STATE OF NEW YORK

677

2017-2018 Regular Sessions

IN SENATE

January 4, 2017

Introduced by Sen. DeFRANCISCO -- read twice and ordered printed, and when printed to be committed to the Committee on Labor

AN ACT to amend the labor law, in relation to certain affirmative defenses

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (b) of subdivision 1 of section 195 of the labor law, as added by chapter 564 of the laws of 2010, is amended to read as follows:

(b) The commissioner shall prepare templates that comply with the requirements of paragraph (a) of this subdivision. Each such template shall be dual-language, including English and one additional language. The commissioner shall determine, in his or her discretion, which languages to provide in addition to English, based on the size of the New York state population that speaks each language and any other factor that the commissioner shall deem relevant. All such templates shall be made available to employers in such manner as determined by the commissioner**. Employers may rely upon these templates and shall not be liable for their good faith reliance upon the templates provided by the commissioner**;

§ 2. Section 196-d of the labor law, as added by chapter 1007 of the laws of 1968, is amended to read as follows:

§ 196-d. Gratuities. No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. This provision shall not apply to the checking of hats, coats or other apparel. Nothing in this subdivision shall be construed as affecting the allowances from the minimum wage for gratuities in the amount determined in accordance with the provisions of article nineteen of this chapter nor as affecting **any affirmative defenses**

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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made available under this chapter, or any practices in connection with banquets and other special functions where a fixed percentage of the patron's bill is added for gratuities which are distributed to employees, nor to the sharing of tips by a waiter with a busboy or similar employee.

§ 3. Subdivision 1-a, the closing paragraph of subdivision 1-b and the closing paragraph of subdivision 1-d of section 198 of the labor law, subdivision 1-a as amended by chapter 362 of the laws of 2015, the closing paragraph of subdivision 1-b and the closing paragraph of subdivision 1-d as amended by chapter 537 of the laws of 2014, are amended to read as follows:

1-a. On behalf of any employee paid less than the wage to which he or she is entitled under the provisions of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim and as part of such legal action, in addition to any other remedies and penalties otherwise available under this article, the commissioner shall assess against the employer the full amount of any such underpayment, and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law, which may include, but is not limited to, reliance by the employer on any template provided by the commissioner pursuant to paragraph (b) of subdivision one of section one hundred ninety-five of this article. Liquidated damages shall be calculated by the commissioner as no more than one hundred percent of the total amount of wages found to be due, except such liquidated damages may be up to three hundred percent of the total amount of the wages found to be due for a willful violation of section one hundred ninety-four of this article. In any action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, which may include, but is not limited to, reliance by employer on any template provided by the commissioner pursuant to paragraph (b) of subdivision one of section one hundred ninety-five of this article, an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due, except such liquidated damages may be up to three hundred percent of the total amount of the wages found to be due for a willful violation of section one hundred ninety-four of this article.

On behalf of any employee not provided a notice as required by subdivision one of section one hundred ninety-five of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim, and as part of such legal action, in addition to any other remedies and penalties otherwise available under this article, the commissioner may assess against the employer damages of fifty dollars for each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars. In any action or administrative proceeding to recover damages for violation of paragraph (a) of subdivision one of section one hundred ninety-five of this article, it shall be an affirmative defense that (i) the employer made complete and timely payment of all wages due pursuant to this article or article nineteen or article nineteen-A of this chapter to the employee who was not provided notice as required by subdivision one of section one hundred ninety-five of this article [~~or~~]; (ii)

the employer reasonably believed in good faith that it was not required to provide the employee with notice pursuant to subdivision one of section one hundred ninety-five of this article; (iii) the employer relied in good faith upon the templates provided by the commissioner pursuant to paragraph (b) of subdivision one of section one hundred ninety-five of this article; or (iv) the employee received sufficient tips to equal or exceed the amount of any allowances claimed by the employer as any part of the minimum wage, including any and all available tip allowances. In such circumstances where the employer establishes any of the affirmative defenses described in subparagraphs (i) through (iv) of this paragraph, the employer shall not forfeit any tip allowances available under law. These affirmative defenses shall be available to employers in defense of actions brought by the commissioner and/or by the employee.

On behalf of any employee not provided a statement as required by subdivision three of section one hundred ninety-five of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim, and as part of such legal action, in addition to any other remedies and penalties otherwise available under this article, the commissioner may assess against the employer damages of two hundred fifty dollars for each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars. In any action or administrative proceeding to recover damages for violation of subdivision three of section one hundred ninety-five of this article, it shall be an affirmative defense that (i) the employer made complete and timely payment of all wages due pursuant to this article or articles nineteen or nineteen-A of this chapter to the employee who was not provided statements as required by subdivision three of section one hundred ninety-five of this article [~~or~~]; (ii) the employer reasonably believed in good faith that it was not required to provide the employee with statements pursuant to paragraph (e) of subdivision one of section one hundred ninety-five of this article; (iii) the employer relied in good faith upon the templates provided by the commissioner pursuant to paragraph (b) of subdivision one of section one hundred ninety-five of this article; or (iv) the employee received sufficient tips to equal or exceed the amount of any allowances claimed by the employer as any part of the minimum wage including any and all available tip allowances. In such circumstances where the employer establishes any of the affirmative defenses described in subparagraphs (i) through (iv) of this paragraph the employer shall not forfeit any tip allowances available under law. These affirmative defenses shall be available to employers in defense of actions brought by the commissioner and/or by the employee.

§ 4. Section 199 of the labor law, as added by chapter 548 of the laws of 1966, is amended to read as follows:

§ 199. Rules and regulations. The commissioner may issue such rules and regulations as he determines necessary for the purposes of carrying out the provisions of this article, which shall be consistent with and shall not alter the terms and conditions set forth in this article.

§ 5. This act shall take effect immediately and shall apply to affirmative defenses that became available before, on, or after such effective date.