or contract for services, both the temporary staffing firm and the employer shall be jointly and severally liable for violations of this Act, the Living Wage Act, and the Accrued Sick and Safe Leave Act to the employee and to the District.
- Every employer shall pay wages earned to his employees on regular paydays designated in advance by the employer and at least twice during each calendar month.

Notice of Complaint

For any employer alleged to be in non-compliance with the Act, The Mayor shall deliver two (2) notices to the employer.

1. Notice of Complaint that specifies:
 - a. The alleged violation
 - b. Potential damages, penalties, and other cost
 - c. Rights and obligations of the parties
 - d. Process for contesting the complaint
2. Notice of Investigation that must be posted for all employees to see for a period of at least 30 days that specifies:
 - a. An investigation is being conducted
 - b. Information for employees on how they may participate

Rules against Retaliation

The WTPAA extends the protection and it also gives the Mayor power to enforce this law.

- Threats are now included as a form of retaliation.
- It is illegal for *any* person to retaliate.
- This law protects employees even if their employer incorrectly believes they made a complaint.

Procedural Options

- Wage-Hour Investigation
- Administrative Law Judge Hearing

- Civil Court Proceedings

Potential Penalties

Wage Payment Penalties, D.C. Official Code § 32-1307; D.C. Official Code § 32-1307(a) Section 7a – Wage Theft Prevention Fund

- Any employer who negligently fails to comply with the provisions of this Act or the Living Wage Act shall be guilty of a misdemeanor and, upon conviction, shall be fined:
 - For the first offense, an amount per affected employee of not more than \$2,500; for any subsequent offense, an amount per affected employee of not more than \$5,000.
- Any employer who willfully fails to comply with the provisions of this Act or the Living Wage Act shall be guilty of a misdemeanor and, upon conviction, shall be fined:
 - For the first offense, an amount not more than \$5,000 or imprisoned not more than 30 days, or both; for any subsequent offense, an amount not more than \$10,000, or imprisoned not more than 90 days, or both.

In addition to and apart from any other penalties or remedies provided for in this Act or the Living Wage Act, the Mayor shall assess and collect administrative penalties as follows:

- For the first offense, \$50 for each employee or person whose rights under this Act or the Living Wage Act are violated for each day the violation occurred or continued.
- For any subsequent offense, \$100 for each employee or person whose rights under this Act or the Living Wage Act are violated for each day the violation occurred or continued.

The Mayor shall collect administrative penalties in the amounts set forth below for the following violations:

- Five hundred dollars for failure to provide notice of investigation to employees
- Five hundred dollars for failure to post notice of violations to the public

Accrued Sick and Safe Leave Act or the Minimum Wage Revision Act.

- No administrative penalty may be collected unless the Mayor has provided any person alleged to have violated any of the provisions of this section notification of the violation, notification of the amount of the administrative penalty to be imposed, and an opportunity to request a formal hearing held pursuant to the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat 1203, D.C. Official Code § 2-501 et seq).
- The Mayor shall issue a final order following the hearing, containing a finding that a violation has or has not occurred. If a hearing is not requested, the person to whom notification of violation was provided shall transmit to the Mayor the amount of the penalty within 15 days following notification.

There is established as a special fund the Wage Theft Prevention Fund (“Fund”), which shall be administered by the Department of Employment Services. The Fund shall be used to enforce the provisions of this Act, the Minimum Wage Revision Act, the Accrued Sick and Safe Leave Act, and the Living Wage Act. The money deposited into the Fund, and interest earned, shall not revert to the

unrestricted fund balance of the General Fund of the District of Columbia at the end of a fiscal year, or at any other time.

Minimum Wage Penalties D.C. Official Code § 32-1011

- Any person who willfully or negligently violates any of the provisions of §32-1010 shall, upon conviction, be subject to a fine of not more than \$10,000, or to imprisonment of not more than six (6) months, or both.
- No person shall be imprisoned under this section except for an offense committed willfully after the conviction of that person for a prior offense under this section.
- Prosecutions for violations of this subchapter shall be in the Superior Court of the District of Columbia and shall be conducted by the Attorney General of the District of Columbia.
- In addition to and apart from the penalties or remedies provided for in this section, the Mayor shall assess and collect administrative penalties as follows:
 1. For the first violation, \$50 for each employee or person whose rights under this Act are violated for each day that the violation occurred or continued;
 2. For any subsequent violations, \$100 for each employee or person whose rights under this Act are violated for each day that the violation occurred or continued;
 3. \$500 for each failure to maintain payroll records or to retain payroll records for three (3) years or whatever the prevailing federal standard is, whichever is greater for each violation;
 4. \$500 for each failure to allow the Mayor to inspect payroll records or perform any other investigation;
 5. \$500 for each failure to provide each employee an itemized wage statement or the written notice as required by section 9(b) and (c); and
 6. \$100 for each day that the employer fails to post notice as required under section 10(a).

ASSLA Penalties D.C. Official Code § 32-131.12

An employer who willfully violates the requirements of this Act shall be subject to a civil penalty for each affected employee of \$1,000 for the 1st offense, \$1,500 for the 2nd offense, and \$2,000 for the 3rd and each subsequent offense. If the Mayor determines that an employer has violated any provision of this Act, the Mayor shall order the employer to provide affirmative remedies including: compensatory damages, punitive damages, and additional damages as provided in the law. The administrative fines and penalties collected under this section shall be deposited in the Wage Theft Prevention Fund.

For the complete text of the Wage Theft Prevention Amendment Act of 2014, go to <http://lims.dccouncil.us/Download/31203/B20-0671-SignedAct.pdf>.



NOTICE OF HIRE – EMPLOYMENT STATUS AND ACKNOWLEDGEMENT OF WAGE RATE(S)

Notice of Hire (Check only one)

At Hire Current Employee Annual–Current Date _____ Change in pay rate(s) or payday

Effective Date: ____/____/____

Section 1

Employer

Company Name: _____
DBA: _____
Permanent Address: _____
Street Line 2: _____
City: _____ State: _____
Zip Code: _____
Mailing Address: Same as Physical Address

Street Line 2: _____
City: _____ State: _____ Zip Code: _____
Phone: (____) _____ - _____

Employee

Employee Name: _____
Physical Address: _____
City: _____ State: _____
Zip Code: _____
Mailing Address: Same as Physical Address

Street Line 2: _____
City: _____ State: _____ Zip Code: _____
Phone: (____) _____ - _____

Section 2

Pay Frequency and Payday

Pay Frequency: _____ Designated Pay Day: _____
(Weekly, bi-weekly, semi-monthly, monthly, etc.) (Day of week when wages are payable/available)

Section 3

Allowances Claimed As Part of Wages: None, or:

Tips \$ _____ per hour
 Meals \$ _____ per meal
 Lodging \$ _____ per _____
 Other \$ _____ per _____

Section 4

Tipped Employees

As of January 1, 2005, the minimum wage required to be paid by any employer in the District of Columbia to any employee who receives gratuities shall be **\$2.77** an hour, provided that the employee actually receives gratuities in an amount at least equal to the difference between the hourly wage paid and the minimum wage. Also, all gratuities received by the employee must be retained by the employee. This employee (*will or will not*) participate in the following company tip pool:

Tip Pool Policy: (*Explain if applicable*)

Section 5

Basis of Wage Payment

- Minimum Wage** **Living Wage** **Living Wage Exempt** **Employer Determined Wage Rate**

Pay Basis: _____ (hourly, shift, day, week, salary, piece, commission)

Hourly

Multiple Rates or Basis (for each type of basis)

Rate of Pay: _____ per hour

Overtime Rate of Pay* _____ per hour

Overtime Pay Exemption for bona fide

Administrative

Executive

Professional

Rate of Pay: _____ per _____ Overtime Rate: _____

Rate of Pay: _____ per _____ Overtime Rate: _____

Rate of Pay: _____ per _____ Overtime Rate: _____

*No employer shall employ any employee for a workweek that is longer than 40 hours, unless the employee receives compensation for employment in excess of 40 hours at a rate not less than 1 ½ times the regular rate at which the employee is employed.

Section 6

Prevailing Rate (if Applicable)

Prevailing Rate Jobs: Your rate of pay will be the posted rate for the classification(s) listed.

Classification 1: _____ Prevailing Rate: _____

Classification 2: _____ Prevailing Rate: _____

Classification 3: _____ Prevailing Rate: _____

Section 7

The Department of Employment Services, specifically the Office of Wage-Hour (OWH), is to be contacted as that office is the designated enforcement agency for the concerns about safety, wage and hour, or discrimination. The OWH can be contacted at 202-671-1880 or via e-mail at owh.ask@dc.gov. The office is located at 4058 Minnesota Avenue, NE, Suite 4300 Washington, D.C. 20019. The office is open Monday –Thursday 8:30-4:30 and Friday 9:30-4:30.

Section 8

Employee Acknowledgement: By signing below, I acknowledge that I have received the foregoing information regarding my pay and my Employer. I told my employer what my primary language is:

Check one:

English

I have been given this pay notice in English.

Other Language

_____. I have been given this pay notice in English only, because Office of Wage-Hour does not yet offer a pay notice form in my primary language.

Employee's Signature: _____ Date ____/____/____

Employer's Signature: _____ Date ____/____/____

The Department of Employment Services provides templates for several common types of pay agreements, including dual language notices and acknowledgements in English and Spanish. If any other languages are needed, please contact the Office of Wage-Hour at 202-671-1880. Employers may create their notices, use or adapt the notice provided by The Department of Employment Services, as long as:

- The required information appears in English and the employee's primary language
- The employee receives a copy
- The employee signs an acknowledgment of receipt and identifies their primary language to the employer
- The employer keeps a copy of the notice and acknowledgement form

The Instructional Guide of how to complete this notice is found below:

Instructional Guide

Notice Given

Indicate the reason the form is being provided to the employee.

Section 1

Employer and Employee

Complete all fields.

Section 2

Pay Frequency and Pay Day

Indicate the frequency (e.g., weekly, bi-weekly, etc.) for when regularly scheduled wage payments will be paid and also indicate the specific payday.

Section 3

Allowances Claimed as Part of Wages

Indicate any allowances claimed as part of the minimum wage, including tips, meals, and/or lodging allowances.

Section 4

Tipped Employees

This section provides tipped employees the required notice under § 32-1003(f).

Note: Employers should also provide the company's tip pool policy in this section or as an attachment.

Section 5

Basis of Wage Payment

Employer must specify whether the employee is paid minimum wage, living wage (or living wage exempt), or if the wage rate is an employer-determined rate above minimum wage.

Specify the basis as hour, shift, day, week, salary, piece, and/or commission.

Provide the actual rate for each type of basis the employee will be paid.

Note: Employers must also provide employees with their overtime rate for each basis paid or given notice that they are exempt from overtime. (Specify the reason for the exemption is for bona fide Administrative, Executive, or Professional)

Section 6

Employees Paid Based on Prevailing Rates or other Jobs.

Complete this section when the employee will be paid a prevailing wage rate such as those specified under the Davis Bacon Act or the Service Contract Act.

Employers must specify the classification(s) the employee will work and the related Wage Rate and any Fringe Benefit applicable. Also, explain any overtime rates that will be paid for the work performed over 40 hours in a work week under each prevailing rate.

Section 7

According to WTPAA, information about how to contact the designated enforcement agency for concerns about safety, wage and hour, or discrimination is to be on this notice.

Section 8

Employee Acknowledgement

The employee must acknowledge that he/she has disclosed his/her primary language by checking one of the two boxes and that the employee has received the form by signing and dating the form.

Note: Employees have a right to receive this notice in a language other than English but only for those languages for which the DOES Office of Wage-Hour has developed its own dual-language notice. Notices will be available from Office of Wage-Hour in English and Spanish. If you need the forms translated in other languages, please contact our office at 202-671-1880.

If an employee refuses to sign the notice, an employer should still give the notice to the employee and note the employee's refusal on its copy of the notice.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

THIS IS TO ACKNOWLEDGE THAT A PRELIMINARY INSPECTION BY THE DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES WAS CONDUCTED AT:

(Company Name & Address)

(Date)

THE FOLLOWING ARE THE RESULTS OF THE PRELIMINARY INSPECTION. THIS IS NOT A NOTICE OF VIOLATION, BUT AN ADVISORY NOTICE TO ENSURE COMPLIANCE.

DC Office of Wage-Hour

Material Provided?

- Posters are not in a conspicuous place: _____ N/A
- No Wage Theft Prevention Amendment Act Notice: _____ YES/NO
- No Living Wage Poster (when applicable): _____ YES/NO
- No Minimum Wage Poster: _____ YES/NO
- No Accrued Sick and Safe Leave Poster: _____ YES/NO

Federal & DC Occupation Safety & Health

- No OSHA 3165 English Poster: _____ YES/NO
- No OSHA 3167 Spanish Poster: _____ YES/NO
- No OSHA Fact Sheet (optional): _____ YES/NO

DC Office of Workers' Compensation (Private Sector)

- No Notice of Compliance Poster: _____ YES/NO
- No Insurance Carrier listed on Poster: _____ N/A
- No Proof of Coverage Form (when applicable): _____ YES/NO
- No Worker's Compensation Forms – 7; 7A; 8 (optional): _____ YES/NO

By signing this document, I acknowledge receipt of this advisory notice and that I have received information regarding compliance requirements with Federal Labor Standards and the District of Columbia Labor Laws and regulations. The District of Columbia Department of Employment Services enforces the DC Labor Laws and regulations.

Print Name/Position

Signature

Delivered by: _____

DOES Representative

Date