



2023 Non-Profit Update:
Legal & Governance

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Complying with the Wage & Hour Laws in New York

A. Pay Regulations - General

1. Overtime rate – 1.5 times regular rate
 - What is “regular rate”
2. Minimum wage
 - NYC - \$15.00
 - Nassau, Suffolk and Westchester - \$15.00
 - Remainder of NYS - \$13.20
3. Spread of Hours Pay – New York
4. Notice of pay rates for new hires – NY Labor Law 195.
5. Wage Statements
6. Frequency of Pay
7. The Importance of Recordkeeping
8. Beware of Rounding

B. Overtime Pay Under federal Fair Labor Standards Act

1. Enterprise Coverage
 - \$500,000 annual revenues
 - In ordinary commercial activities, such as operating a business, like a gift shop.
 - Does not include contributions, membership fees, and donations
2. Individual Coverage
 - Interstate commerce
 - Individual analysis

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C. New York Regulations

1. Minimum Wage Order
2. FAQ's for Non-Profits
3. Election to be Exempt
4. Regulations for Exemption
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D. White Collar Exemptions Typically Applicable

1. Executive Exemption

- Primary duty of managing the enterprise or a recognized department
- Customarily and regularly direct the work of at least two other full-time employees and have right to hire and fire

2. Administrative Exemption

- Primary duty performance of office or non-manual work directly related to the management or general business operations of the employee
- Must include the exercise of discretion and independent judgment with respect to matters of significance.

3. Professional Exemption

- Learned professionals – doctors and lawyers
- Creative professionals in field of artistic or creative endeavors

4. Outside Sales Exemption

- Primary duty is making sales
- Customarily and regularly away from the employer's business location

5. Computer Related Occupations Exemption

Complying with the Wage & Hour Laws in New York

- E. New York State – Salary Thresholds for Overtime Exemptions
 - 1. NYC - \$1,125/week
 - 2. Nassau, Suffolk and Westchester - \$1,125/week
 - 3. Remainder of NYS - \$1,064.25/week
 - 4. Federal threshold is only \$684/week

Complying with the Wage & Hour Laws in New York

- E. Conduct a Self Audit
 - 1. Review salary information
 - 2. Review exemptions
- F. Potential Claims
 - 1. United States Department of Labor Audit
 - 2. New York State Department of Labor Audit
 - 3. Private Action
 - 4. Class or collective action
 - Liquidated Damages
 - Attorneys' Fees
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- G. Independent Contractors
 - 1. IRS 20 factors
 - 2. NYS – right to control test
 - 3. DOL's Proposed FLSA Independent Contractor Rule
- H. Volunteers

Complying with the Wage & Hour Laws in New York

- I. Working from Home: Minefields for Employers
 - 1. Tracking Time (require employees to certify time daily)
 - 2. Set schedules
 - 3. Establish Boundaries
 - 4. Remember meal periods
 - 5. Off the clock time
 - 6. Pay attention to expenses-be careful of minimum wage violations
 - 7. Posters – Physical and electronic notice required by NYS
 - 8. Working from Home Policy – Train Supervisors to be vigilant

Complying with the Wage & Hour Laws in New York

J. Salary Transparency Laws

1. NYC – 11/1/22
2. NYS – Bill signed, effective 9/17/23
3. Include, in advertisements, the compensation or range of compensation and the job descriptions
4. Fines and penalties for non-compliance.

NEW EMPLOYMENT LAWS FOR 2023

NEW YORK LABOR LAW 201

- Took effect on December 16, 2022
- Requires that employers provide certain mandatory notices and statutory excerpts to their employees
- Notices must be posted:
 - Onsite in a conspicuous location on each floor
 - Digitally either by email or on a Company website
 - Notify employees that the postings are available electronically
 - Keep a record of having providing digital notice

LABOR LAW 201: NEXT STEPS

- Employers should ensure that their postings are up to date:
 - October 2022 EEOC provided a new notice of rights;
 - January 1, 2023 New York employers must provide a new notice of Veterans Benefits.
 - New York's posting requirements are available on the DOL's website.

NEW YORK'S PAY TRANSPARENCY LAW

- Labor Law 194-b requires mandatory disclosure of compensation range in any advertisement for a job, promotion, or transfer opportunity, which will be performed, at least in part, in the state of New York and a job description.
- Take effect September 17, 2023
- Any aggrieved by this can file a complaint with the Commissioner of Labor
 - Does not provide for a private right of action

Pay Transparency Cont'd.

- This is similar to the New York City Pay transparency law that took effect on November 1, 2022
- The statute does not define “compensation”
 - For example, NYC Salary Transparency does not require disclosure of benefits, only salary.
- Employers may not refuse to interview or hire any employee/prospective employee who enforces their rights under the statute.

WAREHOUSE WORKER PROTECTION ACT

- Adds a new Article 21-A to the Labor Law
- Applies to an establishment under NAICS codes:
 - 493; 423; 424; 492
- Requires employers to provide employers a written description of each quota to which the employee is subject.
 - Including number of tasks to be performed or materials to be produced or handled,
 - Must advise what adverse employment actions will be taken if the quota is not met.

WAREHOUSE WORKER PROTECTION ACT CONT'D

- Employees will not be required to meet any quota that would prohibit them from getting their statutorily protected meals, rest breaks, and bathroom breaks.
- Employers required to maintain records of:
 - Employee's work speed data;
 - Aggregated work speed data for similar employees in their establishment;
 - Written description of the quota provided to each employee.

WAREHOUSE WORKER PROTECTION ACT: Anti-Retaliation

- Employers may not retaliate for any employee for exercising their rights under this statute.
 - Any adverse actions taken within 90 days of a complaint is a rebuttable presumption that it is retaliatory.
 - To rebut this presumption, employers will have to present by clear and convincing evidence
 - The adverse action was taken for another permissible reason;
 - Engaging or attempting to engage in activities was not a motivating factor in the adverse action.

WAREHOUSE WORKER PROTECTION ACT: ENFORCEMENT

- The Commissioner of Labor may bring an action and seek civil penalties provided in sections 213, 215, and 218 of the Labor Law.
- The Attorney General either on its own complaint, or the complaint of any individual may bring a civil or criminal action.
- There is no private right of action listed.
- Takes effect on February 19, 2023

Minimum Wage Increase in Upstate New York

- Minimum wage in all counties outside of Westchester, Nassau, Suffolk, Queens, Bronx, Manhattan, Brooklyn and Staten Island was raised to \$14.20 per hour.
- Minimum Wage remains at \$15.00 per hour in Long Island, Westchester and NYC
- Minimum wage for home health care aides is \$16.20/ hour (upstate)
 - Minimum wage is \$17.00/hour for home health care aides in NYC, Westchester and Long Island

Expanded Protections for Pregnant and Breastfeeding Workers

- Federal Law Passed the Pregnancy Workers Fairness Act and the PUMP Act.
- The PWFA requires employers with 15 or more employees to provide reasonable workplace accommodations whose ability to perform the functions of a job are limited by pregnancy, childbirth or a related medical condition.
 - This is an expansion of the ADA.
 - New York Law already provided similar protections to pregnant workers.

PUMP Act (Federal)

- Federal PUMP Act expands the FLSA protections for employees who wish to express milk at work.
- This federal statute requires employers to provide employees:
 - Reasonable break time to express milk for 2 years following birth of a child;
 - Provide employees a place, other than a bathroom, that is shielded from view and intrusion from a coworker; and
 - Compensate employees if they are working during this break.

New York Expands Protections for Breastfeeding Employees

- Amends Labor Law 206-c
- Employers must permit employees to use a meal break or paid break time to express breast milk for up to 3 years following birth.
- Provides that the location provided to express breast milk:
 - (i) in close proximity to the work area; (ii) well lit; (iii) shielded from view; and (iv) free from intrusion from other persons in the workplace or the public.
- Such room or other location shall provide, at minimum, a chair, a working surface, nearby access to clean running water and, if the workplace is supplied with electricity, an electrical outlet.
- The room or location provided by the employer for this purpose shall not be a restroom or toilet stall.
- Takes effect June 7, 2023

COVID-19 VACCINATION LEAVE

- Up to 4 hours of leave permitted for employees to receive a vaccine or booster for COVID-19.
- This law, originally passed in 2021, was extended through December 31, 2023.

FTC Bans Non-Competes Proposed Rule

- January 5, 2023, the FTC issued a proposed rule that would ban the use of non-compete clauses and/or any clauses.
- The proposed rule would find that a non-compete violates Section 5 of the FTC Act, which bans unfair methods of competition.
- This proposed rule would generally prohibit employers from using noncompetes to:
 - Enter into or attempt to enter into a noncompete with a worker;
 - Maintain a noncompete with a worker; or
 - Represent to a worker, under certain circumstances, that the worker is subject to a noncompete.

FTC Non-Compete Rule

- The rule would apply to both employees and independent contractors, interns and other workers.
- The rule would invalidate existing non-competes, and provide notice to employees that the law was invalid
- This is consistent with recent enforcement actions taken by the FTC against a Michigan based security company and a U.S. glass manufacturer that imposed non-competes on low wage workers.

FTC Non-Compete Proposed Rule

- FTC Act applies to most for-profit businesses.
- FTC Act does not apply to:
 - Certain savings and loans and bank organizations.
 - Air Carriers
 - Not-For-Profits
- The law would preempt state law. However, a state law that offers greater protections to employees would apply, with the FTC Rule setting a floor.
- The rule does have a carveout to allow non-competes in the sale of a business for any owner who has 25% or greater ownership interest in the business being sold.
- Comment period is 60 days.
- The regulation would then take effect within 180 days.
- There has already been many organizations who have spoken out against the proposed rule, and it is anticipated that there will be legal challenges that will delay implementation of the rule.

New York City Bias Audits

Due to increasing concerns about the risks of using automated tools to make employment decisions, the New York City Council took decisive action, passing a [landmark piece of legislation](#) in 2021 known as the [Bias Audit Law](#). Starting July 5, 2023, under this law – Local Law 144 – companies are prohibited from using automated tools to hire candidates or promote employees unless the tools have been independently audited for bias. These regulations will likely affect hundreds of organizations within the city and may include your own.

*****Note – this includes current employees and external candidates for open positions and promotions.*****

NYC’s Local Law 144 prohibits an employer or employment agency from using AEDTs (“Automated Employment Decision Tool Law”) to make job candidate hiring or employee promotion decisions in New York City unless all three of the following conditions have been met:

1. The AEDT has been subject to a “bias audit” within one year before its use.
2. A summary of the bias audit results and the date the employer or employment agency began using the AEDT has been posted to the employer or employment agency’s website.
3. Notices are provided to employees or job candidates using AEDTs, and an alternative solution is in place.

Local Law 144 also requires covered employers or employment agencies to provide specific notices to employees or job candidates, including at least 10 days prior notice that the AEDT will be used, and that the candidate or employee may request an alternative selection process or accommodation. Below is an example of language to be added to job postings.

Example language for job postings:

Local Law 144 Notice for New York City Resident Applicants: For some requisitions, automated employment decision tools ('AEDTs') may be used as part of the assessment process to assist our recruiters in the initial evaluation of your application. If your application is submitted according to New York City Local Law 144, you may request an alternative assessment from the recruiter. Please visit (**Your company’s website**) to learn how we may collect, process, or retain your professional and employment information for recruiting purposes.

Notice of Electronic Monitoring to Employees

Private-sector employers that “monitor[] or otherwise intercept[] [employee] telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage” must post a notice of electronic monitoring in a “conspicuous place which is readily available for viewing” by affected employees. Employers also must furnish new employees with written notice when they are hired. The law requires that newly hired employees acknowledge receipt of the notice, “either in writing or electronically.

Update EEOC Poster

The Pregnant Workers Fairness Act (PWFA) goes into effect on June 27, 2023. The PWFA requires employers to post a notice describing the various protections under the new law. On June 27th, employers should remove their old EEOC “Know Your Rights” posters and replace them with the updated version.

Artificial Intelligence

EEOC Issues Guidance on Use of Artificial Intelligence Tools in Employment Selection Procedures Under Title VII.

Discrimination Ordinance

NYC Enacts Height and Weight Anti-Discrimination Ordinance.



•Douglas E. Rowe

•Partner

•Douglas E. Rowe is a Partner in our Labor and Employment Group.

•His broad range of expertise includes claims alleging discrimination based upon race, sex, religion, national origin, age and disability, as well as sexual harassment, wage and hour issues, labor arbitrations, and defense of employment-related claims under federal and state statutes. He is frequently quoted in the media about the #MeToo movement and legislation affecting employers and employees.

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He counsels on and litigates issues relating to restrictive covenants and trade secrets. By initiating preventive counseling on company policies and other personnel matters, Mr. Rowe helps clients keep costs down and avoid litigation.

He also prepares and negotiates employment agreements.

A seasoned litigator at the state and federal level, Mr. Rowe has significant appellate experience. He is admitted to practice in the State of New York, United States District Court, Eastern and Southern Districts, and the U.S. Court of Appeals, Second Circuit.

Mr. Rowe was first named to the New York Metro Super Lawyers list in 2011 and has earned the distinction consecutively from 2013 until 2020. Only five percent of lawyers in the New York Metro are honored each year.

He was awarded a “Legal Eagle” by Long Island Pulse Magazine.

He serves on the Board of Directors at Rock and Wrap it Up, an anti-poverty think tank based in New York.

He graduated from Brooklyn Law School and earned his Bachelor of Science in Accounting from the University of Maryland. He is a member of the New York and Nassau County Bar Associations.

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