



Webinar 5 – March 13, 2024

Top Trends in Wage and Hour Law and How They Affect Your Business

WEBINAR OUTLINE

The Latest Legal Trends and Developments and Why They Are Important

- Compliance Is Critical for Protecting Your Business

Top Trends in Wage and Hour Law Employers Should Be Aware of for 2024

- Pay Equity and Pay Transparency
- Focus on Wage Theft and Wage and Hour Law Violations
- The Department of Labor's Investigation and Prosecution of Off-the-Clock Violations
- Wage and Hour Regulators Focus on Child Labor Laws
- Wages and Benefits of Self-Employed Gig Workers
- Wage and Hour Claims Generally

Recent Caselaw

- Workplace Culture
- Discrimination and DEI
- Artificial Intelligence

HRtelligence TIPS

WEBINAR CONTENT

The Latest Legal Trends and Developments and Why They Are Important

Compliance Is Critical for Protecting Your Business

- State and federal wage and hour regulations are constantly evolving.
- Staying compliant minimizes the risk of legal claims related to wage and hour laws.
- Wage and hour compliance and litigation – addressing minimum wage, overtime and overtime exemptions, employee classification, overtime rates of pay, and unpaid time work – continue to be critically important to employers to protect their business, their employees and to remain competitive from a recruiting standpoint.

Top Trends in Wage and Hour Law That Employers Should Be Aware of for 2024

Pay Equity and Transparency

Pay equity will continue to be a high priority at the federal and state level in 2024.

- Equal Pay Named in EEOC Targeted Priorities - EEOC objectives for fiscal years 2024 through 2028 are highlighted in its Strategic Enforcement Plan (SEP), released on September 21, 2023.

EEOC Priorities

The Commission's clear focus is on combatting employment discrimination, promoting inclusive workplaces, and responding to racial and economic justice. To achieve this, it names six targeted subject matter priorities:

- Eliminating barriers in recruitment and hiring.
- Protecting vulnerable workers from underserved communities from discrimination.
- Addressing selected emerging and developing issues.
- Advancing equal pay for all workers.
- Preserving access to the legal system.
- Preventing and remedying systemic harassment.

Advancing equal pay: EEOC focus will prioritize employer practices that may “impede equal pay or contribute to pay disparities.” Reliance on salary history and discouraging or prohibiting employees from asking about pay are named in those practices.

- Pay Transparency Law Have Been Passed Throughout the U.S. – And it’s not expected to slow down in 2024!
 - California, Colorado, Connecticut, Maryland, Nevada, New York, Rhode Island, Washington and Hawaii all have active pay transparency laws.
 - Illinois passed pay transparency legislation which will take effect in 2025.
 - States that considered pay transparency in the 2023 legislative session included Alaska, Kentucky, Maine, Michigan, Missouri, Montana, New Jersey, Oregon, South Dakota, Vermont and Wisconsin.

Source: <https://worldatwork.org/resources/publications/workspan-daily/resetting-the-pay-transparency-landscape-for-2024>

- New York Pay Transparency Law

Effective September 17, 2023, New York State employers with 4 or more employees must include a salary or salary range in their job postings for all jobs to be performed, at least in part, in the state of New York. The job posting must advertise the salary or salary range the employer believes, in good faith, to be true at the time of posting and should give the prospective applicant a legitimate idea of the expected pay.

Focus on Wage Theft and Wage and Hour Law Violations

NY Wage Theft Protection Act — Effective September 6, 2023, employers who engage in wage theft are now subject to criminal prosecution.

New York lawmakers recently proposed three new bills that would make it difficult for wage theft violators to conduct business in the state.

- Senate Bill S8451 would empower the New York State Liquor Authority to suspend liquor licenses for bars and restaurants that the Department of Labor has determined owe more than \$1,000 in back wages to their workers.

Notes:

According to an analysis conducted by Documented and ProPublica’s analysis, more than \$52 million has been stolen from people working in restaurants in New York, more than in any other industry. The amount of back wages accounted for more than 25% of all reported wage theft in the state. Similar measures have been successful in other parts of the country, including Santa Clara County in California, which has recovered \$110,000 for workers since 2019.

- Senate Bill S8452 would enable the Department of Labor to place a stop-work order on any business that has a wage theft claim of at least \$1,000.

Notes:

This approach has proven successful in other states, such as New Jersey, which temporarily shut down 27 Boston Market restaurants and eventually recovered more than \$630,000 in back wages for 314 workers.

- Senate Bill S8453 allows the New York State Department of Taxation and Finance to suspend a business's certificate of authority — which allows it to collect sales tax and conduct business — in cases where wage theft exceeds \$1,000.

Notes:

The three bills include a provision that allows employers to avoid the punishments if they resolve their wage theft claims within 15 days.

While these bills have not yet been passed, they demonstrate a trend towards the attempt to limit wage and hour law violations.

Source: <https://www.propublica.org/article/wage-theft-law-new-york-violators-doing-business>

Artificial Intelligence in Compensation Management

- AI in salary management can analyze vast amounts of data to identify patterns, trends, and anomalies. Employers can then make informed decisions about pay ranges, bonuses, and other forms of compensation. Pay equity trends and disparities are identified, allowing employers to take action to mitigate potential issues.
- Fair pay is ensured as the risk of errors in compensation decisions is reduced. In evaluating compensation, AI can consider factors including an individual's specific skill sets, experience, and the typical salary for their role so compensation packages are personalized. By staying on top of compensation trends, employees receive the "perfect" salary.
- AI could become a significant tool to ensure compliance with pay data reporting. Analyzing employee data helps employers to create equitable, explainable and competitive salaries, while complying with pay equity legislation.
- AI's predictive capabilities help employers to compete in a volatile labor market. By analyzing trends in compensation across different sectors and locations, AI enables HR to anticipate change and adjust compensation accordingly.

Source: <https://www.linkedin.com/pulse/ai-salary-management-solution-pay-equity-trusaic#:~:text=Benefits%20of%20AI%20in%20compensation%20management&text=AI%20in%20salary%20management%20can,and%20other%20forms%20of%20compensation.>

The Department of Labor's Increase of Investigations and Prosecution of Off-the-Clock Violations

- In 2023, the U.S. Department of Labor increased their remote work-related investigations and prosecutions, focusing on off-the-clock claims.
- To provide clarity and establish a framework for compliance, the DOL issued guidance on compensable time for remote workers. The DOL clarified that remote workers' breaks to go to the bathroom, get a cup of coffee, stretch their legs and other similar activities that last 20 minutes or less must be compensated.
- It is expected that the DOL will continue to remain focused on these off-the-clock claims in 2024.

Source: <https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-1.pdf>

Wage and Hour Regulators Focus on Child Labor Laws

- Federal and state enforcement of child labor laws will be a main focus of federal officials in 2024. The USDOL recently reported a 70% increase in the number of children illegally employed by companies in recent years.
- In February of 2023, the U.S. Departments of Labor and Health and Human Services announced new efforts to combat exploitative child labor.

A DOL-led Interagency Taskforce to Combat Child Labor Exploitation: The task force will further collaboration and improve information sharing among agencies, as well as advance the health, education, and well-being of children in the U.S. For instance, timely information regarding active child labor investigations, as appropriate, enables HHS to apply additional scrutiny in the sponsor vetting process when warranted because of geographic or other concerns. Through this task force, the agencies will also jointly conduct education and training initiatives in relevant communities.

A National Strategic Enforcement Initiative on Child Labor: As part of this new initiative, DOL's Wage and Hour Division will use data-driven, worker-focused strategies to initiate investigations where child-labor violations are most likely to occur. And, the Wage and Hour Division and the Labor Department's Office of the Solicitor will use all available enforcement tools, including penalties, injunctions, stopping the movement of goods made with child labor, and criminal referrals where warranted.

Hold All Employers Accountable: DOL will hold all employers accountable to ensure child labor is removed from supply chains. This will include applying further scrutiny to companies doing business with employers using illegal child labor to increase corporate accountability for system abuses of child labor laws. Too frequently employers who contract for services are not vigilant about who is working in their facilities, creating child labor violations up and down the supply chain. With the increased reliance of staffing agencies and subcontracting, host companies are often claiming that they are unaware or unable to control child labor issues happening at their worksites.

Source: <https://www.hhs.gov/about/news/2023/02/27/departments-labor-and-health-and-human-services-announce-new-efforts-combat-exploitative-child-labor.html>

Wages and Benefits of Self-Employed Gig Workers

- New laws enhancing gig worker benefits and protections are making waves.
- New York City has established a minimum hourly wage for gig workers, starting at \$17.96 per hour for app-based delivery employees; this rate will rise to \$19.66 per hour by 2025.

Wage and Hour Claims Generally

- On September 14, 2023, the EEOC and the U.S. DOL announced that they had executed a memorandum of understanding enabling information sharing, joint investigations, training, and outreach. Pursuant to the memo, there will be increased interagency cooperation and coordination and each agency will make complaint referrals to the other while also sharing complaint and investigative files, EEO-1 reports, FLSA records, and statistical analyses and summaries.
- It is expected that moving into 2024, the result of the agreement and interagency cooperation, will be increased enforcement. In addition, both agencies can now bring action for violations of wage and hour claims.

Source: <https://www.eeoc.gov/memorandum-understanding-between-us-department-labor-wage-and-hour-division-and-us-equal-employment>

Recent Caselaw

***Helix Energy Solutions Group Inc. v. Hewitt*, 143 S. Ct. 677 (Feb. 22, 2023)– U.S. Supreme Court Holds Salaried Worker Making Over \$200,000/year Eligible for Overtime**

From 2014 to 2017, respondent Michael Hewitt worked for petitioner Helix Energy Solutions Group as a “toolpusher” on an offshore oil rig. Reporting to the captain, Hewitt oversaw various aspects of the rig’s operations and supervised 12 to 14 workers. He typically, but not invariably, worked 12 hours a day, seven days a week—so 84 hours a week—during a 28-day “hitch.” He then had 28 days off before reporting back to the vessel.

Helix paid Hewitt on a daily-rate basis, with no overtime compensation. The daily rate ranged, over the course of his employment, from \$963 to \$1,341 per day. His paycheck, issued every two weeks, amounted to his daily rate times the number of days he had worked in the pay period. So if Hewitt had worked only one day, his paycheck would total (at the range’s low end) \$963; but if he had worked all 14 days, his paycheck would come to \$13,482. Under that compensation scheme, Helix paid Hewitt over \$200,000 annually.

Holding: For purposes of overtime pay, a high-earning employee was not compensated on a salary basis under when his paycheck was based solely on a daily rate. Rather, the employee could qualify as paid on salary only under 29 C.F.R. § 604(b) (2015). In addition, an employee's compensation did not meet § 604(b)'s conditions, and thus did not count as a salary, where he was not paid by the week or longer. As a result, he was not exempt from the FLSA; instead, he was eligible under that statute for overtime pay.

***Perry v. City of New York*, 78 F.4th 502 (2d. Cir. Aug. 25, 2023) – 2nd Circuit Holds Employer Must Pay Overtime for Tasks Completed Before and After Shifts**

New York City lost its appeal for failing to pay fire department emergency medical technicians and paramedics overtime when they performed tasks before and after their shifts even though the employees didn't take advantage of the City’s system for reporting hours beyond what they're scheduled.

The court held that the FLSA requires pay when an employer "suffers or permits" an employee to work, words that indicate that accepting the fruits of someone's labor is enough to activate the obligation.

The evidence was sufficient for the jury to conclude that defendant maintained a policy or practice of requiring plaintiffs to perform compensable pre- and post-shift work for which they were not automatically paid in violation of 29 U.S.C.S. § 207(a)(1) because it showed that the job required significant preparation to be done properly, plaintiffs were required to be ready to go on emergency calls as soon as possible after the start of their shifts, defendant issued formal regulations and enforced informal expectations to that effect, and testimony showed that it was

essentially impossible to comply with defendant's demands without starting work before the paid shift. The court held that whether an employer knew an employee was not being paid was irrelevant to Fair Labor Standards Act liability.

Uber, Lyft to pay \$328 million to settle wage-theft allegations in New York state

In November 2023, Uber and Lyft agreed to pay a combined \$328 million to settle allegations the ride-hailing companies unlawfully withheld wages from drivers and failed to provide mandatory paid sick leave in New York state. Uber will pay \$290 million and Lyft will pay \$38 million. The state Attorney General's office said it's the largest wage-theft settlement it has won.

The Attorney General's office alleged the companies incorrectly deducted charges from drivers' wages that should have instead been charged to passengers. For example, the office said that from 2014 to 2017 Uber deducted sales taxes and Black Car Fund fees from drivers' paychecks and misrepresented that it would do so in its terms of service. And Lyft, the AG alleged, deducted an 11.4% administrative charge that equaled the amount of the sales tax and Black Car Fund fees between 2015 and 2017. It is also alleged that both companies failed to provide paid sick leave as required under state and New York City law.

Attorney General, Leticia James stated, "For years, Uber and Lyft systemically cheated their drivers out of hundreds of millions of dollars in pay and benefits while they worked long hours in challenging conditions . . . This settlement will ensure they finally get what they have rightfully earned and are owed under the law. My office will continue to make sure that companies operating in the so-called 'gig economy' do not deprive workers of their rights or undermine the laws meant to protect them."

Recent New York DOL Settlements

The New York State Department of Labor announced that its Division of Worker Protection investigators have recovered and returned over \$11.7 million in stolen wages to 12,000 affected workers since January 1, putting the Department on track to recover \$20 million in stolen wages this year.

Over \$200,000 in recovered funds span six larger cases in which the Division of Labor Standards was able to investigate and reach settlements. These cases are just a few of the many cases Worker Protection's Division of Labor Standards has resolved over the last year.

The six notable cases included:

- A grocery store worker in Elmont who received \$37,095
- A dry-cleaning employee in Manhattan who received \$20,000
- A jewelry store worker in Jackson Heights who received \$65,000
- A tow truck operator in Elma who received \$25,900
- An installer working for a restoration company in Yonkers who received \$11,400
- A technician working for a transit company in Plattsburg who received \$48,000



Employers and human resources personnel must stay up to date on the latest legal developments, be informed about U.S. Department of Labor and key state initiatives and regulatory changes.

- Maintaining wage and hour compliance is crucial for businesses to provide fair and legal employment practices.
- Prepare for increases compliance actions.
- Address off-the-clock violations.
- Be sure to address wage and hour violations promptly or risk the financial burdens that could impact your business’s stability and resources.