



WEBINAR OVERVIEW

Wage and Hour Trends

March 22, 2023

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WEBINAR OUTLINE

I. Intro/Setting the Stage

A. Top Trends on the Wage and Hour Scene

1. Trend - US DOL ramps up hiring in 2023 – what does this mean?
 - more investigations
 - increased liquidated damages and
 - civil money penalties
 - more challenges filed by employers to DOL findings
 - increased litigation.

Notes: The US Department of Labor announced in early February that it will be hiring at least 100 new wage and hour investigators, while we also understand it's staffing up with agency lawyers for enforcement purposes.

2. Trend – NYS Labor Laws and NYS DOL broaden oversight
 - Safe and Sick Leave
 - Minimum Wage
 - Overtime Wage
 - Safety and Health in the Workplace
 - Work Breaks and Days of Rest
 - Additional Worker Protections:
 - Domestic Workers
 - Fast Food Workers
 - Immigrant Workers
 - Child Labor

- Apparel Industry Workers
- Freelance Workers
- Other groups, such as building service workers, construction workers, nail salon workers, retail and grocery workers,

Note: Labor and employment laws are put in place to protect workers of any type in any industry. Under the jurisdiction of the US Department of Labor, everyone has the right to be adequately compensated for the work they perform in the United States. The Fair Labor Standards Act (FLSA) is a federal labor law out of which all the other state and city laws branch out. New York state uses the FLSA as a starting point and offers some additional protections to specific groups of workers.

3. Trend -Misclassification Challenges Will Cause Businesses to Reevaluate Structure of Workforce (IC v. EE)
 - A collection of federal agencies and state regulators have indicated that they will focus on independent contractor arrangements and also aim to capture as many businesses as possible in joint employment situations.

Note: This effort to impose liability for misclassification and a variety of wage and hour violations should cause you to rethink business affiliations and contractor structures with this new reality in mind.

4. Trend - Closer scrutiny related to Child Labor
 - The US Department of Labor (DOL) announced a new program to increase the number of child labor investigations and enforcement efforts.
 - This program will coordinate with the Department of Health and Human Services to target industries with high numbers of immigrant laborers such as construction and manufacturing.
 - US DOL is also asking Congress to increase the penalties for child labor violations.
5. Trend – Wage and Hour litigation related to Remote Work
 - Potential for claims from remote based workers that they are not getting paid for all hours worked (including time spent checking employer-required apps) and have not been properly reimbursed for business expenses (Wi-Fi, data plans, cell phones, etc.).
6. Trend - Commissions and Bonuses Will Receive Increased Legal Focus
 - Note: New York Labor Law has specific legislation requiring the payment of commissions to be specifically laid out in written agreements.

Notes: commissions are often mistaken for bonuses, seen as one in the same by employers and workers. Once a commission or bonus is “earned,” it must be paid and there is no way to claw back the payment when a third party

doesn't pay you the amount that is intended to fund the payout, or the employee resigns, without running afoul of the state rules prohibiting deductions.

B. The Outlook Ahead

U.S. DOL plans for a May release for new Overtime Rule

- The DOL's pending proposal might include additional changes, such as:
 - Adjustments to the exempt duties tests;
 - Automatic, periodic increases to the salary threshold based on market data; and/or
 - An additional rate increase for highly compensated employees. Currently, "highly compensated employees" who earn at least \$107,432 are subject to a reduced duties test.

The End of Daylight Savings Time? What it Could Mean for Employers and Timekeeping

- The new Sunshine Protection Act is similar to the bill introduced last year. If passed, the clocks would change for the final time later this month — when daylight saving time begins — and not change them again in November.
 - Employers whose nonexempt employees are in the midst of a shift at 2 a.m. on Nov. 6, when that time becomes 1 a.m., may be required to pay these employees for one additional hour of work—if, in fact, the time change extends the number of hours actually worked.
 - If an employer in the above scenario does pay its nonexempt employees for an additional hour of work, it might be on the hook for overtime compensation as well.
 - When calculating an employee's regular rate, employers must consider all compensation that the employee received in one workweek, including the additional hour of compensation to which a nonexempt employee may be entitled if he or she is working during the time change.

II. Wage and Hour Laws at a Glance

A. FLSA

- The Fair Labor Standards Act (FLSA) is a federal law which applies in all states, and sets a minimum standard for regulations concerning wages, overtime, and hourly work.

1. Overtime

According to New York Overtime Law, employers must typically pay employees 1.5 times their regular rate of pay for all work over 40 hours in a week. If an employee's rate of pay differs at times, then use the average as the regular rate of pay. Under certain circumstances under the Fair Labor Standards Act (FLSA) and the New York Minimum Wage Act and applicable regulations, some positions may be exempt from overtime regulations. Employers should review both the FLSA and NYS Labor Law to determine an employee's overtime pay requirements.

Who Is Exempt? Two Part Test: Salary Basis + Job Duties

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

1. They must be paid on a salary basis.
2. They must hold a position with duties designated by the Labor Department as appropriate for exempt status.

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.
- Minimum salary to qualify as exempt is:
 - \$684 per week/\$35,578 annually (FLSA); \$1125 per week/\$58,500 annually (NYC/LI and Westchester)

Job Duties Test

Employees who earn at least \$455/week (FLSA) \$825/week (NY/LI) may be exempt from overtime pay if they also meet a Job Duties test. Employee job duties must fit at least one of the narrow exempt classifications defined by statute:

Exemption Categories:

Executive

- Regularly supervises two or more other employees (full-time or the equivalent).
- Has management as the primary duty of the position, and
- Has some genuine input into the job status of other employees (such as hiring, firing, promotions, or assignments)

Professional

Predominately intellectual. Requires specialized education. Involves the exercise of discretion and judgment.

- Learned Professional perform work requiring “advanced knowledge” including lawyers, doctors, dentists, teachers, architects, clergy, registered nurses (not LPNs), accountants (not bookkeepers), engineers, actuaries, scientists (not technicians), pharmacists and other employees who perform work requiring “advanced knowledge.”

- Computer Professional

Reserved for high-level computer professionals who

- Exercise independent judgment

And who specifically

- Apply system analysis techniques and procedures to determine hardware, software or system functional specifications **OR**
- Design, develop, or modify computer systems/programs

- Creative Professional - perform original and creative work including actors, writers, journalists, etc.

Outside Sales

- Make sales.
- Obtain orders or contracts.
- Are customarily and regularly engaged away from employer’s place/places of business while selling/obtaining contracts.
- Emphasis on face-to-face selling
- Can do a few tasks that aren’t directly related to selling
- no minimum salary since many are paid on straight commission

Administrative

Office or non-manual work, which is directly related to management or general business operations of the employer or the employer’s customers and a primary component of which involves the exercise of independent judgment and discretion about matters of significance.

Highly Compensated

The employee earns total annual compensation of \$107,432 or more, which includes at least \$684* per week paid on a salary or fee basis;

1. The employee’s primary duty includes performing office or non-manual work; and
2. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

Notes:

Professional Exemption

Professionally exempt work means work that is:

- *Predominately intellectual.*
- *Requires specialized education.*
- *Involves the exercise of discretion and judgment.*

“Creative professions” - perform original and creative work including actors, writers, journalists, etc.

“Learned professions” – perform work requiring “advanced knowledge” including lawyers, doctors, dentists, teachers, architects, clergy, registered nurses (not LPNs), accountants (not bookkeepers), engineers, actuaries, scientists (not technicians), pharmacists and other employees who perform work requiring “advanced knowledge.”

“Advanced Knowledge”:

- *Predominantly intellectual*
- *Not routine mental, manual, mechanical, or physical work*
- *Includes work requiring consistent exercise of discretion, judgment*
- *Knowledge generally used to analyze, interpret, make deductions from varying facts or circumstances*
- *Cannot be attained at high school level*
- *Must utilize principles, theories, or methodologies typically learned in an academic environment when performing the primary job duties (29 C.F.R. § 541.301(b); NYCRR § 142-2.14(c)(4)(iii))*

Note: Field of Science or Learning - Occupations with recognized professional status, as distinguished from mechanical arts or skilled trades

Law, Theology, Medicine, Pharmacy, Accounting, Teaching, Architecture, Engineering, Actuarial Computation, Physical Sciences, Chemical Sciences, Biological Sciences

Computer Professional Employee

Reserved for high-level computer professionals who

- *Exercise independent judgment*

And who specifically

- *Apply system analysis techniques and procedures to determine hardware, software or system functional specifications **OR***
- *Design, develop, or modify computer systems/programs*

1. Outside Sales

- *Make sales.*
- *Obtain orders or contracts.*

- *Are customarily and regularly engaged away from employer's place/places of business while selling/obtaining contracts.*
- *Emphasis on face-to-face selling*
- *Can do a few tasks that aren't directly related to selling*
- *no minimum salary since many are paid on straight commission*

2. Administrative Exemption

Office or non-manual work, which is directly related to management or general business operations of the employer or the employer's customers and a primary component of which involves the exercise of independent judgment and discretion about matters of significance.

Administrative Exemption: Primary duty:

- *office work directly related to the management or general business operations of employer or employer's customers (29 C.F.R. § 541.201; NYCRR § 142-2.14(c)(4)(ii)); and*
- *Must include the exercise of discretion and independent judgment with respect to "matters of significance" (29 C.F.R. § 541.202; NYCRR § 142-2.14(c)(4)(ii))*

Management or General Business Operations - the regulations outline work areas that will typically satisfy this element:

- *budgeting, auditing, or quality control*
- *insurance*
- *purchasing or procurement*
- *advertising, marketing, or research*
- *safety and health*
- *legal and regulatory compliance*
- *human resources*
- *employee benefits*
- *labor relations*
- *public or government relations*
- *computer network, Internet, and database administration*

Administrative Exemption: Discretion and Independent Judgment

- *Comparison and evaluation of possible courses of conduct, and acting or making a decision after considering various possibilities*
- *Must be on "matters of significance"*
- *OK if decisions/recommendations are reviewed at higher level and occasionally revised or reversed*

Factors include:

- *Authority to formulate, affect, interpret, or implement policies or operating practices*
- *Carries out major assignments in business operations*
- *Performs work that affects business operations to a substantial degree*
- *Authority to commit employer in matters with significant financial impact*

- Authority to waive, deviate from established policies and procedures without prior approval
- Authority to negotiate, bind company on significant matters
- Provides consultation, expert advice to management
- Planning long- or short-term business objectives
- Investigates and resolves matters of significance on behalf of management
- Represents the company in handling complaints, arbitrating disputes or resolving grievances

Note: This exemption is designed for relatively high-level employees whose main job is to “keep the business running.”

3. Executive Exemption

- Regularly supervises two or more other employees (full-time or the equivalent).
- Has management as the primary duty of the position, and
- Has some genuine input into the job status of other employees (such as hiring, firing, promotions, or assignments)

Primary duty:

- Management of the enterprise or of a department or subdivision (29 C. F. R. § 541.100(2); NYCRR §142-2.14(c)(4)(i))
- Directs the work of two or more full-time employees or equivalent (29 C.F.R. § 541.100(3); NYCRR § 142-2.14(c)(4)(i))
- Authority to hire, fire, promote, or make similar "changes of status" of other employees, or recommendations regarding such changes are given "particular weight"

Highly Compensated Employees

The regulations contain a special rule for “highly compensated” employees who are paid total annual compensation of \$107,432 or more. A highly compensated employee is deemed exempt under Section 13(a)(1) if:

3. The employee earns total annual compensation of \$107,432 or more, which includes at least \$684* per week paid on a salary or fee basis;
4. The employee’s primary duty includes performing office or non-manual work; and
5. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

Thus, for example, an employee may qualify as an exempt highly compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

Total Annual Compensation

The required total annual compensation of \$107,432 or more, which includes at least \$684 per week paid on a salary or fee basis, may otherwise consist of commissions, nondiscretionary bonuses

and other nondiscretionary compensation earned during a 52-week period, but does not consist of credit for board, lodging, or other facilities, payments for medical or life insurance, or contributions to retirement plans or other fringe benefits.

Additionally, the weekly salary amount of \$684 must be paid in its entirety. Employers may not use nondiscretionary bonuses and incentive payments (including commissions) to satisfy any portion of the weekly standard salary level for HCEs.

2. Pay Equity

The Equal Pay Act of 1963, amending the Fair Labor Standards Act, protects against wage discrimination based on sex.¹ The Equal Pay Act (EPA) protects individuals of all sexes.

All forms of compensation are covered, including salary, overtime pay, bonuses, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits. If there is an inequality in wages between people of different sexes who perform substantially equal jobs, employers must raise wages to equalize pay but may not reduce the wages of other individuals.

Notes: There are several elements that must be met in compensation discrimination complaints under the Equal Pay Act. The jobs being compared must require substantially equal skill, effort, and responsibility and be performed under similar working conditions within the same establishment.

Skill: *Measured by factors such as the experience, ability, education, and training required to perform the job. The issue is what skills are required for the job, not what skills the individual employees may have.*

Effort: *The amount of physical or mental exertion needed to perform a job.*

Responsibility: *The degree of accountability required to perform the job.*

Working Conditions: *This encompasses two factors: (1) physical surroundings like temperature, fumes, and ventilation; and (2) hazards.*

B. New York State Labor Law and the New York State Department of Labor

- In New York, the state government has enacted labor laws that impose more stringent requirements on employers and offer more protection to employees than the standards provided by the FLSA. Most employees are therefore covered by both State and Federal laws in New York, but when the two conflict, the law that is stricter will be applied (NY law).
- The Division of Labor Standards 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.

1. Minimum Wage and Salary Threshold Requirements

2023 Minimum Wage Update

Location	12/31/21	12/31/22
NYC – Large Employers (of 11 or more)	\$15.00	\$15.00
NYC – Small Employers (10 or less)	\$15.00	\$15.00
Long Island & Westchester	\$15.00	\$15.00
Remainder of New York State	\$13.20	\$14.20

* Annual increases for Upstate New York will continue until the rate reaches a \$15 minimum wage.

Note: The 2023 New York minimum wage varies by geographic location and sometimes by industry. For most private employers, the 2023 New York minimum wage in the following chart applies. This chart also applies for non-teaching employees of public school districts or a BOCES. However, there is no New York minimum wage for other employees of public (governmental) employers (but the federal minimum wage of \$7.25 does apply).

Minimum Wage for Tipped Employees in the Hospitality Industry

Hospitality Industry Tipped Minimum Wage Rate Schedule (Food Service Workers)

Location			12/31/21	12/31/22
NYC – Large Employers (of 11 or more)			\$10.00 Cash \$5.00 Tip	\$10.00 Cash \$5.00 Tip
NYC – Small Employers (10 or less)			\$10.00 Cash \$5.00 Tip	\$10.00 Cash \$5.00 Tip

Hospitality Industry Tipped Minimum Wage Rate Schedule (Food Service Workers)

Location	12/31/21	12/31/22
Long Island & Westchester	\$10.00 Cash \$5.00 Tip	\$10.00 Cash \$5.00 Tip
Remainder of New York State	\$8.80 Cash \$4.40 Tip	\$9.45 Cash \$4.75 Tip

Hospitality Industry Tipped Minimum Wage Rate Schedule (Service Employees)

Location				12/31/21	12/31/22
NYC	–	Large	Employers	\$12.50 Cash \$2.50 Tip	\$12.50 Cash \$2.50 Tip
(of 11 or more)					
NYC	–	Small	Employers	\$12.50 Cash \$2.50 Tip	\$12.50 Cash \$2.50 Tip
(10 or less)					
Long Island & Westchester				\$12.50 Cash \$2.50 Tip	\$12.50 Cash \$2.50 Tip
Remainder of New York State				\$11.00 Cash \$2.20 Tip	\$11.85 Cash \$2.35 Tip

Notes: New York State has separate minimum wage rules for employees in the hospitality industry. These rules apply to businesses running a restaurant or hotel.

The minimum wage rates for most non-tipped employees in the hospitality industry are set. However, employers may count a portion of certain tipped employees' gratuities toward the minimum wage requirements. This is known as a "tip credit."

New York State has two separate cash wage and tip credit schedules for tipped hospitality employees who qualify as "food service workers" and "service employees."

*A **food service worker** is any employee who is primarily engaged in serving food or beverages to guests, patrons, or customers in the hospitality industry who regularly receive tips. This includes wait staff, bartenders, captains, and busing personnel. It does not include delivery workers.*

*A **service employee** is one who is not a food service worker or fast food employee who customarily receives tips above an applicable tip threshold.*

Overtime Salary Threshold

Executive & Administrative Exemption Weekly Salary Threshold Schedule

Location	12/31/21	12/31/22
NYC – Large Employers (of 11 or more)	\$1,125.00	\$1,125.00
NYC – Small Employers (10 or less)	\$1,125.00	\$1,125.00
Long Island & Westchester	\$1,125.00	\$1,125.00
Remainder of New York State	\$990.00	\$1,064.25

Note: Along with increases to the 2023 New York minimum wage, the salary requirement to maintain some overtime exemptions also increased.

2. 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

3. Meal Breaks

- Employees earn a 30-minute meal break for working at least six hours that span across 11:00am and 2:00pm (example: working from 10:00am-4:00pm).
- Employees earn a 45-minute meal break for working over six hours and whose shift starts between 1:00pm and 6:00am.
- Employees earn an additional 20-minute meal break between 5:00pm and 7:00pm, if their workday begins before 11:00am, and ends after 7:00pm.

4. Fringe Benefits

- New York Mini-COBRA
- Mandated Disability Benefits in New York
- New York Leave Laws
 - New York Paid Sick Leave Law
 - New York City Safe and Sick Time Law
 - New York Paid Family Leave
- Vacation Time
- Personal Leave

Every employer shall notify his employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays and hours.

5. Absenteeism

- Effective February 19, 2023, the New York Labor Law was amended to prohibit employers from disciplining employees who take legally protected time off from work.
- The amendments to Section 215 of the Labor Law expressly prohibit employers from "assessing any demerit, occurrence, or any other point, or deductions from an allotted bank of time, which subjects or could subject an employee to disciplinary action" for the use of "any legally protected absence under federal, local, or state law."

III. Trends to Watch: Wage and Hour Litigation and Administrative Cases

A. Overtime Cases

1. What are the trends?

- *You're Now a 'Manager.' Forget About Overtime Pay.* - New evidence shows that many employers are mislabeling rank-and-file workers as managers to avoid paying them overtime.

<https://www.nytimes.com/2023/03/06/business/economy/managers-overtime-pay.html>

- Supreme Court Rules That Employee Earning Six Figures Is Also Entitled to Overtime Pay

Notes: In the case, Helix Energy Solutions Group, Inc. v. Hewitt, Michael Hewitt alleged that his employer, an international offshore energy services company (Helix), failed to pay him overtime in violation of the FLSA. Hewitt worked over 84 hours in a week on an offshore oil rig at a rate of \$963 per day. Helix argued that Hewitt was a "highly compensated employee" based on his pay and supervisory duties, and therefore subject to the FLSA's exemption from overtime pay. Since the employee was only paid on a day rate, the Court concluded that Hewitt was not paid on a salary basis, and in turn, the FLSA's HCE overtime pay exemption did not apply to Hewitt.

2. Common Pitfalls for Employers Related to Exemptions

- 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 employees pay
- Always treating salaried employees as exempt
- Always treating supervisors as exempt
- Paying an exempt employee for the entire week if she performs any work in the workweek

B. Frequency of Pay Cases

- On September 10, 2019, the Appellate Division of the New York Supreme Court for the First Department ruled in *Vega v. CM & Associates Construction*

Management, LLC that “manual workers” who receive full pay but are paid “late” in violation of the frequency of payment provision of the New York State Labor Law have a private cause of action and can recover liquidated damages.

Notes: The court held that the statute provides a private right of action, opening the door for employees to sue directly, including in class action lawsuits. The court also held that employees paid less than weekly could recover liquidated damages in the amount of 100% of the late-paid wages – so that even if employees had been paid in full, they could recover the full amount of wages that were not paid within a week of the work performed.

- Federal courts within the Second Circuit have held that merely alleging a pay frequency violation under New York Labor Law § 191 is insufficient for standing under Article III of the United States Constitution. Could this be the tool to end the current onslaught of late-pay claims?

Notes: In Rosario v. Icon Burger Acquisition LLC, the U.S. District Court for the E.D.N.Y., held that plaintiffs cannot merely plead a pay-frequency violation to establish standing; they have to plead how that violation actually injured them. The rationale undergirding these decisions is that courts should not automatically assume that receiving wages one week late causes an injury, and that in many instances it does not.

This and other decisions of courts in the Second Circuit have important implications beyond providing employers an opportunity to successfully move to dismiss threadbare NYLL § 191 allegations. Because plaintiffs must demonstrate standing at all stages of a federal court litigation, they will not only have to allege that they suffered a concrete injury but prove it as well. For many plaintiffs paid on a bi-weekly basis, that may be a difficult showing to make.

1. What is Frequency of Pay?

Labor Law Section 191 outlines the frequency by which employees must be paid.

Manual Workers

- Wages must be paid **weekly** and not later than seven calendar days after the end of the week in which the wages are earned.

Note: The definition of a “manual worker” can include workers who spend at least 25% of their time worked engaging in “physical labor,” which includes such common tasks like sweeping, carrying and standing for long periods of time.

Railroad Workers

- Wages must be paid on or before Thursday of each week and must include wages earned during the seven-day period ending on the Tuesday of the preceding week.

Commissioned Salespeople

- Wages must be paid in accordance with the agreed terms set forth in the written commission agreement but:

- Not less frequently than once in each month
- Not later than the last day of the month following the month in which the wages are earned

Note: If wages are substantial, additional compensation earned, including extra or incentive earnings, may be paid less frequently than once in each month.

Executives, Administrators and Professionals

- Section 191 does not apply to persons employed in a bona fide executive, administrative, or professional capacity whose earnings meet the salary threshold.

Clericals and Other Workers

- Wages must be paid in accordance with the agreed terms of employment and not less frequently than semi-monthly.

2. Why are we seeing an uptick in these cases?

- For decades, the law went mostly unnoticed as industries shifted to robust time-and-pay keeping systems and courts consistently ruled that Section 191 did not provide a basis for valid lawsuits. That changed in 2019 when the *Vega* court (see above), ruled that paying wages less-than-weekly (i.e., every two weeks rather than every week) triggered damages to affected employees.
- The ruling has generated a wave of litigation against businesses that employ “manual” workers, notwithstanding the fact the workers received their full pay, albeit every other week rather than every single week.

You might have manual workers and not know it!

Notes: The New York Department of Labor considers “manual workers” to include individuals who spend 25% or more of their working time engaged in physical labor. Physical labor includes all types of physical tasks – for example:

- *heaving lifting, such as stocking shelves, unpacking boxes and bagging purchases*
- *cleaning tasks*
- *standing and walking for long periods of time*
- *operating machinery*
- *arranging inventory*
- *patrols for theft / loss prevention*
- *installing alarm tags*
- *removing secured items from shelves, and*

Manual workers can include, but are not limited to, jobs such as:

- *customer service and sales associates*
- *cashiers*
- *stockers*

- *receiving clerks and associates*
- *specialists*
- *hairdressers*
- *restaurant workers*
- *supermarket employees*
- *pharmacy technicians*
- *security guards / loss prevention agents*
- *janitors*
- *carpenters*

Employees in the hospitality, retail and construction industries are more likely to qualify as manual workers and need to ensure that they are being paid weekly in accordance with New York Labor Law.

*Untimely wage payment entitles employees to seek **double damages** under NY state labor laws. The New York Labor Law provides for damages in the sum of 100% of the delayed wages, attorneys' fees, and interest on the sum of the delayed wages.*

For Example: if an employer pays its "manual employee" \$1,000 every two weeks (instead of \$500 weekly), the employee may be entitled to recover an additional \$500 for each week in which wages were improperly delayed. In most instances, this can result in a worker being owed delayed wage payment damages of approximately 50% of their total annual wages.

C. Breaks and Travel Time

1. Meal Breaks

- Costco Wholesale Corp. is facing accusations that it violated the Fair Labor Standards Act and New York law by failing to compensate hundreds of store employees for missed meal breaks and improperly delaying their paychecks, according to a new lawsuit filed in federal court.

Notes: The workers are accusing Costco of maintaining an illegal pay practice by automatically deducting an unpaid 30-minute period from their employees' paychecks. This was meant to be their 30-minute meal period. However, Costco would deduct this time whether the employees chose to not take this break or had to work through the 30-minute period in order to meet the demands of work.

They allege "this practice resulted in unpaid overtime wages, as employees regularly worked 40 hours per week and often had to work through meal breaks . . ."

Costco is facing additional allegations of improperly paying their workers on a biweekly instead of a weekly basis. Manual workers are required by law to be paid weekly. According to the complaint, the Costco employees qualify as manual workers because they spend over 25% of their time at work

performing physical and/or manual duties, such standing, walking around the store, and lifting and handling large items.

- A California Supreme Court held, in Naranjo v. Spectrum Security Services, Inc., that an employee who successfully sues to recover unpaid meal premiums under Labor Code § 226.7 will also be entitled to derivative wage statement and waiting time penalties.

2. Breastfeeding Breaks

New York State amends the Nursing Mothers in the Workplace Act

- Recently, legislation was passed that will require private sector employers throughout New York State to meet new time, space and notice requirements for accommodating employees who pump breast milk in the workplace. The new law will be effective on June 7, 2023.

Notes: Specifically, pursuant to the new law, employers must provide a nursing employee with a reasonable break “each time such employee has a reasonable need” to express breast milk. Further, the legislation provides that the room or private location cannot be a restroom and must be close to the employee’s work area, shielded from other individuals’ view and free from intrusion from other employees or the public. The location must also, at a minimum:

- *Contain sufficient lighting*
- *Have a chair*
- *Have an open surface*
- *Be close to clean running water*
- *Contain at least one electrical outlet*

Employers with refrigerators will also be required to allow employees to use them for storing breast milk.

If an employer does not have a permanent area, the bill states that the employer must make available a particular room or other private location on a temporary basis when the need arises for an employee to express breast milk. The employer must then notify all employees when the room or location is being used for such purposes.

Employers that are unable to provide a temporary location for nursing employees because it would cause an undue hardship will be exempt for the requirements but they must still make “reasonable efforts” to provide a private area that is not a restroom in close proximity to the employee’s work area.

The new law will also require employers to adopt a policy developed by the New York State Department of Labor regarding employee rights when breastfeeding in the workplace. Employers must provide the written policy to each employee upon hire and annually thereafter, as well as to

employees returning to work after the birth of a child. The New York State Department of Labor will be developing a model written policy.

New York City employers with at least four employees must provide specific lactation rooms that include a refrigerator for milk storage, as opposed to just any room which offers privacy. In addition, employers must also maintain a lactation room accommodation policy, which shall be distributed to employees.

3. Industry-Specific Scheduling Requirements

Employees in the following industries must be given at least one 24-hour rest period each calendar week:

- Factories
- Hotels
- Restaurants
- Office Buildings
- Apartment Buildings

4. Travel Time

Under the FLSA, travel time may be hours worked if travel is directed by the employer or cuts across a normal workday. Under the FLSA, ordinary commuting time from home to the place of work and back home again does not qualify as “time worked.”

Notes: FLSA Travel Time Rules

- *There are **different types of travel time** under the FLSA. Commuting or “home to work travel” refers to the time an employee spends traveling from their home to their place of work. In general, commuting to and from work is non-compensable, even if the employee uses a company car. This is the case even if the employee does not have a regular worksite and travels to different worksites each day. The travel time rules also don’t change when the company relocates, resulting in a longer commute for the employee.*
- *However, once the employee arrives at work, and their regular day begins, any travel that takes place during the day qualifies as compensable. If the employee must travel on an overnight trip, referred to as “travel away from home community,” and the timing of the travel occurs during their regular work hours, the travel then counts as “time worked.”*
- *An example of compensable travel time would be if the employee were given a task in another city for the day, such as attending a conference. In a case where the employee is “commuting on special assignment,” the employee must be paid for the additional travel time because the special assignment requires travel beyond the regular commute of a fixed location.*
- *Another example of compensable travel time would be an employee who must travel to multiple worksites throughout the day. This is because the travel time is part of their job’s principal activities and considered “all in a day’s work.” And if their job is the type that means they can be called even after completing a day’s work to report to an emergency, travel time must also be paid.*

New York Travel Time Rules:

- Under New York Law, wages must be paid for the time the employee works, including the time spent in traveling as long as the traveling is part of the duties of the employee.

D. Absenteeism

New York State Lawful Absence Law

A new law in New York State guarantees workers expanded remedies if their employer penalizes them for any absence that is legally protected under federal, state, or local law, including time off covered by New York State Paid Family Leave or New York State's or City's Paid Safe and Sick Time Laws. This includes being penalized under absence control policies (also known as "no-fault" attendance policies). Such policies unlawfully discipline workers for legally-protected absences, including those related to pregnancy, sickness, disability, and caregiving responsibilities, chilling workers from exercising their legal rights.

The new law ([A8092B](#), which amends N.Y. Labor Law § 215) makes clear that it is illegal to fire, threaten, penalize, discriminate, or otherwise retaliate against a worker for an absence that is legally protected by federal, state, or local law.

This includes, but is not limited to, assigning points (or deducting from an allotted bank of time) under an absence control policy or system for legally-protected absences, such as those related to disability, pregnancy, sickness, and caregiving obligations.

Notes: Many employers generally maintain and utilize "no fault" attendance policies and/or absence control practices and procedures to regulate and minimize employee absences and tardiness within the workplace. "No fault" attendance policies typically operate by penalizing workers for absences or tardiness through a points system. Points – also referred to as "demerits" or "occurrences" – are typically allocated to an employee's record for taking time off from work, regardless of the reason for such absence. When an employee incurs points for each absence or lateness under these attendance policies, the employee may be disciplined, up to and including termination.

Some "no fault" attendance policies omit and/or include misleading information about statutorily protected absences afforded to workers. As a result of these broad absence control policies, procedures, and practices, employees might feel discouraged from exercising their right to use legally protected absences. Accordingly, the Legislature enacted the lawful absence law with the intent to curtail such "no fault" attendance policies by making it clear that workers shall not be punished or subjected to discipline for lawful absences.

What Constitutes a Legally Protected Absence?

The amendments to NYLL Section 215 add to the definition of protected activity under the existing statute to include an employee who uses any legally protected absence pursuant to federal, local, or state law. Notably, the amendment does not provide a definition as to what constitutes a “legally protected absence pursuant to federal, local, or state law.” Thus, this language should be broadly interpreted to include all New York State, New York City, and federal statutory leave laws. Absences that will likely be covered by this law include, but are not limited to, New York Paid Family Leave, New York Paid Sick Leave, New York Vaccine Leave, New York Paid COVID-19 Leave, New York City Safe and Sick Leave, the Family and Medical Leave Act, the Americans with Disabilities Act, Worker’s Compensation, and other various leaves, such as jury duty leave, voting leave, domestic violence leave, and military leave.

Violations of Section 215 of the NYLL

NYLL Section 215 provides a private cause of action for current and former employees to initiate a lawsuit to recover monetary damages from employers that violate their rights under Section 215. Furthermore, employers that violate Section 215 may be required by the New York State Department of Labor (NYSDOL) to provide reinstatement and pay individuals for damages associated with violations of Section 215, including liquidated damages, back pay and front pay. The NYSDOL can also issue up to \$10,000 in civil penalties to first-time violators of Section 215 and up to \$20,000 for all subsequent violations.

IV. Recent Decisions and Legislation of Interest

A. U.S. Department of Labor

- The United States Department of Labor recently issued an opinion via Field Assistance Bulletin No. 2023-1, which provides guidance to agency officials on a number of telework issues. The Bulletin addresses:
 - paying workers who telework properly under the Fair Labor Standards Act (FLSA);
 - reasonable break time for nursing employees to express milk while teleworking from their home or another location; and
 - eligibility rules under the Family and Medical Leave Act for employees who telework or work away from an employer’s facility.

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

1. Short Breaks of 20 Minutes or Less

- When employees take short breaks of 20 minutes or less, the employer must treat such breaks as compensable hours worked regardless of whether the employee works from home, the employer’s worksite, or some other location that is not controlled by the employer.

Notes: Employees commonly take short breaks during the workday. Breaks of twenty minutes or less must be counted as hours worked. See 29 C.F.R. § 785.18. Whether teleworking at home or working at the employer's facility, employees often take short breaks to go to the bathroom, get a cup of coffee, stretch their legs, and other similar activities. By their very nature, such short breaks primarily benefit the employer by reducing employee fatigue and helping employees maintain focus and be more productive at work.

2. Meal Breaks and Off-Duty Time

- Unlike short rest breaks of 20 minutes or less, bona fide meal breaks (typically 30 minutes or more) in which an employee is completely relieved from duty for the purposes of eating regular meals are not worktime. See 29 C.F.R. § 785.19. Similarly, breaks that are longer than 20 minutes and permit the employee to use the time effectively for their own purposes and during which the employee is completely relieved from duty are not hours worked. See 29 C.F.R. § 785.16.
- To be completely relieved from duty, the employees must be told in advance that they may leave the job and they will not have to commence work until a specified hour has arrived. See 29 C.F.R. § 785.16. An employee may also be completely relieved from duty when the employer allows the employee to freely choose the hour at which they resume working and the time is long enough for the employees to effectively use for their own purposes.

Notes: In sum, bona fide meal breaks and periods where employees are completely relieved from duty and are able to effectively use the time for their own purposes are not hours worked under the FLSA. This is true regardless of the location from which employees perform their work.

3. Break Time for Pumping Breast Milk, and Privacy to Pump

- The FLSA also requires that employers provide covered employees “reasonable break time for an employee to express breast milk for such employee’s nursing child for 1 year after the child’s birth each time such employee has need to express the milk” and provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.” 29 U.S.C. § 218d(a). These protections apply at the employee’s worksite, including when an employee is teleworking from their home or another location.
- In most cases, an employer cannot deny the employee the right to take a needed break to pump breast milk. Employers are not required under the FLSA to compensate nursing employees for breaks taken for the purpose of expressing milk. However, when an employer provides compensated breaks, an employee who uses that break time to express milk must be compensated for the break. In addition, consistent with the FLSA’s general

requirement, if an employee is not completely relieved from duty during these breaks, the time must be compensated as work time. 29 U.S.C. § 218d(b). If a remote employee chooses to attend a video meeting or conference call – even if off camera – generally the employee in that case is not relieved from duty and, therefore, must be paid for that time.

Notes: On December 29, 2022, President Biden signed the Consolidated Appropriations Act, 2023 into law, which includes the PUMP for Nursing Mothers Act (“PUMP Act”). Pub. L. No. 117-328, 136 Stat. 4459, 6093-97 (Dec. 29, 2022). The PUMP Act extended coverage to more employees, among other changes. The PUMP Act did not change the basic requirements under the FLSA that reasonable break time and space must be provided to employees for pumping breast milk.

4. Telework and the Family and Medical Leave Act

- To be eligible for FMLA leave, an employee must have worked for the employer for at least 12 months, worked at least 1,250 hours within the last 12 months, and work at a location where the employer has at least 50 employees within 75 miles.
- For most employees, including employees who telework, the 1,250 hours of service requirement is determined according to the principles under the FLSA for determining compensable hours of work (*see* 29 C.F.R. Part 785). 29 C.F.R. § 825.110(c). If accurate records are not kept, the employer has the burden of showing that the employee has not met the hours-of-service requirement in order to claim the employee is not eligible for FMLA leave.

B. SCOTUS on Salaried Employees and Overtime Pay

- In *Helix Energy Solutions Group, Inc. v. Hewitt*, a 6-3 decision issued on February 22, 2023, the United States Supreme Court decided what “salary” means for purposes of applying the regulations exempting highly compensated employees from the overtime pay requirements under the Fair Labor Standards Act (FLSA).
- Hewitt, an employee with supervisory duties, had a guaranteed daily pay of \$983 no matter how long he worked and was paid over \$200,000 annually. His employer denied him overtime based on the executive exemption under federal regulations. The narrow question before the Court was whether Hewitt was paid on a salaried basis under Regulation Section 541.602(a,) disqualifying him from overtime pay. The Court held that because Hewitt’s pay was based on a daily rate, he was not paid a “salary,” as defined under regulations, did not meet the executive exemption, and therefore was owed overtime pay.

V. HRtelligence TIPS

For employers, wage and hour laws can be considerably complex and compliance with the scheme of federal and state laws, regulations regulating the payment of wages and overtime pay can be daunting. But it is critical for employers to understand their responsibilities under the applicable wage and hour laws. These laws are in place to protect your company and staff, and non-compliance with these laws can subject you to litigation which can be extremely costly.

When reviewing exempt and non-exempt status under the FLSA keep in mind that:

- Non-Exempt employees aren't necessarily paid hourly. You might assume that "salaried" means "exempt" and "hourly" means "non-exempt," but that's not necessarily the case. Although exempt employees under the white-collar exemptions must be paid on a "salary basis," there are many ways to compensate non-exempt employees and remain in compliance with the FLSA, as long as the employee receives (1) the minimum wage for all hours worked and (2) the overtime premium, which is due on almost all wages.
- Job duties matter. Simply paying employees the salary threshold isn't enough to determine whether they are properly classified as exempt, nor is having the word "manager" in their job title. They also must perform certain duties, and the tests under the executive, and administrative, and professional exemptions slightly differ from each other. So, as you evaluate your employees' salary data, you should also use this as an opportunity to do a self-audit reviewing and updating job descriptions to ensure they accurately reflect the duties employees perform and that they are still properly classified as exempt.

Further, in order to comply with wage and hour laws, it is imperative for employers to familiarize themselves with current federal and state laws. In addition, revise your company policies and employee handbook with legal guidance and in accordance with recent updates. Managers, HR, executives, and employees should also all be trained on what wage and hour rights are and those that are applicable to your industry and workplace.