



Webinar 6 – March 27, 2024

Legal Requirements and Recent Developments in Wage and Hour Law

WEBINAR OUTLINE

Legal Requirements in Wage and Hour Law

- Classifying Exempt and Non-Exempt Employees
- Establishing Criteria for Overtime Pay
- Utilizing Reliable Timekeeping Systems
- Notice Requirements
- Timely and Accurate Payroll Practices
- Working Hours – Stand By, Travel Time, Split Shifts/Spread of Hours
- Recording Requirements

Recent Developments

- Minimum Wage and Salary Threshold Increases
- Tip Credit, Meal Credit and Uniform Maintenance Pay Increases
- New York Freelance Isn't Free Act
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- Independent Contractor Rule
- Frequency of Pay Claims

HRtelligence TIPS

Legal Requirements and Trends in Wage and Hour Law

Applicable Laws and Regulations

The Fair Labor Standards Act (“FLSA”) establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments.

Applicable Laws & Regulations

- 29 U.S.C. Section 201 et. seq.
- 29 C.F.R. parts 510-794

The New York State Division of Labor enforces the New York State Labor Laws that:

- Define wages, benefits, tips and frequency of payment of wages, benefits and tips.
- Define categories of employees.
- Delineate permissible deductions.
- Set recordkeeping and notice requirements.
- Set minimum wage.

Define hours of work and breaks.

Classifying Exempt and Non-Exempt Employees

Every employee is either “exempt” or “non-exempt,” so understanding what each category means and how to classify your employees is a crucial first step.

Exempt workers cannot claim overtime pay. An office manager responsible for strategic planning and organizational success would likely fall into this category.

On the other hand, non-exempt employees are typically paid on an hourly basis and must be compensated at a rate of at least one and a half times their regular hourly wage for overtime hours.

Who is Exempt?

Generally, employees must meet two requirements to be classified as exempt:

- They must be paid on a salary basis.
- They must hold a position with duties designated by the Labor Department as appropriate for exempt status.
- Paid the same amount each week, with no improper deductions.

Two-Part Test: Salary Basis + Job Duties

Salary Basis Test

- Employees are paid on a salary or fee basis.
- In return, there's no overtime for working more than 40 hours a week.
- Guaranteed salary – no reduction if they work less than 40 hours or when work isn't available.

Job Duties Test

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations.

Must fit at least one of the narrow exempt classifications defined by statute:

- Executive
- Professional
- Administrative
- Outside Sales
- Computer
- Highly Compensated

Why Getting It Right Is Critical

Improper Classification increases your risk of being:

- Audited by USDOL or NYDOL and subject to fines and penalties.
- Sued by individuals or on a class wide or collective action basis.

Claims go back 3 years in federal court, 6 years in state court.

Attorneys' fees are built into statute.

If you didn't track overtime, how can you prove how much you owe?

If You've Misclassified: Self-audit.

- Pay people what you owe.
- Ask DOL to come in and certify.

Pros

- It's less costly than full audit or lawsuit.
- You make an informed business decision and you are prepared.

Common Pitfalls for Employers

- Misclassifying executive assistants, office managers and IT staff
- Changing exemption status once the pay threshold is reached
- Going by the title, not the job duties
- Paying employees extra for working extra hours – thereby jeopardizing their exempt status

- Assuming all medical staff or highly educated jobs qualify for the exemption
- Going with the degree, not the job duties, to classify as learned professionals
- Deducting from an exempt employee's pay
- Always treating salaried employees as exempt
- Always treating supervisors as exempt
- Paying an exempt employee for the entire week if they perform any work in the workweek

Establishing Criteria of Overtime Pay

- Both federal law (FLSA) and state law (New York Minimum Wage Act and applicable regulations) generally require the payment of overtime wages for work performed over 40 hours per week.
- Overtime pay must be at least 1.5x their regular hourly rate.
- Employers must clearly define these policies and communicate them to staff, outlining the eligibility criteria, calculation method, and specific rules or exceptions.
- Overtime hours must be accurately tracked and recorded. This is vital for compliance with wage and hour regulations.

Utilizing Reliable Timekeeping Systems

- Keeping track of the hours your employees work is essential to running an efficient business. Timekeeping keeps your payroll on track by making sure your employees are paid accurately for the hours they've worked and that overtime is calculated correctly.
- Effective employee timekeeping helps you better manage your workforce, pay your employees accurately and ensure your business is staying compliant with local labor laws.

Benefits of effective employee timekeeping:

- Fewer payroll errors
- Better compliance with labor laws
- Improved productivity
- Higher employee morale
- Better decision making

Different Methods of Timekeeping:

- Online timekeeping software
- Mobile Time Tracking Apps
- Biometric timekeeping
- Manual timekeeping

Notice Requirements

Notice of Pay Rate

The Wage Theft Prevention Act (WTPA) requires employers to give **written** notice of wage rates to each new hire and to all employees by February 1st of each year.

The notice must include:

- Rate or rates of pay, including overtime rate of pay (if it applies)
- How the employee is paid: by the hour, shift, day, week, commission, etc.
- Regular payday
- Official name of the employer and any other names used for business (DBA)
- Address and phone number of the employer's main office or principal location
- Allowances taken as part of the minimum wage (tips, meal and lodging deductions)

Note:

The notice must be given both in English and in the employee's primary language (if the Labor Department offers a translation). The Department currently offers translations in the following languages: Spanish, Chinese, Haitian Creole, Korean, Polish and Russian.

Wage Statements

Employers must give each employee a wage statement or pay stub each payday that lists all payroll data and must give any employee who asks a written explanation of how they computed wages.

With regard to information that must be given to workers on their pay stubs, the WTPA requires all pay stubs/wage statements to contain the following:

- Employer's name, address, and phone number
- Employee name
- Dates covered by payment (pay period)
- Basis of payment (hourly, salary, commission, etc.)
- Rates paid (regular and overtime)
- Hours worked (regular and overtime)
- Allowances or credits applied against wages
- Gross wages
- Any deductions from wages, and
- Net wages

Timely and Accurate Payroll Practices

Proper record-keeping guarantees that employee hours, wages, benefits, and deductions are all accurately tracked, resulting in timely and accurate payments. This prevents disputes and legal issues stemming from payment discrepancies.

Types of Payroll Records

In general, employers should keep the following important payroll records:

- **Employee Information.** Employee's legal name, address, social security number, and date of birth.
- **Employment Information.** Offer letters, date of employment, Form I-9s, occupation/titles, job description, background checks, professional references, acknowledged company policies, evaluations/reviews, and termination information.
- **Pay Information.** Pay agreement/status, wages paid each period, type of wage payment, time and day of week employee's work week starts. Total number of regular hours worked each day and each week. Overtime hours and amount paid. Date of payment and the pay period covered by the payment. Supplemental pay, tips, amounts, and dates of all taxable annuities, pension payments, bonuses, and commissions.
- **Deductions.** Benefits, deferred compensation information, etc.
- **Direct Deposit Details.** Bank/financial institution names, account numbers, and routing numbers.
- **Timesheets.** Regular hours worked, overtime hours.
- **Leave Records.** Paid time off (PTO) and vacation time balances. Leave requests documentation, such as the Family Medical Leave Act (FMLA), state-paid leave programs, and paid sick leave.
- **Reimbursement Forms.** Expense reports for travel, mileage, etc.
- **Tax Documents.** Federal, state, and local tax forms/returns, W-4, W-2 forms.
- **Employer Tax Information.** Payroll reports and payment receipts

Accurate payroll records offer valuable insights into employee performance, productivity, and costs. This data enables business owners to identify trends, make more informed hiring decisions, assess the effectiveness of compensation structures, and implement performance-based incentives.

Source: <https://www.propelhr.com/blog/the-importance-of-accurate-record-keeping-for-small-business-payroll>

Normal Working Hours

An employee's regular working hours may not exceed the legal maximum of 40 hours weekly (exclusive of overtime).

Workweek: New York minimum wage laws define a workweek as 7 consecutive 24-hour periods or a regular repeating span of 168 hours. A workweek may begin at any hour of the day and on any day of the week and does not have to coincide with a calendar week.

Work Schedules: Employers are obligated to accommodate an employee's request for a temporary change in their work schedule, relating to personal events. This adjustment can include modifications in working hours, locations, or the use of paid time off, remote work, or short-term unpaid leave. The employer must approve such requests twice a year, with each request limited to one business day. Alternatively, the employer can allow the employee to use 2 business days for a single request, eliminating the need for a second request.

Stand By, On-call and Travel Time

Stand By – An employer is required to count employee waiting time as hours worked for purposes of its minimum wage and overtime requirements if the employees are required to remain available to work at or near the employer's premises and are unable to use the time productively for their purposes.

On-call time – The law mandates that employers must include on-call time as part of hours worked for minimum wage and overtime calculations. This applies when employees are obligated to remain available for work on or near the employer's premises and cannot use the time for personal activities. However, certain exceptions exist, employers are not required to count as hours worked the time when an employee who resides on the employer's premises is present but is:

- During regular sleeping hours, even if they are on-call
- Any other time when the employee is free to leave the employer's premises but voluntarily chooses to stay.

Travel time – Employers are required to count employee travel time as hours worked for purposes of its minimum wage and overtime requirements if the travel is part of the employee's duties.

Split Shifts/Spread of Hours

Spilt Shift (Spread of hours): The laws mandate employers in the hospitality industry, non-profit institutions, religious, charitable, educational institutions, hotels, restaurants, and bars to

provide an additional hour of pay at the standard minimum wage under the following circumstances:

- If employees work more than a spread of 10 hours in a workday.
- If employees work a split shift.
- If both scenarios mentioned above occur.

A split shift is defined as a daily schedule with non-consecutive working hours, excluding meal periods of one hour or less. The 10-hour spread includes any breaks, meals, or other off-duty periods.

Recordkeeping Requirements

Every employer shall keep at the place of employment or at the employer's principal place of business in New York, a true and accurate record for each employee for at least 6 years from the date of entry which contains the following information:

- name and address;
- social security number;
- wage rate;
- the number of hours worked daily and weekly, including the time of arrival and departure of each employee working a split shift or spread of hours exceeding 10;
- when a piece-rate method of payment is used, the number of units produced daily and weekly (required for for-profit employers only);
- the amount of gross wages; deductions from gross wages;
- allowances, if any, claimed as part of the minimum wage;
- net wages paid; and
- student classification (required for for-profit employers only).

Recent Developments in Wage and Hour Law that Employers Should Be Aware of for 2024

Minimum Wage and Salary Threshold Increases

Effective January 1, 2024, the minimum wage will increase incrementally over the next few years based on the region where employees work as follows:

For New York City, Westchester and Long Island:

- 2024 – \$16.00/hour
- 2025 – \$16.50/hour
- 2026 – \$17.00/hour

For the rest of New York:

- 2024 – \$15.00/hour
- 2025 – \$15.50/hour
- 2026 – \$16.00/hour

Notes:

Beginning on January 1, 2027, increases to the minimum wage rates will be based on inflation using a three-year average of the Consumer Price Index for Urban Wage Earners and Clerical Workers (“CPI-W”). The State labor commissioner is directed to publish the adjusted minimum wage rate no later than October 1st each year, with the new rates taking effect the following January 1st.

New York State Increases Salary Thresholds for Minimum Wage and Overtime Exemptions for Executive or Administrative Employees

Effective January 1, 2024, the New York State salary threshold for exempt executive and administrative employees is as follows:

New York City, Westchester, Nassau and Suffolk Counties

\$1,200.00/week (\$62,400.00/year)

The Rest of New York State

\$1,124.20/week (\$58,458.40/year)

Employers will have to increase the salary of executive and administrative employees accordingly to continue to treat them as exempt from overtime under New York State law.

Note:

professional employees are not subject to the New York State salary threshold requirements, but these employees remain subject to the federal exempt salary threshold (currently \$684.00/week (\$35,568.00/year)).

Different Salary Threshold for Other Exceptions Under the New York Labor Law – Effective March 13, 2024

In addition to establishing a salary threshold for the executive and administrative employee overtime exemption, the New York Labor Law establishes a separate salary threshold for employees to be excluded from Article 6 of the New York Labor Law, which governs specific pay

practices. Specifically, as of March 13, 2024, executive, administrative, and professional employees who meet this separate salary threshold of \$1,300 per week are excused from the following New York Labor Law requirements:

- Paying clerical and other workers “not less frequently than semi-monthly” § 191(d).
- Obtaining the advance written consent of employees before paying wages via direct deposit (NYLL § 192).
- The employer being guilty of a misdemeanor if it fails to provide benefits or wage supplements within 30 days after they are due (NYLL § 198(c)).

Based on these two laws, an employee may be considered exempt for overtime purposes but still subject to the other Article 6 requirements.

Employers should review the salaries of exempt administrative and executive employees to ensure they meet the 2024 threshold and should review the payroll practices regarding those exempt employees making less than \$1,300 a week to ensure they are in compliance with the requirements of Article 6.

Tip Credit Increase – Tipped Food Service Workers

As of January 1, 2024, the minimum wage and minimum cash wage for tipped food service workers increased as follows:

New York City, Westchester, and Long Island

- \$10.65 cash wage and \$5.35 tip credit/hour
(increased from \$10.00 cash wage and \$5.00 tip credit/hour)

Remainder of New York state

- \$10.00 cash wage and \$5.00 tip credit/hour
(increased from \$9.45 cash wage and \$4.75 tip credit/hour)

Tip Credit Increase – Tipped Service Workers

A service employee is defined as an employee, other than a food service worker or fast food employee, who customarily receives tips.

As of January 1, 2024, the minimum wage and minimum cash wage for tipped service workers increased as follows:

New York City, Westchester, and Long Island

- \$13.35 cash wage and \$2.65 tip credit/hour
(increased from \$12.50 cash wage and \$2.50 tip credit/hour)

Remainder of New York state

- \$12.50 cash wage and \$2.50 tip credit/hour
(increased from \$11.85 cash wage and \$2.35 tip credit/hour)

Meal Credit Increase

As of January 1, 2024, the allowable "meal credit" for food service workers, service employees, and non-service employees increased as follows:

Food Service Workers

New York City, Westchester, and Long Island

- \$3.85/meal (increased from \$3.60/meal)

Remainder of New York State

- \$3.80/meal (increased from \$3.60/meal)

Service Workers

New York City, Westchester, and Long Island

- \$4.45/meal (increased from \$4.15/meal)

Remainder of New York State

- \$4.10/meal (increased from \$3.90/meal)

Non-service Workers

New York City, Westchester, and Long Island

- \$5.50/meal (increased from \$5.15/meal)

Remainder of New York State

- \$5.20/meal (increased from \$4.90/meal)

Uniform Allowance

Under New York law, if an employer requires an employee to wear a uniform, the employer can either (i) launder and maintain the uniform itself; or (ii) pay the employee an allowance, also known as "Uniform Maintenance Pay," on a weekly basis. The amount an employer must pay an employee in Uniform Maintenance Pay depends on the number of hours worked by the employee during the week. A "required uniform" is defined as "clothing required to be worn while working at the request of an employer" that may not be worn as part of an employee's ordinary wardrobe outside of work.

As of January 1, 2024, the uniform pay is as follows:

New York City, Westchester and Long Island

Work Week More than 30 Hours	\$19.90
Work Week Between 20-30 Hours	\$15.75
Work Week of 20 Hours or Less	\$9.50

Remainder of New York State

Work Week More than 30 Hours	\$18.65
Work Week Between 20-30 Hours	\$14.80
Work Week of 20 Hours or Less	\$8.95

New York Freelance Isn't Free Act

On November 22, 2023, New York Governor Kathy Hochul signed into law the “Freelance Isn't Free Act,” which addresses payment of wages for freelance workers. Specifically, the Act amends the New York Labor Law to establish protections for covered freelance workers, including the right to receive a written contract, the right to be paid timely and in full, and the right to be free from retaliation. The new law takes effect May 20, 2024 and applies only to contracts entered into on or after that date.

NLRB Joint Employer Rule

- On October 26, 2023, the National Labor Relations Board issued a final rule addressing the standard for determining joint-employer status under the National Labor Relations Act. The new rule was scheduled to take effect on March 11, 2024.
- However, on March 8, 2024, a federal judge in Texas ruled that the Board’s new joint employer regulations are invalid as inconsistent with the National Labor Relations Act.
 - The ruling found that the new rule failed to create a clear standard for employers to follow and that the NLRB’s rescission of a prior rule was arbitrary and capricious.
 - Under regulations which were issued last October, an employer could be deemed a “joint employer” if it merely had the right to exercise indirect control over an essential term or condition of employment, even if it never actually exercised that control. According to Judge J. Campbell Barker, that went beyond the bounds of common law and therefore the NLRA.
 - The NLRB is reportedly exploring its options on whether to appeal the ruling to the Fifth Circuit Court of Appeals or reexamine its efforts to expand its joint-employer rule.

Note:

The new rule would have made it easier for workers to be considered employees of more than one entity for labor relations purposes – a move that will result in more opportunities for unions to organize not only the workforce but also those workers formerly understood to be independent contractors.

Independent Contractor Rule

- The U.S. Department of Labor (“DOL”) recently published its Final Rule for determining independent contractor status under the Fair Labor Standards Act (“FLSA”). The Final Rule became effective March 11, 2024.
- The new rule restores the multifactor analysis and affirms that a worker is not an independent contractor if they are “economically dependent” on an employer for work. The rule addresses six factors that guide the analysis of a worker’s relationship with an employer, including: (1) any opportunity for profit or loss a worker might have; (2) investments by the worker and the potential employer; (3) the degree of permanence of the work relationship; (4) the nature and degree of control an employer has over the person’s work; (5) the extent to which the work performed is an integral part of the potential employer’s business; and (6) the worker’s skill and initiative.

Frequency of Pay Claims

Second Department Holds that Manual Workers Do Not Have a Private Cause of Action in Frequency of Pay Claims

On January 17, 2024, the Appellate Division of the New York Supreme Court for the Second Department held that a private right of action under New York Labor Law 198(1-a) does not apply to frequency of payment claims under Section 191.

In *Grant v. Global Aircraft Dispatch, Inc.*, 2024 N.Y. App. Div. LEXIS 180, the question before the Second Department court was whether Labor Law § 198(1-a) expressly provides a private right of action for a manual worker paid on a biweekly basis in violation of Labor Law § 191(1)(a) to recover liquidated damages, interest, and attorneys’ fees. The court found that the plain language of Labor Law § 198(1-a) supports the conclusion that this statute addresses nonpayment and underpayment of wages, and not frequency of payment. The court held that payment of full wages on the regular biweekly payday does not constitute nonpayment or underpayment.

Notes:

This decision is significant because in 2019, the Appellate Division of the New York Supreme Court for the First Department, held that New York employers may be liable for liquidated damages for

violating the “Frequency of Pay” requirements under New York State law. *Vega v. CM & Assoc. Constr. Mgt., LLC*, 175 A.D.3d 1144, 107 N.Y.S.3d 286 (1st Dept. 2019).

Specifically, in the Vega decision, the court held that that “manual workers” who receive full pay but are paid “late” (on a biweekly or later basis) in violation of the frequency of payment provision of the New York State Labor Law (“NYLL”) have a private cause of action and can recover liquidated damages. The First Department determined that such a private right of action exists, concluding that the “wage claim[s]” to which section 198 refers include not only instances of nonpayment or partial payment of wages, but also late payment of wages (see Vega v CM & Assoc. Constr. Mgt., LLC, 175 AD3d at 1145- 1146).

The Second Department court disagreed with the First Department’s holding in Vega, which creates a split between the appellate departments over whether a private cause of action exists under the law. Therefore, cases located in the Second Department (cases emanating from the superior courts located in the counties of Dutchess, Brooklyn, Nassau, Orange, Putnam, Queens, Staten Island, Rockland Suffolk, and Westchester) will now be required to follow the holding in Grant. Trial courts within the First Department (in Manhattan and the Bronx) will continue to follow the Vega decision.

Governor Hochul Proposes to Limit Plaintiffs’ Recovery of Liquidated Damages for Frequency of Payment Claims

On January 16, 2024, Governor Hochul publicly announced her Executive Budget Proposal for fiscal year 2025, which included proposed legislation that would limit plaintiffs’ recovery of liquidated damages for violations of frequency of payment provisions in the NYLL “where the employee was paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly.”

Notes:

While it is too early to tell whether this proposed legislation will be approved by the legislature, it would, as currently drafted, provide an additional layer of relief for employers challenging NYLL Section 191 claims brought by employees seeking to recover liquidated damages for wages that were paid regularly, albeit not within the time limits prescribed by Section 191.



Here are some key takeaways for employers:

- Employers are required to keep accurate employment records, payroll records, and records of hours worked, and to provide employees with information about how their wages are calculated. Employers must also keep records to demonstrate compliance with these requirements.
- Ensure proper classification of employees.
- Track all hours worked.
- Know current federal and state laws.
- Update your company policies and employee handbook with legal guidance and updates.
- Train managers, HR, executives, and employees