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*Minimum Wage, Overtime
Exemptions and Other Changes to
New York State Law Employers
Should be Aware of*

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April 18, 2019

Minimum Wage Changes And How they Affect New York Employers

- New York requires all employers to notify employees of wage information at time of hiring and when changes are made.
- At time of hiring, all employers must inform employees of:
 - Their pay rate(s) and the basis for calculating them.
 - Allowances claimed as part of the minimum wage, including tip, meal or lodging allowances.
 - Whether the employee is exempt or nonexempt from federal and state minimum wage and overtime requirements.

Notifying Employees of Wage Information Cont'd

- Employers must obtain a signed written acknowledgment of the employees' receipt of the notice and retain receipt for six (6) years (N.Y. Lab. Law § 195(1)(a)).
- The notice must be delivered in English and in the employee's primary language (if the NYSDOL offers a translation) (N.Y. Lab. Law § 195(1)(b)).
- Employers must notify employees of any changes at least seven (7) days before they become effective, unless they issues a new paystub that carries the notice (N.Y. Lab. Law § 195(2)).

Additional Requirements for NYC Employers

- Includes Brooklyn, the Bronx, Manhattan, Queens and Staten Island.
- Some New York State laws apply different standards to employers located in NYC. These laws cover:
 - Minimum wage and overtime exemptions.
 - Paid safe and sick time.
 - Independent contractors.
 - Employer applications, including:
 - Criminal background checks; and
 - Salary history inquiries.
 - Discrimination.
 - Accommodation requests.
 - Sexual harassment.
 - Temporary schedule changes.
- If you hire from, or operate a business in NYC, make sure you are in compliance with all additional requirements.

Startup Companies and Compliance with Minimum Wage Laws

- Startup companies can operate under the assumption that minimum wage laws do not apply to them.
 - **This is False!**
- They must:
 - Properly classify workers as exempt or nonexempt;
 - Notify them of their status; and
 - Comply with all minimum wage laws.

Federal and State Laws impose Strict Requirements on the payment of Minimum Wage and Overtime Pay for most employees

- Unless an employer can demonstrate that an employee qualifies for an exemption under the Fair Labor Standards Act (FLSA) and state law, the employer must pay all nonexempt employees at least the minimum wage and overtime due under applicable wage and hour laws.
- Employers must also keep records of all hours worked by nonexempt employees.
 - There are harsh penalties for noncompliance.

The Fair Labor Standards Act (FLSA)

- The FLSA applies to all private employers and employees that in any workweek:
 - Engage in interstate commerce or in the production of goods for commerce
 - Employed by an enterprise engaged in interstate commerce or in the production of goods for commerce with gross annual sales or business of at least \$500,000 (enterprise coverage)
 - Most private and public employers, with the exception of family businesses, are covered
 - Most startup employees regularly use the internet and other interstate communications to conduct business and therefore qualify for individual coverage, even if the business does not meet the revenue threshold

The New York Minimum Wage Act (MWA)

- The MWA and its accompanying wage orders generally incorporate the FLSA requirements for calculating overtime payments for nonexempt employees (12 NYCRR § 142-3.2)

New York's Minimum Wage vs. Federal Minimum Wage

- New York's minimum wage (\$11.10 per hour as of December 31, 2018) is currently higher than the federal minimum wage (\$7.25 per hour) and varies based on the employer:
 - Size – different rates apply:
 - Large employers in NYC (with 11 or more employees)
 - Small employers in NYC (with 10 or more employees)
 - Location – different rates apply:
 - NYC
 - Long Island and Westchester
 - Remainder of the state
 - Industry – different rates apply to workers:
 - In the fast food industry
 - Receiving tips

New York Wage Orders Modify some Wage and Hour Obligations, including Minimum Wage, in Specific Industries

- The building service industry
- The hospitality industry
- Farm workers

Recent and Upcoming Minimum Wage Increases

- The minimum wage rates are scheduled to increase each year on 12/31 until they reach \$15.00
- Employers must post a minimum wage information poster in their establishment in a place that is readily accessible to all employees
- As of December 31, 2018:
 - NYC - Large Employers (of 11 or more): \$15.00
 - NYC - Small Employers (10 or less): \$13.50
 - Long Island & Westchester: \$12.00
 - Remainder of New York State: \$11.10
- As of December 31, 2019:
 - NYC - Small Employers (10 or less): \$15.00
 - Long Island & Westchester: \$13.00
 - Remainder of New York State: \$11.80

New York's Overtime Exemptions

- New York generally incorporates the federal FLSA overtime pay requirements for nonexempt employees and requires employers to pay 1.5x the employee's regular rate of pay for all hours worked more than 40 hours in a workweek
 - Employees exempt from overtime under the FLSA, but nonexempt under New York law, are entitled to 1.5x the New York minimum wage for overtime hours

Nonexempt Employees must Record All Hours Worked

- All employers must ensure that nonexempt employees record all hours worked and do not perform off-the-clock work
- Unpaid overtime makes the employer susceptible to liability
 - Employers can reduce this risk by:
 - Adopting a timekeeping policy
 - Training supervisors and managers that nonexempt employees must:
 - Accurately record all hours worked, including unauthorized overtime
 - Be paid for all hours worked, including unauthorized overtime
 - Auditing timekeeping records to ensure that they accurately capture all hours worked

Notification of Overtime Exemptions

- At the time of hiring all employers must notify employees of whether they are exempt or nonexempt from federal and state overtime requirements

Startup Companies and Overtime Exemptions

- Although some employers prohibit nonexempt employees from working overtime unless they have advance authorization, this type of policy may be unrealistic for startup companies.
- Many startups never contemplate paying overtime to their employees and operate under the false assumption that the overtime laws do not apply to startups.
 - These startups are vulnerable to potential wage and hour liability
 - There is no catchall exception for startups
- All startups should consider wage and hour compliance as part of their initial business planning and strategy. This includes:
 - Properly classifying workers as exempt or nonexempt
 - Notifying them of their status
 - Complying with all overtime laws

Executive Exemption

- New York exempts executive employees from its minimum wage and overtime requirements (N.Y. Lab. Law § 651(5)(c)). To qualify they must:
 - Primarily manage the company, or manage a commonly recognized department or subdivision of the company;
 - Customarily and regularly direct the work of two (2) or more other employees;
 - Have the authority to hire and fire other employees or their opinions on same are given weight;
 - Customarily and regularly exercise discretionary powers; and
 - Be paid a salary of not less than \$675.00 per week, including board, lodging, other allowances and facilities.

Administrative Exemption

- New York exempts administrative employees from its minimum wage and overtime requirements (N.Y. Lab. Law § 651(5)(c)). To qualify they must:
 - Perform primary duties that include office work or non-manual field work relevant to management policies and general operations;
 - Customarily and regularly exercise discretion and independent judgment;
 - Regularly and directly assist an employer or another employee in the position of a bona fide executive or administrative assistant, or perform the same duties under general supervision; and
 - Be paid a salary of not less than \$675.00 per week, including board, lodging, other allowances and facilities.

Professional Exemption

- New York exempts professional employees from its minimum wage and overtime requirements (N.Y. Lab. Law § 651(5)(c)). To qualify they must:
 - Perform work that requires advanced knowledge in the field of science or an education generally acquired by a “prolonged course of specialized intellectual instruction and study,” as mastered from a general academic education, an apprenticeship, or training in the performance of routine mental, manual, or physical processes;
 - Perform work that is original and creative in an accepted field of artistic undertaking, and achieves results that mainly depend on the employee’s invention, imagination, or talent; and/or
 - Perform work that is predominantly intellectual and varied in character such that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

Professional Exemption – Who Qualifies?

- Examples of professional jobs:
 - Teachers; doctors/surgeons/dentists; accountants; lawyers; engineers; architects; artists/authors; designers; chemists; editors; scientists; registered nurses, etc.
 - The definition can be subjective and open to interpretation.
 - A way to differentiate is whether you can leave the job at work at the end of the day or if you take it home with you,
 - i.e. take legal briefs home with you to read.
 - Another way to differentiate is that if you are paid on a salary basis with a threshold of \$455.00 or more per week, then you are exempt as well.

Outside Salesman Exemption

- New York exempts outside salesman from minimum wage and overtime requirements (N.Y. Lab. Law § 651(5)(c)). To qualify they must:
 - Work for the purpose of:
 - Making sales;
 - Selling and delivering articles or goods; or
 - Obtaining orders or contracts for service or for the use of facilities (NY Admin. Rules 142-2.14(5))

Computer Employee Exemption

- New York exempts computer systems analysts, computer programmers, software engineers, or other similarly skilled workers from its minimum wage or overtime requirements under the same rules as the Fair Labor Standards Act (NY Code, Rules, and Regulations 12 NYCRR 142-2.2).

Other Exemptions

- Individuals working on a casual basis as a part-time babysitter in the home of the employer;
- Individuals working in labor on a farm, who are under NY Labor Law 674;
- Drivers of a Taxicab;
- Individuals working as a member of a religious order, or as a duly ordained, commissioned or licensed minister, priest or rabbi, or as a sexton, or as a Christian science reader;
- Individuals working in or for a religious or charitable institution, which work is incidental to or in return for charitable aid conferred upon the individual and not under any express contract of hire

Other Exemptions - Continued

- Students working for a religious, education or charitable institution;
- Individuals working in or for a summer camp or conference of a religious, education, or charitable institution for not more than three months annually;
- Individuals working as staff counselors in a children's camp;
- Students working in or for a college or university fraternity, sorority, student association, or faculty association, whose earnings do not in any manner insure to the benefit of any private shareholder or individual, and which is recognized by such college or university;
- Individuals working for a federal, state or municipal government or political subdivision thereof; and
- Individuals working as volunteers at a recreational or amusement event run by a business that operates such events so long as:
 - No single event lasts more than eight (8) consecutive days; and
 - No more than one (1) such event concerning substantially the same subject matter occurs in any one calendar year

Sexual Harassment Training: What is Sexual Harassment?

- Sexual harassment is a form of sex discrimination.
- Any harassment, bias, sexual stereotyping, or discrimination, based on someone's sex or gender, gender identity, status of being transgender, pregnancy, etc.
- Any unwanted or unwelcome verbal or physical abuse of a sexual nature, i.e. sexually-explicit or derogatory statements that are offensive or objectionable to the person at whom it is directed, or which interferes with that person's job performance.

New Sexual Harassment Laws Passed by New York State in 2018

- New York State Human Rights Law (“NYSHRL”) now protects all individuals against sexual harassment in the workplace, regardless of status or role.
- Employers are held responsible for sexual harassment endured not only by their employees, but also by their contractors.
- These new laws significantly increase the potential liability of employers.
- Employers who contract with NYS must submit an affirmation confirming they are following the new laws.

Sexual Harassment Compliance Deadlines for 2018-2019

- As of July 11, 2018:
 - Agreements requiring sexual harassment claims to be submitted to mandatory arbitration are null and void under New York law.
- As of October 9, 2018:
 - All employers must prepare, post, and distribute a written sexual harassment policy compliant with all standards of the model policy provided by New York State.
 - A poster in a place readily available to all employees, i.e. the cafeteria/lunch area, detailing the company's policy, is suggested by the State.
- As of January 1, 2019:
 - Sexual harassment training for all employees (regardless of how many hours they work) must occur annually, starting no later than October 9, 2019, and must be given while the employee is working/being paid:
 - Must be provided in the language spoken by the employee;
 - Must be interactive.

How Can Employers Bring Themselves into Compliance?

- Create or update a company-wide Sexual Harassment Policy.
- Be pro-active in assessing all existing policies and in implementing changes to remain in compliance with New York state law.
- Make sure Managers and Supervisors know their responsibilities, lead by example, and set the tone for a company.
- Have a Standard Complaint Form and inform employees on how to locate it.
- Provide sexual harassment training for all employees.

What should be in the Sexual Harassment Policy?

- A comprehensive definition of sexual harassment.
- A statement that it applies to all “applicants for employment, interns, whether paid or unpaid, contractors, and persons doing business with” the employer.
- A statement prohibiting sexual harassment or retaliation for complaints.
- A statement that even a single incident can be addressed.
- Employee rights related to prohibition of sexual harassment.
- Examples of prohibited conduct.
- Information about federal and state laws regarding sexual harassment.

What Should be in the Sexual Harassment Policy – Part II

- Information on **how to report sexual harassment complaints** both internally, as well as to local, state and federal agencies and local police departments.
- Reference to a **standard complaint form** with commitment to due process of all involved (actual complaint form does not have to be attached, but policy must include how to locate it).
- **Procedure by which oral complaints will be accepted** – including the information that employers will complete the complaint form with information provided by the employee.
- A confidential procedure for **timely investigation of complaints**.
 - Investigations should be concluded within 30 days.
- A **statement of rights**.

What Should be in the Sexual Harassment Policy - Part III

- Notice that **sexual harassment is considered to be employee misconduct** by any employee, and that supervisors/managers who knowingly allow sexual harassment will be disciplined.
- Notice that **supervisors/managers are required to report any complaint** they receive or observe.
- A clear statement that **retaliation against those who report or assist in any complaint is prohibited.**
- Statement that **employer will keep written investigation records.**
- Statement that the employer **will notify the complainant in writing** of the final investigation determination;
 - Include statement of complainant's **right to file complaint externally** with the EEOC, the NYSDHR, the NYCCHR (if applicable), other local agencies, and/or a local police department.
 - An outline of **remedies available to complainant if discrimination is found** after hearing, i.e., injunctive relief, monetary damages, attorneys' fees, and civil fines.

Mandated Content of Sexual Harassment Training

- Required Training Content:
 - A definition of sexual harassment;
 - Examples of prohibited conduct;
 - Explanation of responsibility for conduct of employees by supervisors/managers and additional responsibilities of supervisors/managers in matters regarding complaints of sexual harassment;
 - Information about employees' rights and federal and state laws addressing sexual harassment;
 - Employees' right of redress;
 - Exterior methods/forums to handle complaints;
 - Potential remedies available to employees.

Training Should Let Employees Know...

- How to recognize harassment as inappropriate workplace behavior;
- The nature of sexual harassment;
- That harassment because of any protected characteristic is prohibited;
- The reasons why workplace harassment are employment discrimination;
- That all harassment should be reported;
- That supervisors and managers have a special responsibility to report harassment;
- How to find the Complaint Form;
- The rights and security to which all employees are entitled – the ability to work in an atmosphere of respect for all people.

Additional Requirements in New York City as of 2018

- Must post a notice of new laws, in English and Spanish, in breakrooms or other common areas, by September 6, 2018 (all employers);
- Must distribute fact sheet to employees by September 6, 2019 (all employers);
- Employers with 15 or more employees must provide training on the NYC laws annually and within 90 days of employment as of April 1, 2019;
- Must distribute/display the sexual harassment materials published by the NYC Commission on Human Right:
 - Anti-sexual harassment rights and responsibilities poster; and
 - Fact sheet to be distributed to all employees.

Employee Acknowledgment of Policy

- Although employee acknowledgment is not part of the model Sexual Harassment Policy and training issued by the State, it is recommended that all employers get signed acknowledgments from all employees to protect themselves from alleged violations of the law.

The Cost of Liability

- Back pay - the amounts employee would have earned had the discriminatory event not occurred
- Future earnings/front pay - future earnings the employee is not earning as a result of the discriminatory event
- Damages for emotional distress
- Punitive damages - “punishment” damages
- Attorneys’ fees and costs
- Job reinstatement in case of unlawful termination

Salary History Ban

- Many states and localities have made pay equality a priority and have passed various wage-gap initiatives, including salary history bans.
 - The goal of these laws is to ensure that compensation is based on job-relevant criteria.
 - Proponents of the salary history ban argue that using past compensation in future employment decisions perpetuates existing pay disparities among women and minorities.

New York's state and city anti-discrimination laws might apply to you!

- New York's state and city anti-discrimination laws apply to smaller business and cover a wider range of protected issues than federal anti-discrimination laws.
 - Employers, including startups, face potential liability risks in the hiring process for inquiring about an applicant's salary history, or relying on salary history in making hiring or compensation decisions in:
 - New York City (all five boroughs);
 - Suffolk County (goes into effect on June 30, 2019);
 - Albany County; and
 - Westchester County
 - The NYSHRL applies to all employers with four or more employees, except to the prohibition on sexual harassment, which applies to all employers.

What to Do if You Are Located In, or Hire From, these Areas

- Employers that regularly hire employees to work in or recruit from these locations may want to create a company policy banning salary history inquiries altogether.
- Make sure all those conducting hiring interviews or assessing payment increases are aware of where their employees live.
- Continue to review and follow up with all changes in New York state law to make sure your company policy is in compliance.

What Does the Salary Ban Prohibit?

- Making pre-employment inquiries about an applicants:
 - Prior salary;
 - Benefits; and
 - Other compensation.
- Considering salary information when making interview, hiring, or compensation decisions.

Suffolk County Joins the Ban on Salary History Inquiries - What you Need to Know!

- The salary history ban is called “A Local Law to Restrict Information Regarding Salary and Earnings” or “RISE Act.”
- Goes into effect on June 30, 2019.
- Applies to all employers with four (4) or more employees.
- Employers that regularly hire employees to work in or recruit from Suffolk County may want to create a company policy banning salary history inquiries altogether.

What Does the RISE Act Provide?

- No inquiries about an applicant's salary history.
- No consideration of salary history in setting compensation.
- There are exceptions:
 - Does not prohibit employers or employment agencies from verifying a candidate's salary where required by federal, state or local law.
 - Does not prohibit any actions taken by an employer, employment agency, employee, or agent thereof, pursuant to a collective bargaining agreement.
- Is Enforced by the Suffolk County Human Rights Commission. They;
 - May impose civil penalties of up to \$50,000 for an unlawful discriminatory act; and
 - May impose civil penalties of up to \$100,000 if the violation is "willful, wanton or malicious."

What Should Employers in Suffolk County Do to Prepare for June 30, 2019?

- Review all written policies to make sure they fully conform to the law.
- Review all employment applications and hiring practices to remove questions regarding salary history.
- Train Human Resources personnel, recruiters and anyone else involved in the recruiting and hiring process in the new law's requirements.

Paid Family Leave

- Effective January 1, 2018, employers are required to provide paid family leave benefits.
 - Amendments to the Disability Benefits Law, specifically The New York Paid Family Leave Benefits Law (PFL), require that as of January 1, 2018, employers with at least one (1) employee for at least thirty (30) days of any calendar year, must provide employees with paid family leave benefits.
 - Leave entitlement was phased in over four (4) years with full benefits required to be made available in 2021.

How is Paid Family Leave to be Funded?

- Paid leave benefits are to be funded exclusively through employee contributions deducted from payroll, without any direct costs to employer.
- Payroll deductions were required to begin on July 1, 2017.

Who Qualifies for Paid Family Leave and What is the Length of Time to be Provided?

- Under the PFL, beginning on January 1, 2018, employees working for covered employers for 26 or more consecutive weeks are entitled to take eight weeks of paid leave during a 52-week calendar period.
- The length of available leave increases annually:
 - On January 1, 2019, the length of available leave increases to 10 weeks in a 52-week period;
 - On January 1, 2021, to 12 weeks within a 52-week period.

An Employee Make Take Paid Family Leave...

- To participate in providing care (physical or psychological) for a family member with a serious health condition;
- To bond with their child during the first 12 months after the child's birth, or for the first 12 months after adoption/foster care of a child; or
- For any qualifying exigency under the Family and Medical Leave Act (FMLA).

Employees under the Family and Medical Leave Act (FMLA)

- Are entitled to:
 - Reinstatement to the same or a comparable job with the same or comparable benefits, pay and other terms and conditions of employment.
 - Any benefits which the employee accrued before the date on which the leave commenced must be restored.
 - Continuation of any existing health benefits for the duration of the leave.
- Are **NOT** entitled to:
 - Accrual of seniority or other employment benefits during leave.

Employees Under the PFL Who Are Also Eligible for Disability Benefits

- Are entitled to a combined maximum of 26 weeks during any 52-week period;
- PFL and FMLA leave runs concurrently;
- Employees collecting workers' compensation benefits for a **total disability** are not eligible for PFL.

PFL and Pregnancy Leave

- The PFL does not require employers to provide specific pregnancy leave apart from their family leave policy.
- Employees temporarily unable to work due to pregnancy/childbirth may be entitled to short-term disability (STD) benefits and leave;
 - Can include partial wage replacement for up to 26 weeks.

Questions & Answers

Thank you.



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