

YEAR-END UPDATE ON NYS AND NYC EMPLOYMENT LAWS

Over the past several years, both New York State and New York City have enacted significant new employment and labor laws. This Update summarizes the key laws you should be following and the penalties for violations¹.

LAWS DISCUSSED

New York City Laws

NYC Earned Safe and Sick Time Act (ESSTA)
 NYC Anti – Sexual Harassment Law
 NYC Fair Chance Act
 NYC Stop Credit Discrimination in Employment
 NYC Salary History Ban
 NYC Temporary Schedule Change Law
 NYC Fair Work Week Laws
 NYC Freelance Isn't Free Act (FIFA)
 NYC Cooperative Dialogue Law

New York State Laws

NYS Minimum Wage Law
 NYS Salary Thresholds for Exempt Employees
 NYS Paid Family Leave Law
 NYS Anti – Sexual Harassment Law
 NYS Corrections Law 23-A
 NYS Wage Theft Prevention Act (WTPA)

1. NYS Minimum Wage Law

|| Effective: December 31, 2018

Effective December 31, 2018, the statewide minimum wage will increase, depending on employer location, employer size and industry.

Type of Employer	Effective: 12/31/18	Cash Minimum Wage to Tipped Employees*
NYC employers with 11 or more employees	\$15.00	\$10.00 (Tip Allowance/ Credit: \$5.00)
NYC Employers with 10 or fewer employees	\$13.50	\$9.00 (Tip Allowance/ Credit: \$4.50)
Nassau, Suffolk and Westchester Counties	\$12.00	\$8.00 (Tip Allowance/ Credit: \$4.00)
Other NYS Counties	\$11.10	\$7.50 (Tip Allowance/ Credit: \$3.60)
NYC Fast Food Employees	\$15.00	N/A
Remainder of NY Fast Food Employees	\$12.75	N/A

¹ This guide is intended to provide an overview of recently enacted laws and should not be construed as legal advice or a complete recitation of all recently enacted New York City or State laws, nor should it be interpreted to be a complete recitation of the laws discussed. Information is current as of December, 2018.

*Tip allowance/credit varies depending on employer industry. For more information, please visit: <https://www.ny.gov/new-york-states-minimum-wage/new-york-states-minimum-wage>.

What if you fail to comply? Employers that violate the Minimum Wage Law are liable for wage underpayments and liquidated damages, plus interest, civil and criminal penalties.

2. FLSA: NYS Salary Threshold for Exempt Employees || *Effective: December 31, 2018*

Effective December 31, 2018, NYS will increase the salary threshold for administrative and executive exempt employees, depending on where the employer is located, as shown on the chart below. These thresholds are significantly higher than the federal salary minimums. (NYS has no minimum salary for professional employees, whereas the federal minimum salary is \$455/week, or \$23,660/year.) Because December 31, 2018 falls on a Monday this year, and the overtime exemption analysis is applied on a workweek by workweek basis, if an employer intends to increase the salary of an employee, the increase should go into effect on the first day of the workweek (usually the payroll week) in which December 31, 2018 falls, or the employee will lose the exemption for that workweek. If an employer intends to reclassify as non-exempt an employee who currently earns less than the new salary threshold, it should begin tracking hours for any overtime pay due the employee on the first day of the workweek in which December 31, 2018 falls. Note that all exempt employees must also meet a “duties” requirement to qualify for an exemption from overtime. Employees being re-classified from exempt to non-exempt status must also be given a Wage Theft Prevention Act Notice (see Section 12 herein).

Type of Employer	Type of Employee	Per Week Minimum	Annual Minimum
NYC employers with 11 or more employees	Administrative or Executive employee	\$1,125	\$58,500
NYC employers with 10 or fewer employees	Administrative or Executive employee	\$1,012.50	\$52,650
Employers in Nassau, Suffolk and Westchester counties	Administrative or Executive employee	\$900	\$46,800
Employers in other counties in NYS	Administrative or Executive employee	\$832	\$43,264

What if you fail to comply? Administrative and executive employees who are not paid these salary minimums must be paid overtime for any work hours over 40 in a workweek, calculated based on the employee’s “regular rate” for that week. Under NYS labor law, you are liable for a 100% penalty on any unpaid overtime amount, plus interest and may be held personally responsible for unpaid wages.

3. New York City Earned Sick Time Act (ESTA) / New York City Earned Safe and Sick Time Act (ESSTA) || *Effective: April 1, 2014; amended: May 5, 2018*

All NYC employers with five or more employees must provide employees up to 40 hours of paid safe/sick time per year. An eligible employee is an employee working within NYC for more than 80 hours in a calendar year.

Employees accrue one hour of safe/sick time for every 30 hours worked. Accrual begins on the employee's first day of work, but cannot be used until 120 days after their date of employment. Employees can use their time for a variety of reasons relating to their own health or a family member's and for certain non-health related reasons concerning the employee's safety. At the end of a year, the employer may pay out accrued and unused safe/sick time or allow the employee to roll it over to the next year. If it is paid out, the employer has to front load 40 hours of safe/sick time for the employee at the beginning of the next calendar year.

Employers with fewer than five employees must provide *unpaid* safe and sick leave.

What if you fail to comply? Employers may be held liable for civil penalties of \$500 per employee for each first-time violation. Subsequent violations may result in fines up to \$1,000. Further damages include paying three times the wages that should have been paid for each time an employee took sick leave but was not paid, as well as full compensation and appropriate equitable relief each time the employer fires an employee for taking sick leave.

4. New York State Paid Family Leave Law || *Effective: January 1, 2018*

Private employers with one or more employees are required to provide eligible employees with paid leave: a) to bond with a newly born, adopted or fostered child, b) to care for a close relative with a serious health condition, or c) to assist loved ones when a family member is deployed abroad on active military service. An eligible full – time employee is one that has worked for a covered employer for at least 26 consecutive weeks. Eligible employees are guaranteed: paid time off for 8 weeks in 2018 (capped at 50% of the statewide average weekly pay), increasing to 12 weeks by 2021 (capped at 67% of the statewide average weekly pay), job protection upon return from leave, and continuation of health insurance while on leave. Employers are also required to obtain Paid Family Leave insurance, post a Notice of Compliance in plain view and inform employees of their Paid Family Leave benefits and rights.

What if you fail to comply? Employers who fail to make provisions for the payment of family leave benefits (e.g., failing to obtain Paid Family Leave insurance), may be criminally liable for a misdemeanor and civilly liable for a fine up to \$500, or imprisonment of up to one year, or both. Subsequent violations may result in fines up to \$2,500.

5. NYC & NYS Anti – Sexual Harassment Laws || *Effective: October 9, 2018 (NYS)/April 1, 2019 (NYC)*

Effective 10/09/18, all NYS covered employers must adopt a sexual harassment prevention policy and provide anti-sexual harassment training to all part time, full time, seasonal and temporary employees. Training must be completed by October 9, 2019. Mandatory arbitration for sexual harassment claims is prohibited (although this portion of the law may be subject to challenge as preempted by the Federal Arbitration Act) and employers may no longer use non-disclosure agreements in private settlements of sexual harassment claims unless the claimant voluntarily consents.

Effective 04/01/19, under the Stop Sexual Harassment in NYC Act (the “Act”), all NYC employers with 15 or more employees are required to conduct annual anti-sexual harassment training for all employees. Employers have one year to complete this training. Moreover, under this Act, employers will be required to display an anti-sexual harassment rights and responsibilities poster and distribute an information sheet on sexual harassment to new hires.

NYS also extended coverage under its sexual harassment law to independent contractors, making employers liable for sexual harassment of independent contractors by their employees.

What if you fail to comply? Employers who violate the New York State Human Rights Law (“NYSHRL”), may be criminally liable for a misdemeanor and civilly liable for a fine up to \$500, or imprisonment of up to one year, or both, as well as held liable for compensatory, emotional injury and punitive damages if a claim is filed with the State Division on Human Rights or a complaint is filed in court. Employers who violate the New York City Human Rights Law (“NYCHRL”) may be civilly liable for a fine up to \$125,000, and up to \$250,000

if it's a willful violation. Employers are liable for compensatory, emotional injury and punitive damages if a sexual harassment claim is filed with the New York City Commission on Human Rights or a complaint is filed in court.

6. NYS State Corrections Law 23-A & NYC Fair Chance Act || Effective: October 27, 2015 (NYC)

Under the NYS State Corrections Law 23-A ("Article 23-A"), an employer or agency has long been prohibited from denying an application for employment or license to an individual previously convicted of one or more criminal offenses, unless there is a direct relationship between the applicant's criminal history and the employment or license sought and/or the issuance of a license or employment would prove an unreasonable risk to the employer, the public or other individuals.

Under the more recently enacted NYC Fair Chance Act, NYC employers, with few exceptions, are not allowed to inquire about or consider the criminal history of job applicants until *after* extending a conditional offer of employment. If, after evaluating the applicant according to Article 23-A, an employer wishes to refuse employment, it must follow the Fair Chance Process: presenting the applicant with a written copy of its inquiry and analysis of the applicant's conviction history, along with at least 3 business days for the applicant to respond.

What if you fail to comply? Employers who violate Article 23-A may be held criminally liable for a misdemeanor and civilly liable for a fine up to \$500, or imprisonment of up to one year, or both. Employers who violate the Fair Chance Act may be held liable for lost wages and other damages to the employees affected and may be subject to civil penalties of up to \$125,000. A willful violation may be subject to a civil penalty of up to \$250,000.

7. NYC Stop Credit Discrimination in Employment Act || Effective: September 3, 2015

NYC employers with more than four employees are prohibited from using an employee's credit history to decide whether to hire, fire or promote an individual. Employers are prohibited from asking about an applicant's and current employee's credit history, credit report, charged-off debts, items in collections, bankruptcies, judgments, and liens. Covered employees need not work in NYC, and include full-time, part-time workers, interns and independent contractors.

What if you fail to comply? Employers who violate the Stop Credit Discrimination Act may be held liable for lost wages and other damages to the employees affected and may be subject to civil penalties of up to \$125,000. A willful violation may be subject to a civil penalty of up to \$250,000.

8. NYC Salary History Ban || Effective: October 31, 2017

Public and private NYC employers of any size are prohibited from asking about or relying on an applicant's salary history during the hiring process, including on applications, and in interviews. The law covers most applicants for new employment in NYC regardless of whether the position is full-time, part-time, or an internship. Independent contractors who do not have their own employees are also covered.

What if you fail to comply? Employers who violate the Salary History Ban may be held liable for lost wages and other damages to the employees affected and subject to civil penalties of up to \$125,000. A willful violation may be subject to a civil penalty of up to \$250,000.

9. NYC Temporary Schedule Change Law || Effective: July 18, 2018

Employees who work more than 80 hours in a calendar year in NYC and are employed for 120 or more days have a right to temporary changes to their work schedule for certain "personal events." An employer must grant an employee's request for a temporary change up to two times per calendar year, each request totaling one business day. Covered personal events include: a) to care for a minor child or a disabled family member, b) to attend a legal proceeding for subsistence benefits to which the employee or a family member is a party, or c) any reason that constitutes permissible safe/sick time under ESSTA. Employers are also required to post a

“You Have the Right to Temporary Changes to Your Work Schedule” notice where employees can easily see it in each NYC workplace.

What if you fail to comply? Employers may be held liable for compensatory damages or other relief to the employee and a \$500 civil penalty for each violation per employee. Employers who retaliate against an employee for requesting a temporary schedule change are subject to additional penalties, including a \$2,500 fine for terminating an employee, plus reinstatement and back pay.

10. NYC Fair Work Week Laws || *Effective:* November 26, 2017

Fast food employers must give fast food employees good faith estimates of when and how much they will work, predictable work schedules and the opportunity to work newly available shifts before hiring new workers. Employers are also prohibited from scheduling employees to work the closing shift one day and work the opening shift the next (also known as “clopensing”), unless the employees consent in writing and are paid a \$100 premium to work the shift.

Retail employers must give retail employees their written work schedule at least 72 hours before the start of the schedule and cannot modify the schedule (e.g. canceling, rescheduling shifts) with less than 72 hours’ notice without the written affirmation of the employee. Employers are also prohibited from requiring on-call shifts, where employees are ready and available to work at any time the employer demands.

Both retail and fast food employers must post the notice “You Have a Right to a Predictable Work Schedule” where employees can easily see it at each NYC workplace.

What if you fail to comply? Employers may be held liable for compensatory damages or other relief to the employee and a \$500 civil penalty for each violation per employee.

11. NYC Freelance Isn’t Free Act (FIFA) || *Effective:* May 15, 2017

Freelance workers retained as independent contractors have the right to: a) a written contract if the freelance work is for a fee of at least \$800 (including multiple small projects over a 120-day period), b) timely and in full payment for services, and c) freedom from retaliation for exercising their rights under the law.

What if you fail to comply? Employers who violate FIFA may be subject to penalties for violations, including statutory damages, double damages, injunctive relief, and attorney’s fees.

12. NYC Cooperative Dialogue Law || *Effective:* October 15, 2018

An employer is obligated to engage in a “cooperative dialogue” within a reasonable time with an employee who requests an accommodation with respect to (i) domestic violence, sex offenses or stalking; (ii) pregnancy, child birth or related medical conditions; (iii) religious needs; or (iv) disability. Upon conclusion of the cooperative dialogue, the employer must provide the employee requesting the accommodation with a written final determination stating why the employer granted or denied the accommodation. Examples of reasonable accommodations include, but are not limited to, flexible scheduling, voluntary substitutes or shift changes, and exceptions to uniform requirements or dress code.

What if you fail to comply? Employers who violate the Cooperative Dialogue Law may be held liable for lost wages and other damages to the employees affected and may be subject to civil penalties of up to \$125,000. A willful violation may be subject to a civil penalty of up to \$250,000.

13. NYS Wage Theft Prevention Act (WTPA) || *Effective:* April 9, 2011

All employers, regardless of the number of employees employed, are prohibited from retaliating or discriminating against employees engaged in protected activities including, but not limited to a) making a complaint to the employer or other legal authorities based on the employee’s belief that the employer has violated the Labor Law, b) instituting a proceeding under or related to the Labor Law or c) otherwise exercising the employee’s

rights under the Labor Law.

Moreover, employers are required to provide employees with a written notice at the time of hiring and firing, maintain payroll records and provide wage statements (i.e. pay stubs).

- **Written Notice:** at the time of hiring, an employer must provide a new employee with a written notice that sets forth: the rate and basis of pay, any allowances, the regular pay day, and the name, address and telephone number of the employer. The employee must sign a written acknowledgment of the receipt of the notice in English and in their primary language, which the employer must maintain.
- **Payroll records:** employers must maintain ongoing records detailing an employee's hours worked, rate of pay, how the employee is paid (hourly, weekly, commission etc.), gross and net wages, itemized deductions, allowances and credits, if any.
- **Wage statements:** employers must provide employees with a wage statement that lists all of the above payroll data, each payday.
- **Notice of termination:** an employer must provide an employee with a written notice of the exact date of termination, as well as the exact date of cancellation of employee benefits, issued less than 5 days after the date of termination.

What if you fail to comply? Employers who fail to provide employees a written notice at the time of hiring and/or accurate wage statements, may be fined up to \$5,000 per employee per violation. Employers who violate the Labor law by discriminating against employees engaged in protected activities are subject to injunctive and equitable relief, liquidated damages (not more than \$20,000), lost compensation, reinstatement or front pay, costs, and attorney's fees.

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