

# Management Alert



## DLSE Template For New Wage Notices--A Cautionary Note

On October 9, 2011, Governor Brown signed the Wage Theft Protection Act (Assembly Bill 469) which, effective January 1, 2012, requires employers to provide certain prescribed notices to all new hires, including their rates of pay, name and address of employer, and workers' compensation carrier. (The Act is summarized in our October 13, 2011 California Labor and Employment Legislation Alert [http://www.seyfarth.com/uploads/siteFiles/publications/583298e4-9d57-4711-b9ae-994c63426cbe\\_documentupload.pdf](http://www.seyfarth.com/uploads/siteFiles/publications/583298e4-9d57-4711-b9ae-994c63426cbe_documentupload.pdf).)

The legislation specifically directed the California Labor Commissioner to prepare and promulgate a template form for employers' use to comply with new Labor Code Section 2810.5. On December 29, 2011, the Division of Labor Standards Enforcement ("DLSE") issued the much anticipated template. A day later, the DLSE released Frequently Asked Questions (FAQs) on the new notice <http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html>.

The new template, available in both Word and PDF formats on the Department of Industrial Relations' web site, [http://www.dir.ca.gov/dlse/LC\\_2810.5\\_Notice.doc](http://www.dir.ca.gov/dlse/LC_2810.5_Notice.doc), raises several concerns for employers. Labor Code Section 2810.5 provides that at the time of hiring, the employer must provide written notice to each employee, concerning:

- The employee's rate or rates of pay and the basis thereof (e.g., hourly, salary, commission), including any applicable overtime rates;
- The regular payday designated by the employer;
- The name, address and telephone number of the employer, including any "doing business as" names used by the employer;
- The name, address, and telephone number of the employer's workers' compensation insurance carrier; and
- Any other information the Labor Commissioner deems "material and necessary."

Written notice of changes in any of the above information must be given within seven calendar days after the time of the changes, unless the changes are all reflected on a timely itemized wage statement or in another writing. Section 2810.5 contains exceptions for state and local government employees, employees who are exempt from the payment of overtime wages under California law, and employees covered by certain collective bargaining agreements.

As noted above, new Labor Code Section 2810.5 further provides that the Labor Commissioner "shall prepare a template that complies" with its requirements. Employers hoped the DLSE would issue the template earlier than a few days before the law was scheduled to go into effect. As a result, many employers designed their own notice forms as the January 1 effective date drew closer. Those forms now may need to be modified to reflect additional information the DLSE added to the original information required by the statute.

## Concerns Raised by the DLSE Template

The new statute specifically contemplates that the DLSE would add other required information deemed “material and necessary” to the list of eight items specifically covered in the statute, and it did so to what some will regard as an intrusive level. In addition to the name(s) and address(es) (physical and mailing) of the employer, the DLSE form requires an employer to state whether it is a sole proprietor, corporation, limited liability company, general partnership or other, whether it is a staffing agency (e.g., temp agency or PEO) and any other names under which it does business (such as d/b/a’s).

If the worksite employer uses any other business or entity to hire employees or administer wages or benefits, the form requires completing two sections, one for the worksite employer and one for the other business. Both sections need not be completed if the only other business is a recruiting service or a payroll processing service. The information that must be provided about “the other business” includes whether the other business is a professional employer organization (PEO), employee leasing company or a temporary services agency, and requires physical address of main office, mailing address, telephone number, and other names.

One challenge for employers will be reaching agreement on which entity is responsible for giving the notice and cooperation in making the necessary information available. In some cases, characterizing the relationships according to DLSE categories may not be a simple matter.

The DLSE’s template pertaining to overtime rate also raises questions. Overtime may be time and one-half the regular rate of pay or double the “regular rate.” “Regular rate” may not be readily calculable because it may include bonuses and commissions and vary from pay period to pay period.

The DLSE also expanded its template beyond the language of Labor Code 2810.5 in the area of workers compensation insurance. Not content with the identity of the insurance carrier, the DLSE requires insurance carrier’s name, address, telephone number, policy number or, if self-insured (Labor Code 3700), certificate number for consent to self-insure. Employers whose workers’ compensation insurance programs utilize a third party administrator have expressed concern that employees should contact the third party administrator, not the insurance carrier, for help with a claim.

Possibly most perplexing and concerning is how best to complete the DLSE’s “check the box” for whether the employment agreement is written or oral. Most employment agreements are a complex mix of both written and oral components. A major concern is preventing the 2810.5 notice from undercutting at-will employment, which is often contained in a written agreement. One solution may be to modify the DLSE form to reflect that the notice is a written agreement governing wage information, and to include, if appropriate, an at-will reminder, such as “This notice is a written agreement on rates of pay, and confirms that your employment is at-will, meaning that either you or (the Company) can end the employment relationship at any time, without or without cause or notice.”

## The FAQ’s Provide Some Answers

Despite the issues presented by the form template, the DLSE’s FAQ’s do provide some guidance, such as:

- Employers can use their own notices, as long as they contain all of the required information.
- Non-English templates will be available on DLSE’s website, as they are completed, in Spanish, Chinese, Korean, Vietnamese and Tagalog.
- The notice may be given with other materials that are presented at the time of hire, but in the opinion of the DLSE, the notice required under Labor Code 2810.5 must be on its own form. DLSE believes employees should not be required to piece together the information from several separate documents or pages of a manual.
- The notice may be given electronically, but the electronic system must allow for acknowledgement of receipt.
- An employee may refuse to sign the notice, which simply signifies receipt. Proof of delivery should exist where an employee refuses to sign.

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- Where there are multiple wage rates, the employer needs to put them all on the notice (e.g., shift differentials, different piece rates).

Even with the helpful FAQ, questions remain. Employers should consider carefully whether to use the DLSE template or whether to modify and customize it while assuring all the required information is provided to employees in accordance with the statute.

## Customize, Customize

“One size fits all” rarely works in the world of employment law. Section 2810.5 and the DLSE’s template notice raise many unique issues that need to be carefully considered. Employers should consider contacting employment law counsel for individualized advice on how best to comply with Labor Code Section 2810.5.

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