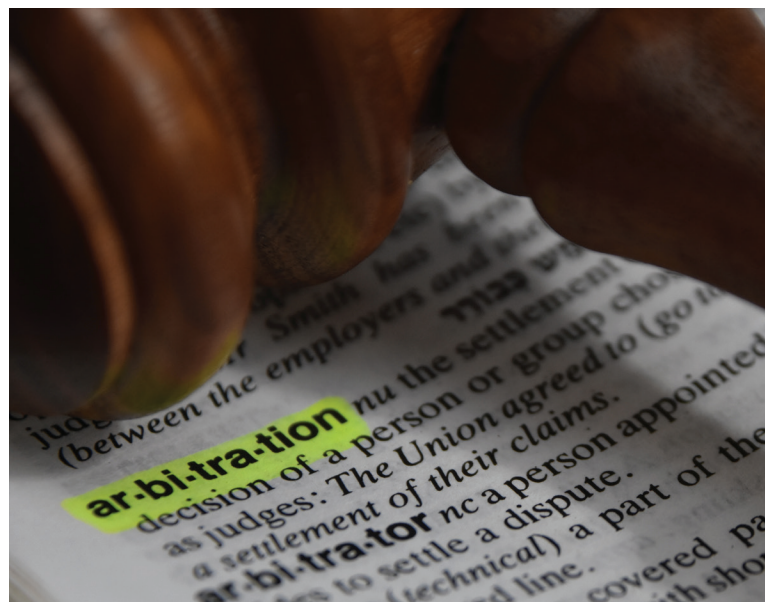


The BakerHostetler Quarterly New York Employment Law Newsletter



Trends

- Increased focus on independent contractor misclassifications at the state level.
- Companies are increasingly meeting their employees' demands for more parental leave, and our federal government continues to explore the possibility of a federal paid family leave law.
- Marijuana continues to be legalized in various ways in states across the country. Within that legalization comes the need for employers to familiarize themselves with the legal status of marijuana in each state and locality in which they have employees and what the legal status means for employers – are they allowed to do a drug test for marijuana, and are they allowed to terminate based on marijuana use? Courts are also trying to catch up. As these laws go into effect and employers make hiring, disciplinary and termination decisions based on marijuana use, court cases are being filed based on these decisions. Courts will interpret these new laws, which will provide employers with better guidance on how not to run afoul of them. Follow our blog and our newsletters, or give us a call to stay up to date on the most recent developments regarding marijuana use in the workplace.
- In the #MeToo era, sex discrimination/harassment continues to be a top focus for the Equal Employment Opportunity Commission (EEOC) and the lawsuits that it files, though this year's end-of-the-year push had slightly fewer sex discrimination cases than last year's end-of-the-year push.
- The federal government continues to relax labor/employment laws. The rules being proposed by the Department of Labor (DOL) are far less employer-friendly – for instance, the new overtime rule and the fluctuating workweek rule. Additionally, an executive order issued to agencies advised them to avoid treating guidance as enforceable law; this actually may be bad news for employers, because it may mean less guidance will be issued from agencies, giving employers less to rely on. It is anticipated that this hands-off approach will continue with this administration. (See our article below, “What Can Employers Expect From the Trump Administration in 2020?” for more information.)
- Disability suits also seem to remain a focus of the EEOC and plaintiffs' firms. The newest cash cow for plaintiffs' firms is mass filed class action lawsuits that allege violations of the Americans with Disabilities Act (ADA) because gift cards do not have Braille on them. Hundreds of lawsuits have already been filed in New York alone, many of them by the same plaintiffs and plaintiffs' firms who filed ADA suits alleging inaccessibility of websites.

In-Depth Analysis and Recent Developments:

New Jersey's Attack on Independent Contractor Misclassification

On Nov. 12, 2019, New Jersey sent a \$459 million bill to Uber and a \$642 million bill to Uber's subsidiary Rasier LLC for unpaid contributions, penalties and interest. The bills allege a failure to make required payments under the New Jersey Unemployment and Temporary Disability Insurance Laws for the period 2014-2018.

Uber vowed to fight the assessment and stated that it “challeng[ed] this preliminary but incorrect determination, because drivers are independent contractors in New Jersey and elsewhere.”

Uber and other gig economy businesses have faced growing scrutiny over their business models that critics say exploit workers. These businesses typically classify their workers as independent contractors, which means workers aren't owed overtime and minimum wages, and their employers don't have to pay into unemployment or provide other benefits.

NYC's Expansion of Protections to Independent Contractors

On Oct. 13, 2019, New York City enacted Int. 136-A (the Law), expanding the [employment protections](#) of the New York City Human Rights Law (NYCHRL) to freelancers and independent contractors. The Law will take effect on Jan. 11, 2020.

The NYCHRL applies to employers with four or more employees. In determinations of whether there are four employees, the headcount will now include (1) interns, freelancers and independent contractors, and (2) the employer's parent, spouse, domestic partner or child, if employed by the employer. The four-employee threshold does not apply to gender-based harassment claims, as the NYCHRL's prohibition on sexual harassment covers all New York City employers, regardless of size. The Law also has a 12-month look-back period for employee count purposes.

The Law affords freelancers and independent contractors the same rights and protections that traditional employees have under the NYCHRL, so they are now protected from discrimination, harassment and retaliation. The prohibition on pre-offer criminal background checks and pre-offer salary history inquiries will also apply to freelancers and independent contractors.



New York State Bans Discrimination Based on Reproductive Health Decision-Making

On Nov. 8, 2019, Gov. Andrew Cuomo signed into [law](#) an amendment to New York’s state labor law banning employment discrimination based on an employee’s “reproductive health decision making” or that of an employee’s dependents.

The law prohibits an employer from:

- Accessing an employee’s personal information regarding the employee’s (or the employee’s dependent’s) reproductive health decisions, without the employee’s prior informed affirmative written consent.
- Discriminating or taking any retaliatory personnel action against an employee with respect to compensation, terms, conditions or privileges of employment because of or based on the employee’s (or the employee’s dependent’s) reproductive health decisions.
- Requiring an employee to sign a waiver or other document that purports to deny employees the right to make their own reproductive healthcare decisions.

The law allows an employee to bring a civil action against an employer for alleged violations in any court of competent jurisdiction. The law enables the court to award remedies including but not limited to back pay, benefits, and reasonable attorneys’ fees and costs, as well as injunctive relief, reinstatement or liquidated damages. It also provides for a separate award of civil penalties against an employer for retaliation.

Ahead of 2020 Election, Make Sure You Are Prepared for ‘Political’ Conversations in the Workplace – New York City’s Enforcement Guidance on National Origin and Immigration Status Discrimination Can Help

During our last presidential election, and now that the 2020 presidential election looms, many employers have been asking about what is, and is not, appropriate to discuss in the workplace. Generally speaking, political affiliations are not a protected class, so making employment decisions based on such affiliation is not illegal. However, many employers wish to make their workplace a welcoming one, where all ideas and political beliefs, provided they are not discriminatory, are welcomed.

Recent politics, however, have become a bit more personal for many, and when it comes to social issues, it is possible that someone’s political opinion related to a social issue may become a discriminatory comment. To the extent judgmental comments are being made with respect to, for example, LGBT rights, immigration, the country’s racial makeup and the rights of minorities, and the recent focus on sexual harassment, the comments could be problematic in the workplace, because they could rise to the level of harassing a protected class. It will be important for employers to police the workplace to ensure that any conversations related to politics are respectful and do not wander into commenting on protected classes, regardless of the individual involved in the conversation (i.e., it does not matter if a member of the protected class being discussed is a party to the conversation). Recent guidance from New York City makes it clear that, at least with respect to management, political beliefs about immigration should not bleed into the way you treat immigrant employees in the workplace.

Immigration has been at the forefront of news reports and court cases recently, and has already proven to be a hot-button issue for the 2020 election candidates to debate. As we move closer to the election, such political conversation may find its way into the office. If it does, employers should ensure that they know what are and are not permitted commentary and actions with respect to individuals who are not U.S. citizens or are of a different national origin.



As you are likely aware, the NYCHRL prohibits discrimination, harassment and retaliation on the basis of, among other protected categories, actual or perceived “alienage and citizenship status” and “national origin.” Citing various statistics to support that New York City is one of the most diverse cities in the world, the NYC Commission on Human Rights (the Commission) released enforcement guidance and a [fact sheet](#), emphasizing that fighting national origin and immigration status discrimination is a priority of the Commission.

The guidance recognizes that while employers are required, pursuant to federal and/or state law, to ask certain questions about citizenship, including for verification of employment authorization, once an employer has hired an individual, that individual enjoys the same protections under the NYCHRL as any other employee, regardless of his/her/their perceived or actual immigration status or employment authorization. The enforcement guidance cautions against not just disparate treatment, but also disparate impact on the basis of citizenship status and national origin (for instance, a policy that only passports are accepted as identification for all employees). The guidance illustrates examples of prohibited conduct against individuals based on their immigration status and national origin, including but not limited to:

- Demanding certain work authorization documents prior to an individual accepting an employment offer, demanding specific documents other than those on the List of Acceptable Documents on the federal I-9 form to establish authorization to work, and refusing to accept documents that have an expiration date.
- Targeting only certain applicants for questions related to work authorization based on actual or perceived immigration status or national origin.
- Taking an adverse action against an employee or requiring reverification for work authorization in response to a “no match” letter from the Social Security Administration.
- Prohibiting workers from speaking a language other than English based on customer preference or image concerns, and using such terms as “illegal or illegal alien” with the intent to demean, humiliate or offend.
- Threatening individuals with actions related to their citizenship status, for example, not sponsoring them for their next visa or calling Immigration and Customs Enforcement (ICE).
- Acting on stereotypes or assumptions based on actual or perceived immigration status or national origin, such as making assumptions based on English proficiency, the presence of an accent or the use of another language.

The guidance also advises employers how to prepare for worksite immigration enforcement, whether in the form of an ICE inspection or an I-9 audit. For example, unless otherwise expressly prohibited (such as during an ongoing criminal investigation), the Commission encourages employers to give notice to employees when employers know or suspect that an audit or raid will occur, in order to provide employees with an opportunity to update any necessary documents and make other preparations.

The takeaway for employers is that although a topic may be debated in politics, New York City law provides non-U.S. citizens and undocumented workers with the same rights as employees who are U.S. citizens, and employers need to ensure that all employees are being treated equally, regardless of citizenship status or national origin. Employers in New York City should also review their anti-discrimination policies and ensure that personnel, including but not limited to managers and hiring staff, are familiar with the requirements of the law.

EEOC Rescinded Prior Guidance Documents

In Q4 2020, the EEOC rescinded a dozen guidance documents, as well as other agency information, that “have been superseded by legislation, court decisions, or newer and more complete guidance” or are otherwise “outdated.”

The documents rescinded were:

- Policy Guidance on the Compulsory Retirement of Tenured Faculty Members (1989).
- Policy Statement on the Issue of Whether the Commission Can Assert Jurisdiction Over Charges/ Complaints Raising Issues of Discrimination Based on Age Arising from the Implementation of an Integrated Seniority List Developed Pursuant to an Airline Merger Approved Under the Federal Aviation Act (FAA) by the Department of Transportation (DOT) (1987).
- Policy Statement: Employer Standing to Bring a Charge of Discrimination Against a Labor Organization (1987).
- Policy Guidance on Cases Involving the Definition of Willful Violation Under the Age Discrimination in Employment Act (ADEA) for Purposes of Liquidated Damages and the Statute of Limitations (1989).
- *Interpretive Memorandum: Martin v. Wilks*, 109 S. Ct. 2180 (1989).
- Policy Guidance on Cases Involving Charging Parties Who Have Been Disqualified by Bona Fide Occupational Qualifications or Other Age-Based Statutory Provisions and Not Given the Same Options Afforded Employees Disqualified for Reasons Unrelated to Age (1989).
- *Policy Guidance on the Processing of Charges Where There Is a Collective Bargaining Agreement or an Individual Employment Contract Requiring the Arbitration of Age Discrimination Related Issues* (1990).
- Enforcement Guidance on the Effect of Section 112 of the Civil Rights Act of 1991 on the Supreme Court’s Decision in *Lorance v. AT&T Technologies, Inc.* and Charges Involving Seniority Systems (1993).

- Enforcement Guidance on *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).
- Compliance Manual Section 902: Definition of the Term “Disability” (March 1995).
- EEOC Policy Guidance on the Effect of Representations Made in Applications for Benefits on *the Determination of Whether a Person Is a “Qualified Individual with a Disability” Under the Americans with Disabilities Act of 1990 (ADA)* (February 1997).
- EEOC Policy Guidance on Executive Order 13145: *To Prohibit Discrimination in Federal Employment Based on Genetic Information* (July 2000).
- *EEOC Compliance Manual, VOLUME 2: INTERPRETIVE MANUAL, Vol. 2, Sec. 612, Appendix A-Application of Title VII to Plant Relocation* (1989).
- *EEOC Compliance Manual, VOLUME 2: INTERPRETIVE MANUAL, Vol. 2, Sec. 616, Appendix C-Unilateral Seniority Systems* (1983).
- *EEOC Compliance Manual, VOLUME 2: INTERPRETIVE MANUAL, Exemption for Executive and High Policymaking Employees* (1989).
- *EEOC Compliance Manual, VOLUME 2: INTERPRETIVE MANUAL, Policy Guidance on Retroactive Relief For Sex-Based Discrimination in Retirement Plans* (1989).
- *EEOC Compliance Manual, VOLUME 2: INTERPRETIVE MANUAL, Vol. 2, Sec. 603-Processing Title VII, ADEA, and EPA Cases That Raise Issues Included on Priority or Pending Lists* (1986).
- *EEOC Compliance Manual, VOLUME 2: INTERPRETIVE MANUAL, Vol. 2, Sec. 801-Age Discrimination in Employment Act: Introduction* (1985).
- *Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory* (1992) (amended by 2009 guidance to conform to *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)).
- How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers.

It is important, therefore, to ensure that employers are not relying on such rescinded guidance. It is also important to keep in mind that other guidance documents can be rescinded by the EEOC. In fact, the agency has created an internal work group, which will continue to review EEOC’s guidance and technical assistance documents. Guidance documents that were originally voted on by the EEOC will receive a vote to determine whether they should be rescinded. Documents without an original vote will be withdrawn at the EEOC chair’s discretion after notice to the EEOC.

NLRB Uses Common Sense to Review Workplace Rules

The National Labor Relations Board (NLRB) recently issued an important decision in *LA Specialty Produce Company*, 368 NLRB No. 93 (2019), regarding the framework for evaluating whether workplace policies interfere with employee rights under the National Labor Relations Act (NLRA). Relying on the recent standard for reviewing employer handbook rules established in *The Boeing Co.*, 365 NLRB No. 154 (2017), the NLRB concluded that a company's policies barring workers from responding to media inquiries and discussing certain confidential and proprietary information with third parties were lawful.

The Boeing Standard

Section 7 of the NLRA makes it unlawful for an employer to interfere with or restrain employees' right to join together to unionize. Prior to December 2017, the NLRB's standard for determining whether facially neutral employment policies violated the NLRA focused on whether such policies could be "reasonably construed" to prohibit employees' Section 7 rights. This vague standard resulted in the NLRB invalidating commonplace rules that the ordinary person would not view as restricting his or her rights. For example, the NLRB held that a rule that stated, "Do not make insulting, embarrassing, hurtful or abusive comments about other company employees online" and "avoid the use of offensive, derogatory, or prejudicial comments" was unlawful because debate about unionization is often contentious and employees could read the rule as limiting their ability to speak freely about the issue.

In December 2017, in its *Boeing* decision, the NLRB announced a new standard for evaluating employer handbook rules. In doing so, the NLRB noted that it was time to bring some common sense to evaluating employer rules that do not, in fact, touch upon protected concerted activity, and are justified by legitimate business considerations.

Under the *Boeing* standard, employer policies are evaluated based on the nature and extent of their potential impact on employees' Section 7 rights, counterbalanced against an employer's legitimate business justifications. Using this balancing test, policies are grouped into one of three categories: (1) lawful rules that, if reasonably interpreted, do not interfere with the exercise of NLRA rights; (2) rules that warrant individualized scrutiny as to whether any adverse impact on employee rights is outweighed by legitimate justifications; and (3) rules that are unlawful because they patently limit protected conduct.



Introduction of the 'Reasonable Employee' Test

The *LA Specialty Produce* case is a good illustration of how the *Boeing* standard has loosened the overly tight grip the NLRB previously placed on ordinary rules. The two rules at issue were:

- Confidentiality policy: "Every employee is responsible for protecting any and all information that is used, acquired or added to regarding matters that are confidential and proprietary of [the employer] including but not limited to client/vendor lists."
- Media contact rule: "Employees approached for interview and/or comments by the news media cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization."

Prior to *Boeing*, the NLRB would have declared both rules unlawful. *Boeing*, however, dictated a different result. In *LA Specialty Produce*, the NLRB emphasized that rules should be viewed from the lens of a "reasonable employee" rather than an NLRA subject matter expert. The NLRB reasoned that a "reasonable employee" does not "view every employer policy through the prism of the NLRA" or "scour the employee handbook searching for ambiguities that suggest interference with their Section 7 rights." Rather, they "interpret workplace rules from a viewpoint that [the NLRB has] termed the 'everydayness of their job,'" from which they do "not presume a Section 7 violation lurks around every corner."

Using the reasonable person test, the NLRB found that the confidentiality policy sought to protect information the company developed over time and did not target information central to the exercise of Section 7 rights, such as employee salary or wage information. With the media rule, the NLRB declared that when read as a whole from the perspective of a reasonable employee, the rule provides that employees approached for comment by the news media cannot speak on the employer's behalf. As a result, both rules fit firmly within *Boeing's* Category 1 meaning.

Key Takeaways

LA Specialty Produce clarified how the NLRB will apply the *Boeing* standard. Employers now know that policies drafted to protect confidential customer and vendor lists from disclosure and policies that require employees to obtain approval before speaking on behalf of their employer will be permissible. As employers update handbooks for 2020, they should review ordinary policies governing issues such as confidentiality, media contact and employee conduct to ensure they are drafted to meet *Boeing's* Category 1 definition and, therefore, immune from added scrutiny.



Keep a Lookout:

Gig Economy Regulations

As discussed above, states have been trying to regulate the gig economy. For example, California's Assembly Bill 5 adopted the "ABC test" for determining whether a worker is an employee or an independent contractor. The law, which goes into effect in January, is already the subject of a ballot measure seeking to overturn it.

In 2019, New Jersey and New York failed to adopt legislative initiatives calling for more stringent laws for employers' misclassification of independent contractors, but there is little doubt that legislators will renew their efforts in 2020.

Cannabis Regulations

As of today, 33 states have legalized medicinal marijuana use and 12 more have also authorized recreational use. Efforts are currently underway in ten states – Arizona, Arkansas, Florida, Idaho, Mississippi, Missouri, Nebraska, New Jersey, North Dakota and South Dakota – to get a recreational-use ballot measure before voters next year.

DOL, NLRB and EEOC Expect to Issue Joint Employment Rules by Year's End

In recent years, there has been increasing focus on the standard applied when determining whether two businesses share sufficient control over an employee such that they may be considered "joint employers." The DOL, the NLRB and the EEOC all expect to issue rules by year's end that would clarify the joint employer standard.

According to the EEOC's Agency Rule List, the agency plans to issue a notice of proposed rule-making on this topic in December 2019, and the comment period will extend until at least February 2020.

The NLRB has been working to finalize its proposed rule clarifying the joint employer test under the NLRA since September 2018. The agency's final rule is scheduled to be published in the Federal Register in December 2019.

NY Employers, Don't Forget About the Statewide Salary History Ban Going Into Effect in January

As we originally reported in our Summer Newsletter, earlier this year New York state passed a salary history ban, which will go into effect on Jan. 6, 2020. As a reminder, this means that New York employers are prohibited from:

- Asking about OR relying upon salary history for employment OR pay decisions for a new applicant or promoted employee.
- Retaliating against an employee based upon his/her refusal to disclose salary.

There are only very limited exceptions to this, such as confirming salary once it has been voluntarily disclosed in a salary negotiation process. Be sure that all of your hiring personnel are informed and trained regarding this new law, and that all of your documents are updated to remove any questions regarding previous salary.

What Can Employers Expect From the Trump Administration in 2020?

When looking at the administration’s upcoming regulation agenda, the DOL has stated the following as one of its priorities: providing employers with certainty about workplace rules by prioritizing proposed rules, along with notice and comments periods regarding the rule-making. Further, the DOL echoed a recent executive order that stated guidance could not be treated as law, and made clear that where Congress was silent, the DOL would not fill in the blank by essentially writing the law. This could mean further deregulation for employers, which is generally good news but, ultimately, may result in more uncertainty, which is less-good news.

The DOL then clarified what its overall goal would entail; here are some examples:

- Expanding the DOL’s apprenticeship program.
- Defending the administration’s new overtime rule against workers’ rights advocates who say the minimum salary threshold for qualifying as an exempt employee (\$35,586) should be higher.
- Updating the fluctuating workweek. The DOL released a proposed rule regarding the fluctuating workweek method in November. The fluctuating workweek method is a method of calculating overtime pay for nonexempt employees who do not work set schedules. The proposed rule would permit the method to be applied to more employees and provide employers with more flexibility in paying bonuses or other incentive compensation. Finalizing that new rule will be a priority.
- Altering the current tip-sharing rules. In October, the DOL released a proposal regarding tip sharing that would permit employers to require tipped employees to share the tips they receive with “back of the house” employees – such as chefs, line cooks and dishwashers – who are not customarily tipped.
- Updating what constitutes an employee’s “regular rate.” Employers must calculate a regular rate in order to know how much an employee’s overtime rate is.



The regular rate includes nearly any actual wage paid to an employee, except discretionary bonuses or gifts, but employers have long been confused about what other fringe benefits should be included in the regular rate – a new rule from the DOL may help clarify that.

- As reported in our article *DOL, NLRB and EEOC Expect to Issue Joint Employment Rules by Year's End*, the DOL, the EEOC and the NLRB plan to finalize a joint employer test, which the DOL will then begin enforcing.

Assuming no ambiguity exists between the statute and these proposed rules, they may bring some finality to employers in determining whether they are in violation of certain wage and hour laws, but it is unlikely that states (especially states such as New York and New Jersey) will follow suit, so although employers may be in the clear in terms of federal law, they will not be in terms of state law.

Finally, the DOL also will clarify its joint employer standard by the end of 2019. In April 2019, the DOL published its notice of proposed rule-making, which pitches a four-part balancing test. The test assesses whether the potential joint employer (1) hires or fires the employee, (2) supervises and controls the employee's work schedule or conditions of employment, (3) determines the employee's rate and method of payment, and (4) maintains the employee's employment records. The comment period for this rule closed in June, and the DOL plans to release its much-anticipated final rule in December 2019. However, the DOL has yet to release a draft of the final rule to the Office of Management and Budget for review, which suggests the agency is still working on finalizing the details.

The agencies' projected publication dates for these proposed and final rules may be pushed into the new year.

New Overtime Pay Requirements – Effective Jan. 1, 2020

At the end of September, the Trump administration unveiled a final rule to extend overtime pay eligibility to many more workers.

The new rule increases the federal annual salary threshold from roughly \$23,600 to \$35,568 (or \$684 per week), effective Jan. 1, 2020. Starting Jan. 1, the regulation requires employers to pay time-and-a-half rates to workers making less than the threshold amount for all hours worked above 40 per week. Of course, certain states/cities have higher salary thresholds and even more protective overtime requirements.

Employers also will be able to satisfy up to 10 percent of the \$35,568 minimum standard salary level via bonuses and commissions that are paid at least once per year.

The rule also increases the salary cutoff for “highly compensated employees” to receive overtime eligibility to \$107,432 per year from its previous \$100,000 per year. Highly compensated employees are automatically exempt from overtime pay requirements under federal law (although this is not recognized in all states). Under federal law, employees who make more than the minimum salary threshold for overtime eligibility and less than the threshold for “highly compensated” status are still eligible for overtime pay if their job duties aren't considered supervisory.

All employers should ensure that each of their exempt employees meets the new salary threshold under federal law (as well as those under any applicable state/city laws). Many will have to choose between offering raises to maintain employees' overtime exemption or reclassifying them as nonexempt.

2020 Wage and Hour Law Update for Hospitality Industry Employers in New York

Effective Dec. 31, 2019, important changes are coming to New York's wage and hour laws covering private employers in the hotel and restaurant industries. These changes may require employers to, among other things, change their pay rates and update their employment posters and other documentation.

Importantly, there are no changes in this area for businesses with 11 or more employees in NYC. We have, therefore, not addressed those unchanged rates in this article.



Increased Minimum Wage for Nonexempt Employees

Nonexempt employees are those who are not exempt from the minimum wage and overtime requirements of federal and state wage and hour laws, and they make up the majority of the hospitality industry’s workforce.

On Dec. 31, 2019, New York’s basic minimum wage for nonexempt non-tipped employees outside NYC, other than fast-food employees, in the hospitality industry increases to \$13.75 per hour.

For fast-food employees, New York’s minimum wage increases as shown in the table below.

Location	Regular Minimum Wage
NYC – Small Business (<11 employees)	\$15.00
Nassau, Suffolk and Westchester Counties	\$13.00-
Greater New York State	\$11.80

Increased Tip Credit

A tipped employee is an employee who regularly receives more than \$30 per month in tips. Effective Dec. 31, like any other nonexempt employee, a tipped employee must earn the minimum wage listed in the first table. However, unlike with other nonexempt employees, tips paid by customers can be counted toward the minimum wage as a “tip credit.” The tip credit is subtracted from the minimum wage, resulting in a lower hourly wage for tipped employees (cash wage). The cash wage is the minimum amount that employers are permitted to pay tipped employees.

And effective Dec. 31, the tip credits that employers may take against the wages of tipped employees are being increased. However, the amount of tip credit permitted in New York’s hospitality industry depends on the employee’s position. For food service workers (employees primarily engaged in serving food or beverages who regularly receive tips, such as waitstaff, bartenders, captains, bussers), see the table below.

Location	Cash Wage	Tip Credit
NYC – Small Business (<11 employees)	\$10.00	\$5.00
Nassau, Suffolk and Westchester Counties	\$8.65	\$4.35
Greater New York State	\$7.85	\$3.95

For service employees (non-food service workers, such as coat check attendants, bathroom attendants), the maximum tip credit increases as shown in this table below.



Location	Cash Wage	Tip Credit
NYC – Small Business (<11 employees)	\$12.50	\$2.50
Nassau, Suffolk and Westchester Counties	\$10.85	\$2.15
Greater New York State	\$9.85	\$1.95

No tip credit is permitted for fast-food employees.

Increased Overtime Rates for Tipped Employees

Employers must pay overtime to all nonexempt employees (including tipped employees) for all hours worked in excess of 40 in a workweek. A tipped employee’s overtime rate is calculated by multiplying the employee’s regular rate of pay by 1.5 and then subtracting the tip credit. So, naturally, New York’s increased minimum wage and tip credit also increase the overtime rate for tipped employees.

Increased Spread-of-Hours Pay

New York’s increased minimum wage also increases the spread-of-hours pay rate to the relevant minimum wage. The spread of hours is the length of time between the beginning and end of an employee’s workday. This includes time worked, time off for meals and intervals off duty. For example, if an employee works from 1 to 4 p.m. and 6 p.m. to midnight, he or she only worked nine hours, but there is an 11-hour spread.

On each day when an employee’s spread of hours exceeds 10, the employer must pay the employee one additional hour of pay at the applicable minimum wage rate, regardless of the employee’s regular rate of pay. So, again, because the minimum wage rate increases as of Dec. 31, 2019, so does the spread-of-hours pay.

Increased Uniform Maintenance Pay

In the hospitality industry, employers must purchase or reimburse employees for required uniforms. Employers are also responsible for the costs associated with maintaining required uniforms. If an employer does not maintain employee uniforms, it must (unless it falls within the specific exemptions defined by applicable law) provide uniform maintenance pay in addition to regular wages to cover employee costs associated with cleaning their required uniforms.

Effective Dec. 31, 2019, the weekly uniform maintenance pay is based on the number of hours worked, where employees who work more than 30 hours per week are paid the high rate, employees who work more than 20 hours but fewer than 30 hours are paid the medium rate, and employees who work 20 hours or less are paid the low rate for work performed as shown below.

Location	High	Medium	Low
NYC – Small Business (<11 employees)	\$18.65	\$14.75	\$8.90
Nassau, Suffolk and Westchester Counties	\$16.20	\$12.80	\$7.75
Greater New York State	\$14.70	\$11.60	\$7.00

Meal and Lodging Credit

Meals and/or lodging provided by a hospitality industry employer to an employee may be considered part of the wages paid to the employee, subject to applicable meal and lodging credit limitations. When an employer takes a meal and/or lodging credit against the wages of an employee, the employer may not charge the employee any additional money for the meal(s) and/or lodging.

Effective Dec. 31, 2019, restaurants and all-year hotels may credit the following amounts per meal against the wages of food service workers, service employees and other non-service workers.

Location	Food Service	Service	Other
NYC – Small Business (<11 employees)	\$3.60	\$4.15	\$5.15
Nassau, Suffolk and Westchester Counties	\$3.25	\$3.60	\$4.50
Greater New York State	\$3.00	\$3.30	\$4.05

Effective Dec. 31, 2019, restaurants may also credit the following against employee wages for lodging for food service workers, service employees and other non-service workers.

Location	Food Service	Service	Other
NYC – Small Business (<11 employees)	\$2.15/day \$13.85/week	\$2.90/day \$18.85/week	\$3.65/day \$23.35/week
Nassau, Suffolk and Westchester Counties	\$1.95/day \$12.45/week	\$2.55/day \$16.30/week	\$3.20/day \$20.20/week
Greater New York State	\$1.80/day \$11.60/week	\$2.30/day \$14.80/week	\$2.90/day \$18.35/week

Effective Dec. 31, 2019, all-year hotels may credit the following against employee wages per hour for lodging.

Location	Food Service	Service	Other
NYC – Small Business (<11 employees)	\$0.50	\$0.60	\$0.75
Nassau, Suffolk and Westchester Counties	\$0.45 (unchanged)	\$0.50	\$0.65
Greater New York State	\$0.40 (unchanged)	\$0.45 (unchanged)	\$0.60

Meal and lodging credits in resort hotels also increase as of Dec. 31, 2019.

Increased Minimum Salary for Exempt Employees

Exempt employees are exempt from the overtime requirements of federal and state wage and hour laws; therefore, such employees are not entitled to overtime pay. Exempt employees are classified as such if their job duties and responsibilities fit within the exemptions set forth under applicable laws and they are paid on a salaried basis. In the hospitality industry, high-level management positions are the most common exempt positions, although not all managers are exempt, and some nonmanagement positions can be exempt, depending on the employee's duties.

On Dec. 31, 2019, the minimum salary for an employee to qualify for the executive or administrative exemptions to overtime increase per week as shown in the table below, inclusive of board, lodging, or other allowance and facilities.

Location	Minimum Weekly Salary for Exemption
NYC – Small Business (<11 employees)	\$1,125.00
Nassau, Suffolk and Westchester Counties	\$975.00
Greater New York State	\$885.00

New York Paid Family Leave Updates for 2020

For the third year of New York state's landmark Paid Family Leave benefit, there are further updates to share for 2020. Effective Jan. 1, the leave amount remains at 10 weeks, but the required pay during leave increases from 55 percent to 60 percent of the employee's average weekly wage, up to a cap of 60 percent of the current Statewide Average Weekly Wage of \$1,401.17. The maximum weekly benefit for 2020 is \$840.70.

Below are a few additional important points employers should note as we head into 2020.

- If an employee starts his/her/their intermittent leave in 2019 and it extends into 2020, he/she/they gets the benefit rate in effect on the first day of a period of leave. When more than three months passes between days of Paid Family Leave, the next day or period of Paid Family Leave is considered a new claim under the law. This means the employee will need to file a new Request for Paid Family Leave and that he/she/they may be eligible for the increased benefits available should this day or period of Paid Family Leave begin in 2020.
- If an employee has a baby in the fall of 2019, he/she/they can take (and must complete) Paid Family Leave for bonding with a new child at any time within the first 12 months of the child's birth, adoption or foster care placement, provided that he/she/they remains an eligible, covered employee.

- If an employee used all 10 weeks of Paid Family Leave in 2019 and experiences another qualifying event in 2020, he/she/they can take more Paid Family Leave only when it has been 52 weeks from his/her 2019 leave dates.

In addition, Gov. Cuomo recently signed legislation to expand access to Paid Family Leave to workers who provide farm labor in New York. As of Jan. 1, eligible farm laborers will be covered for Paid Family Leave.

New York employers should ensure that any related changes are made in practice and in their policies.

New and Upcoming Pennsylvania Employment Law Updates

- While 2019 has been a relatively slow year in the world of employment law legislation in Pennsylvania, it appears that 2020 will bring some changes for employers and employees alike. Below are some 2019 developments in Pennsylvania, and issues to watch for in 2020.

■ Minimum Wage

A plan to raise Pennsylvania's minimum wage to \$9.50 over two years passed in the Pennsylvania Senate on Nov. 20. The bill, however, still needs to be approved by the Pennsylvania House. Under the bill, Pennsylvania's minimum wage, currently set at \$7.25 an hour, would rise in four steps to \$9.50 over the next two years. On July 1, 2020, the hourly wage would rise to \$8; to \$8.50 on Jan. 1, 2021; to \$9 on July 1, 2021; and to \$9.50 on Jan. 1, 2022.

■ E-Verify in the Construction Industry

In September, the Pennsylvania General Assembly passed the Construction Industry Employee Verification Act to prohibit the employment of unauthorized workers. The act became law on Oct. 7 and will take effect on Oct. 6, 2020, and requires construction industry employers in Pennsylvania to verify the employment eligibility of new employees through E-Verify and to keep a record of the verification of the employee's employment for three years, whichever is longer. Employers in violation of the act will be required to terminate the employment of each such unauthorized worker, enter a





three-year probationary period, and within five business days verify in writing that they have terminated unauthorized workers – or run the risk of having their license suspended.

■ **Medical Marijuana**

The state-level legalization of medical marijuana has certainly created new workplace challenges for employers. Pennsylvania, along with many other states, created certain employment protections for medical marijuana patients.

- Employers must always balance safety in the workplace with these newer laws. The Pennsylvania Medical Marijuana Act protects registered patients from unfair discrimination in the workplace without requiring employers to violate federal law. It also prohibits patients from participating in certain high-risk activities while using medical marijuana and allows employers to ensure a safe workplace.

■ **Philadelphia Fair Workweek Ordinance**

At the end of 2018, the Philadelphia City Council passed the Fair Workweek Employment Standards Ordinance, which was supposed to be effective on Jan. 1, 2020. Under this new ordinance, large retail, hospitality and food services establishments (i.e.,

those that employ 250 or more workers, including outside of Philadelphia, and have 30 or more locations worldwide) will be required to (1) give existing employees the right of first refusal to work additional hours before hiring new employees, (2) post and provide advance written notice of work schedules, (3) provide predictability pay for any departure from the posted schedules, and (4) permit a rest period of nine hours between shifts. In essence, the laws are intended to give employees more control over their work-life balance by requiring scheduling to be set two weeks in advance and by penalizing employers for requiring shift changes without sufficient notice.

However, implementation of the city’s Fair Workweek Employment Standards Ordinance was pushed back from Jan. 1 to April 1, 2020, to allow public input to be incorporated into the final rule. Covered employers also have until July 1, 2020, to provide employees with “good faith estimates” of average work schedules, one of the components of the new law.

■ **Pittsburgh Paid Sick Leave Law**

Enacted in 2015, the Paid Sick Days Act (PSDA) requires businesses with fewer than 15 employees to provide employees up to 24 hours of paid sick leave per year, and those employers with 15 or more

employees to provide up to 40 hours of paid sick leave per year. The PSDA was challenged by the Pennsylvania Restaurant & Lodging Association and other local businesses, and while the lower courts sided with the businesses, the Supreme Court of Pennsylvania reversed the lower court's decision.

- In July, in the Pennsylvania Supreme Court reversed, in *Pennsylvania Restaurant & Lodging Association v. City of Pittsburgh*, a lower court decision and upheld

a city ordinance mandating that employers provide paid sick leave to employees who work within the geographical boundaries of the city of Pittsburgh. The ordinance will take effect on March 15. Employers in Pittsburgh may want to start looking at the following in order to ensure compliance: number of employees working within the city limits affected, number of facilities affected, number of employees who split their work in multiple locations, and current policies on paid leave.

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