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STATE

Littler on

New York Employment Law

COVERAGE

Scope of Discussion. This publication is designed to help employers operating in a state to identify and apply various state employment law requirements. It follows the chronology of employment—tracking requirements from pre-hire, time of hire, during employment, and the end of employment. Because employers are subject to both federal and state employment laws, each section provides a brief overview of federal law and then summarizes applicable state law.

Although the major developments in New York employment law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. In addition:

- This publication focuses on requirements for private-sector employers; requirements applicable solely to public employers are not covered. Similarly, while some provisions applicable to government contractors may be covered, this publication is not designed to address requirements applicable only to government contractors.
- Local ordinances are generally excluded from this publication. Notwithstanding, local rules may be included to the extent they deal with ban-the-box or criminal history restrictions, local minimum wage, paid sick leave, or antidiscrimination provisions. A detailed discussion of these requirements, however, is outside the scope of this publication. Further, the focus of local ordinances is primarily on jurisdictions with populations of 100,000 or more residents, but laws in locations with populations below that threshold may also be included.
- State law may create special rules or provide exceptions to existing rules for certain industries—for example, the health care industry. This publication does not offer an exhaustive look at these industry-specific exceptions and should not be interpreted to cover all industry-specific requirements.
- Civil and criminal penalties for failure to follow any particular state employment law requirement may be covered to the extent the penalty is specifically included and discussed in the statute. Any penalty discussion that is included, however, is nonexhaustive and may only highlight some of the possible penalties under the statute. In many instances, an individual statute will not include its own penalty provision; rather, a general or catchall penalty provision will apply, and these are not covered here.

To adhere to publication deadlines, developments, and decisions subsequent to **October 11, 2024** are not covered.

DISCLAIMER

This publication is not intended to, and does not, provide legal advice or a legal opinion. It does not establish an attorney-client relationship between Littler Mendelson, P.C. and the user. It also is not a do-it-yourself guide to resolving employment issues or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation may find the information useful in understanding the issues raised and their legal context. This publication is not a substitute for experienced legal counsel and does not provide legal advice regarding any particular situation or employer, or attempt to address the numerous factual issues that arise in any employment-related dispute.

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1. PRE-HIRE

1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

A person providing services to another for payment generally can be classified either as an employee or an independent contractor. An independent contractor is considered self-employed, whereas an employee, as the term suggests, works for an employer. The choice between classifying a worker as an independent contractor or an employee is more than a question of terminology and can have many and far-reaching consequences for a company. A company's legal obligation to its workers under various employment and labor laws depends primarily on whether workers are employees. For example, a company using an independent contractor is not required to:

- withhold income taxes from payments for service;
- pay minimum wages mandated by state or federal law;
- provide workers' compensation coverage or unemployment insurance;
- provide protections for various leaves of absences required by law; or
- provide a wide range of employee benefits, such as paid time off or a 401(k) retirement plan, that are offered voluntarily to the employer's employees as part of the terms or conditions of their employment.

As independent contractor use increased, government officials began to scrutinize asserted independent contractor relationships with increasing skepticism. Courts have also proven willing to overturn alleged independent contractor relationships that fail to satisfy the increasingly rigorous standards applied by federal and state agencies for classifying workers as independent contractors.

For companies, misclassification of a worker as an independent contractor can carry significant tax, wage, and benefit liabilities, as well as unanticipated and perhaps under-insured tort liability to third parties for injuries caused by the worker.

There are four principal tests used to determine whether a worker is an employee or an independent contractor:

1. the common-law rules or common-law control test;[1]
2. the economic realities test (with several variations);[2]

[1] The common-law rules or common-law control test, informed in part by the Internal Revenue Service's 20 factors, focus on whether the engaging entity has the right to control the means by which the worker performs their services as well as the end results. *See generally* Treas. Reg. § 31.3121(d)-(1)(c); I.R.S., Internal Revenue Manual, *Technical Guidelines for Employment Tax Issues*, 4.23.5.4, *et seq*. (Nov. 22, 2017), *available at* https://www.irs.gov/irm/part4/irm_04-023-005r.html#d0e183.

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for themselves." *Brock v. Superior Care, Inc.*, 840F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

3. the hybrid test, combining the common law and economic realities test;[3] and
4. the ABC test (or variations of this test).[4]

For a detailed evaluation of the tests and how they apply to the various federal laws, see **LITTLER ON CLASSIFYING WORKERS**.

1.1(b) *State Guidelines on Classifying Workers*

In New York, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law (see Table 1).

In November 2013, the Wage and Hour Division of the U.S. Department of Labor entered into agreements with the New York State Department of Labor and the New York State Attorney General's Labor Bureau to share data and coordinate their enforcement efforts regarding misclassification of independent contractors.[5] New York also has a Joint Enforcement Task Force on Employee Misclassification ("Task Force on Employee Misclassification") to redress the allegedly widespread problem of misclassification of employees as independent contractors. The Task Force on Employee Misclassification is charged with coordinating the efforts of applicable state agencies to ensure employers are complying with New York employment and tax laws.[6]

The New York State Construction Industry Fair Play Act (Fair Play Act). While there is no statewide statute on independent contractor status applicable to all industries, New York has a statute concerning employee classification in the construction industry, the Fair Play Act.[7] The Fair Play Act creates a statutory presumption that most construction workers are employees, unless the following criteria are met:

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[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15F.3d 103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347(5th Cir. 2008).

[4] Under a typical formulation of the ABC test, a worker is an independent contractor if: (A) there is an ABSENCE of control; (B) the BUSINESS is performed outside the usual course of business or performed away from the place of business; and (C) the work is CUSTOMARILY performed by independent contractors.

[5] More information about the U.S. Department of Labor Misclassification Initiative is available on the Wage and Hour Division website, *Misclassification of Employees as Independent Contractors*, available at https://www.dol.gov/whd/workers/misclassification/. The Memoranda of Understanding are available at https://www.dol.gov/whd/workers/MOU/ny.pdf (with the Labor Bureau of the New York State Office of the Attorney General) and https://www.dol.gov/whd/workers/MOU/nydol.pdf (with the New York State Department of Labor). *See also* U.S. Dep't of Labor, Wage & Hour Div. & N.Y. State Office of the Att'y Gen., *Amendment No. 1 to Partnership Agreement* (Nov. 16, 2016), *available at* https://www.dol.gov/whd/workers/MOU/ny_amend.pdf.

[6] Additional information about the Task Force can be found athttps://dol.ny.gov/employer-misclassification-workers , including copies of its annual reports.

[7] *See* N.Y. LAB. LAW §§ 861-a *et seq*.; *see also* N.Y. State Dep't of Labor, *Construction Industry Fair Play Act*, *available at* https://labor.ny.gov/legal/construction-industry-fair-play-act.shtm.

1. the individual is free from direction and control in performing their job;
2. the individual performs a service that is not part of the usual work done by the business that hired the individual; and
3. the individual is customarily engaged in an independently established trade, occupation, profession, or business similar to the service at issue.[8]

Employers that willfully violate the Fair Play Act may be subject to civil penalties, criminal prosecution, and debarment from bidding on and being awarded public works contracts for a specific period of time.[9]

Common-Law "Right to Control" Test. As noted in Table 1, New York frequently applies the common-law "right to control" test in determining independent contractor status. In applying this test, New York courts have borrowed the common-law definitions of *master* and *servant* to determine whether a traditional employment relationship exists or whether a particular worker is an independent contractor. There are four elements considered under this common-law test:

1. whether the principal (employer) retains the power to select and engage the servant;
2. the principal's methods of payment for services rendered by the servant;
3. whether the principal has the power to dismiss the servant; and
4. the extent of the principal's power of direction and control over the servant's activities.[10]

Of these four elements, the "essential element of the [employment] relationship is the right of control, that is, the right of one person, the master, to order and control another, the servant, in the performance of work by the latter."[11]

The *right to control*, in turn, refers to the extent of a principal's control over "the results produced [by the worker] or the means used to achieve the results."[12] Of these two factors, the principal's control over the means of achieving the results is given greater emphasis than is control over the result achieved, although no one factor is determinative.[13] To ascertain whether requisite control exists in a given situation to classify the relationship as employment, courts review all aspects of the relationship,

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[8] N.Y. LAB. LAW § 861-c. The law also contains a separate 12-part test for determining whether an entity is considered a "separate business entity" from a contractor.

[9] N.Y. LAB. LAW § 861-e.

[10] *Scott v. Mass. Mut. Life Ins. Co.*, 657 N.E.2d 769 (N.Y. 1995) (interpreting the Human Rights Law); *In re Ted Is Back Corp.*, 485 N.Y.S.2d 742 (N.Y. 1984) (interpreting the Unemployment Insurance Law); *State Div. of Human Rights ex rel. Emerich v. GTE Corp.*, 487 N.Y.S.2d 234 (N.Y. App. Div. 1985) (interpreting the Human Rights Law); *Galligan v. St. Vincent's Hosp.*, 279 N.Y.S.2d 886 (N.Y. App. Div. 1967) (interpreting the Workers' Compensation Law). *But see Salamon v. Our Lady of Victory Hosp.*, 514 F.3d 217 (2d Cir. 2008) (applying a 13-point test to determine whether the plaintiff was an employee under the New York Human Rights Law and Title VII of the Civil Rights Act of 1964).

[11] *GTE Corp.*, 487 N.Y.S.2d at 235.

[12] *Koren v. Zazo*, 691 N.Y.S.2d 549, 551 (N.Y App. Div. 1999) (quoting *In re 12 Cornelia St., Inc.*, 453 N.Y.S.2d 402, 403 (N.Y. 1982)); *see also In re Ted Is Back Corp.*, 485 N.Y.S.2d at 743; *Chalcoff v. Project One*, 784 N.Y.S.2d 738, 739 (N.Y. App. Div. 2004).

[13] *In re Hertz Corp.*, 778 N.Y.S.2d 743, 744 (N.Y. 2004); *In re Ted Is Back Corp.*, 485 N.Y.S.2d at 743; *see also Abouzeid v. Grgas*, 743 N.Y.S.2d 165, 166 (N.Y. App. Div. 2002).

with particular attention given to the principal's right to exercise supervision, direction, or control over the manner and means by which the work is performed.[14]

Under this "right to control" test, no single factor or group of factors is conclusive in classifying the relationship. Since actual control is the critical determinant, however, the label that the parties themselves place on their relationship is far from dispositive. Thus, for example, a written agreement acknowledging the worker's status as an independent contractor does not resolve the question.[15]

Freelance Isn't Free Act. Effective August 28, 2024, the state's Freelance Isn't Free Act will provide certain rights to independent contractors, and responsibilities to those who utilize their services, similar to the New York City ordinance, see **1.1(c)**. Under the law, a freelance worker is any independent contractor hired for services of $800 or more, subject to exceptions. The law contains requirements related to written contracts, compensation, recordkeeping, and antidiscrimination that hiring parties must follow.[16]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	New York Division of Human Rights	Common-law "right to control" test described above. The Human Rights Law does not apply to independent contractors.[17]
Income Taxes	New York Department of Taxation and Finance	Internal Revenue Service (IRS) twenty-factor test. New York relies on federal statutes and interpretations for state income tax purposes.[18]
Unemployment Insurance	New York Department of Labor	Common law "right to control" test described above.[19]

[14] *In re Yoga Vida NYC, Inc.*, 64 N.E.3d 276 (N.Y. 2016) (concluding that yoga instructors were properly categorized as independent contractors, where they made their own schedules, chose how to be paid, were paid only if a certain number of students attended their classes, could work for competitors, could encourage students to follow them to other studios for additional classes, and did not have to attend company meetings or trainings).

[15] RESTATEMENT (SECOND) OF AGENCY § 220 cmt. i (1958).

[16] N.Y. GEN. BUS. LAW §§ 1410 *et seq*.; S.B. 5026 (N.Y. 2023).

[17] *Scott v. Mass. Mut. Life Ins. Co.*, 657 N.E.2d 769, 771 (N.Y. 1995); *Murphy v. ERA United Realty*, 674 N.Y.S.2d 415 (N.Y. App. Div. 1998); *see also* N.Y. EXEC. LAW § 292 (defining *employee* by what it does not include).

[18] N.Y. COMP. CODES R. & REGS. tit. 20, § 171.1(b).

[19] *In re Ted Is Back Corp.*, 485 N.Y.S.2d 742, 743 (N.Y. 1984) (concluding that "incidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship"); *see also In re DeRose*, 989 N.Y.S.2d 193, 193 (N.Y. App. Div. 2014). The New York Department of Labor's Unemployment Insurance Division has published an information sheet, *Independent Contractors*, which describes independent contractors as individuals who are in business for themselves; who make their services available to the public; and who perform their services free from supervision, direction, and control. The sheet specifically states: "The [unemployment] law does not define an independent contractor. Court decisions hold that we must apply the common law tests of master and servant control to make a determination of whether services an individual provides are that of an employee or an

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Wage & Hour Laws	New York Department of Labor, Division of Labor Standards	Common law "right to control" test described above.[20] Relevant factors to consider in determining if control was exerted over the worker alleging independent contractor status include: 1. whether they worked at their own convenience; 2. whether they were free to engage in other employment; 3. whether they received fringe benefits; 4. whether they were on the employer's payroll; and 5. whether they were on a fixed schedule.[21]
Workers' Compensation	New York Workers' Compensation Board	(1) Common-law "right to control" test; (2) "relative nature of the work" test; or (3) a hybrid of the two tests. Factors that are considered in determining whether an individual is an employee include: • the right to control; • whether the character of the work is the same as the employer's; • the method of payment; • the furnishing of equipment and materials; and • the right to hire and fire.[22]

independent contractor." N.Y. Dep't of Labor Unemployment Ins. Div., *Independent Contractors* (Sept. 2014), *available at* https://dol.ny.gov/system/files/documents/2024/02/ia318.14.pdf.

[20] N.Y. LAB. LAW § 651 (defining *employee* for minimum wage purposes); N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.14; N.Y. LAB. LAW § 190 (defining *employee* for wage payment purposes); *see also Hernandez v. Chefs Diet Delivery*, 915 N.Y.S.2d 623, 624 (N.Y. App. Div. 2011) (identifying factors to be used for the analysis and explaining that the critical inquiry concerns control, particularly over the means employed to achieve results).

[21] *Bynog v. Cipriani Grp.*, 802 N.E.2d 1090, 1093 (N.Y. 2003).

[22] *See, e.g.*, *In re Jennings v. Avanti Express, Inc.*, 936 N.Y.S.2d 718 (N.Y. App. Div. 2012); *In re Cassaro v. Horton*, 933 N.Y.S.2d 751 (N.Y. App. Div. 2011); *Bugaj v. Great Am. Transp., Inc.*, 798 N.Y.S.2d 529 (N.Y. App. Div. 2005); *Commissioners of State Ins. Fund v. Lindenhurst Green & White Corp.*, 475 N.Y.S.2d 42 (N.Y. App. Div. 1984). The "relative nature of the work" test includes six components: (1) character of the work; (2) degree of separation of the work from the owner's occupation; (3) whether work is continuous or intermittent; (4) whether work is "expected to be permanent;" (5) the work's "importance in relation to the owner's business;" and (6) the work's character in relation to whether the claimant should be expected to carry their own accident insurance burden. *Commissioners of State Ins. Fund*, 475 N.Y.S.2d at 44. The New York Workers' Compensation Board also provides

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Workplace Safety	Not applicable	There are no relevant statutory definitions or case law identifying a test for independent contractor status. New York does not have an approved state plan under the federal Occupational Safety and Health Act covering private employers.

1.1(c) *Local Guidelines on Classifying Workers*

The New York City Freelance Isn't Free Act. The New York City Freelance Isn't Free Act (FIFA), a first-of-its-kind law, establishes protections for freelance workers.[23] The FIFA defines a *freelance worker* as a single person, or an entity composed of no more than one person (whether incorporated or using a trade name), that is retained as an independent contractor to perform services in exchange for compensation. Individuals or entities practicing law, sales representatives, and licensed medical professionals are excluded.[24] The FIFA does not, however, specifically define the term "independent contractor."

The FIFA protects freelance workers by requiring: (1) a written contract if the freelance work is worth at least $800, including multiple small projects over a 120-day period; (2) that payment for services be made timely and in full; and, (3) that freelance workers be free of retaliation for exercising their rights under the law. The minimum terms of the written contract to which the freelance worker has a right include: (1) the name and mailing address of both the hiring party and the freelance worker; (2) an itemized list of services to be provided by the freelance worker, with the value of the services and the rate and method of compensation; and (3) the date on which the freelance worker will be paid, or a method for determining such date.[25]Under the FIFA, an employer is subject to penalties for violations, including statutory damages, double damages, injunctive relief, and attorney's fees.[26]

Employers in New York City are limited further in the provisions they may include in independent contractor agreements with individuals performing services in New York City pursuant to Rule 12-05 of Title 6 of the Rules of the City of New York, which applies to the FIFA:

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guidance on determining who is an employee under the Workers' Compensation Law, *available at* http://www.wcb.ny.gov/content/main/Employers/identifying-independent-contractor.jsp. Relatedly, the Workers' Compensation Law specifically incorporates the Fair Play Act at section 2(4), and thus, a presumption of employment applies for the construction industry under the Workers' Compensation Law.

[23] N.Y.C. Office of the Mayor, *Freelancers Aren't Free: Mayor Announces First in Nation Protections for Freelance Workers* (May 15, 2017), *available at* http://www1.nyc.gov/office-of-the-mayor/news/307-17/freelancers-aren-t-free-mayor-first-nation-protections-freelance-workers. More information about the FIFA, including model contracts and a copy of the law, is available from the New York City Department of Consumer Affairs at https://www1.nyc.gov/site/dca/workers/workersrights/freelancer-workers.page.

[24] N.Y.C., N.Y., ADMIN. CODE § 20-927.

[25] N.Y.C., N.Y., ADMIN. CODE §§ 20-928, 20-929.

[26] N.Y.C., N.Y., ADMIN. CODE §§ 20-931, 20-933, and 20-934.

1. Any contract entered into by a hiring party and freelance worker cannot include any prospective waiver or limitation of rights under the FIFA. Any such waiver or limitation will be invalid as a matter of law.
2. If a contract includes language that waives or limits a freelance worker's right to participate in or receive money or any other relief from any class, collective, or representative proceeding, that waiver or limitation is void.
3. Wherever a hiring party asks a freelance worker to waive or limit, via contract, any other procedural right normally afforded to a party in a civil or administrative action, any such contractual waivers and limitations are void under section 20-935 of the Administrative Code. Such rights include but are not limited to procedural rights of parties to a civil action established by the New York Civil Practice Law and Rules, the Federal Rules of Evidence, and the Federal Rules of Civil Procedure.
4. A freelance worker has the right to disclose the terms of a contract with a hiring party to the director. Any private contractual agreement that purports to waive or limit a freelance worker's right to communicate the terms of such a contract to the director is void as against public policy.

Employers should consider these rules when drafting independent contractor agreements applicable to individuals performing services in New York City.

1.2 Employment Eligibility & Verification Requirements

1.2(a) *Federal Guidelines on Employment Eligibility & Verification Requirements*

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly employing workers who are not authorized to work in the United States. Under IRCA, an employer must verify each new hire's identity and employment eligibility. Employers and employees must complete the U.S. Citizenship and Immigration Service's Employment Eligibility Verification form (Form I-9) to fulfill this requirement. The employer must ensure that: (1) the I-9 is complete; (2) the employee provides required documentation; and (3) the documentation appears on its face to be genuine and to relate to the employee. If an employee cannot present the required documents within three business days of hire, the employee cannot continue employment.

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[27]

[27] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly, state and local immigration laws have faced legal challenges.[28] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[29]

For more information on these topics, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.

1.2(b) *State Guidelines on Employment Eligibility & Verification Requirements*

New York does not have a generally applicable employment eligibility or verification statute. Therefore, private-sector employers in New York should follow federal law requirements regarding employment eligibility and verification.

New York's labor law in general prohibits employers from retaliating against employees who complain to the employer or the state about alleged labor law violations, cooperate with an investigation, or exercise their rights under the labor law. To threaten, penalize, or in any other manner discriminate or retaliate against any employee includes threatening to contact or contacting U.S. immigration authorities or otherwise reporting or threatening to report an employee's suspected citizenship or immigration status or the suspected citizenship or immigration status of an employee's family or household member.[30]

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

1.3(a) *Restrictions on Employer Inquiries About & Use of Criminal History*

1.3(a)(i) *Federal Guidelines on Employer Inquiries About & Use of Criminal History*

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[31] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

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[28] *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007), *aff'd*, 724 F.3d 297 (3d Cir. 2013) (striking down a municipal ordinance requiring proof of immigration status for lease and employment relationship purposes).

[29] *See Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

[30] N.Y. LAB. LAW § 215.

[31] EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq.* (Apr. 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

1. **Arrest Records.** An exclusion from employment based on an arrest itself is not job related and consistent with business necessity as required under Title VII. While, from the EEOC's perspective, an employer cannot rely on arrest records alone to deny employment, an employer can consider the underlying conduct related to the arrest if that conduct makes the person unfit for the particular position.
2. **Conviction Records.** An employer with a policy that excludes persons from employment based on criminal convictions must show that the policy effectively links specific criminal conduct with risks related to the particular job's duties. The EEOC typically will consider three factors when analyzing an employer's policy: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.

Employers should also familiarize themselves with the federal Fair Credit Reporting Act (FCRA), discussed in **1.3(b)(i)**. The FCRA does not restrict conviction-reporting *per se*, but impacts the reporting and consideration of criminal history information in other important ways.

For additional information on these topics, see **LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING**.

1.3(a)(ii) *State Guidelines on Employer's Use of Arrest Records*

Under New York's Human Rights Law, unless specifically required or permitted by statute, it is an unlawful discriminatory practice for an employer generally to inquire about (in applications or otherwise), or act adversely to any applicant based upon, "any arrest or criminal accusation" that did not result in conviction, is not currently pending against the individual, and which was followed by a termination of the criminal action or proceeding in favor of the individual, or which resulted in a youthful offender adjudication or sealed conviction.[32] These provisions apply equally to applicants and current employees.

Thus, it is prohibited for an employer in New York to ask about any arrest or criminal accusation that is not currently pending. As discussed in more detail in **1.3(a)(iv)**, it is also permissible to inquire about convictions.

Moreover, the Human Rights Law was not intended to foreclose employers from requiring verification of the disposition of criminal charges once the existence of those charges has been legally and properly discovered. Nor does it preclude employers from considering independent evidence of the underlying conduct leading to criminal charges.[33]

The provisions of the Human Rights Law regarding unlawful inquiries into arrest records additionally do not apply to the licensing activities of governing bodies, with respect to the regulation of firearms, or in relation to an application for employment as a police or peace officer.[34]

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[32] N.Y. EXEC. LAW § §§ 296(1), 296(16).

[33] *New York State Dep't of Mental Hygiene v. State Div. of Human Rights*, 481 N.Y.S.2d 371 (N.Y. App. Div. 1984).

[34] N.Y. EXEC. LAW § 296(16).

1.3(a)(iii) *Local Guidelines on Employer's Use of Arrest Records*

In addition to the statewide restrictions, certain cities in New York have enacted local "ban-the-box" ordinances.

New York City Fair Chance Act. New York City Fair Chance Act, which is part of the city's Human Rights Law, applies to employers with four or more employees.[35] As with the state law, certain positions are exempt from the Fair Chance Act.[36] Consideration of an applicant's criminal history outside of the parameters of the Fair Chance Act is deemed an unlawful discriminatory practice.[37]

The Fair Chance Act provides that, unless specifically required or permitted by any other law, employers are prohibited from inquiring about any arrest or criminal accusation of an individual that is not currently pending against the individual and that was terminated in favor of the individual. This prohibition covers advertisements, job application forms, and any type of inquiry.[38] Employers are also prohibited from denying employment to an applicant or taking adverse action against an employee based on an arrest or criminal accusation that is not pending or that was resolved in favor of the individual, and based on the applicant or employee having been convicted of a violation or a non-criminal offense.[39]

Specific restrictions apply for application forms and job advertisements under the Fair Chance Act. It is an unlawful discriminatory practice for an employer to: "(1) [d]eclare, print, or circulate or cause to be declared, printed or circulated any solicitation, advertisement or publication, which expresses, directly or indirectly, any limitation, or specification in employment based on a person's arrest or criminal conviction;" or (2) represent that any employment or position is unavailable to a person because of their arrest or criminal conviction record, when in fact it is.[40]

With respect to pending arrests, an employer may only inquire *after* extending a conditional offer.[41] For more information about post-offer inquires and use of this information, see **1.3(a)(iv)**.

Buffalo Fair Employment Screening Ordinance. In 2013, Buffalo passed its own local ban-the-box statute that covers any employer with 15 or more employees located in the City of Buffalo. However, it does not cover inquiries into arrests (only convictions).[42] Accordingly, existing state law applies.

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[35] N.Y.C., N.Y., ADMIN. CODE § 8-102(5).

[36] N.Y.C., N.Y., ADMIN. CODE § 8-107; *see also* N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 63 (2015)* (rev. June 24, 2016), *available at* http://www1.nyc.gov/site/cchr/law/fair-chance-act.page.

[37] N.Y.C., N.Y., ADMIN. CODE § 8-107(10), (11), (11-a); N.Y.C.R. tit. 47, § 2-04; N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination* (July 15, 2021) *available at* https://www1.nyc.gov/assets/cchr/downloads/pdf/fca-guidance-july-15-2021.pdf.

[38] N.Y.C., N.Y., ADMIN. CODE § 8-107(11), (11-a).

[39] N.Y.C., N.Y., ADMIN. CODE § 8-107(11).

[40] N.Y.C., N.Y., ADMIN. CODE § 8-107(11-a).

[41] N.Y.C., N.Y., ADMIN. CODE § 8-107(11-a).

[42] BUFFALO, N.Y., CODE §§ 154-25 *et seq.*

Rochester Fair Employment Screening Ordinance. Rochester's ban-the-box ordinance applies to any private employer located within the City of Rochester with four or more employees.[43] The ordinance expressly incorporates the New York Human Rights Law with respect to arrests.[44]

Suffolk County Human Rights Law. These restrictions on an employer's ability to conduct criminal background checks are modeled after the statewide law. The Suffolk County law prohibits employers of four or more employees from inquiring, on an application form or otherwise, into an individual's record of arrests or criminal accusations followed by a termination of that criminal action or proceeding in favor of such individual. Employers are further prohibited discrimination against or from taking adverse action against an individual due to their arrest record or criminal accusations not currently pending. With respect to convictions, an employer cannot deny employment to any individual by reason of their having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" based upon their convictions of one or more criminal offenses, if the denial is in violation of the provisions of the New York Correction Law. Finally, the county law prohibits inquiries into certain sealed and juvenile offenses.[45]

Westchester County Human Rights Law. Westchester County "bans the box" on employment applications. Like the other local jurisdictions' laws, this county law is modeled on the statewide requirements. The Westchester County Human Rights Law prohibits employers of four or more employees from:

- making a preliminary or initial inquiry or statement related to a criminal conviction or arrest record of any person in an application for employment; or
- declaring, printing, or circulating, or causing to be declared, printed, or circulated any solicitation, advertisement or publication that directly or indirectly expresses any limitation or specification in employment based on a person's arrest record or criminal conviction.[46]

Any inquiry means any question communicated to an applicant in writing or otherwise. "Any statement" means a statement communicated in writing or otherwise to an applicant for purposes of obtaining an applicant's criminal background information regarding an arrest record or a conviction record. An applicant is not required to respond to any inquiry or statement that violates the above prohibitions, and any refusal to respond to such inquiry or statement cannot disqualify an applicant from employment.[47]

An employer may inquire about an applicant's arrest or conviction record in accordance with New York State Executive Law section 296(16) after the applicant has submitted an application for employment.[48]

1.3(a)(iv) *State Guidelines on Employer's Use of Conviction Records*

New York law does not prohibit an employer from asking about past criminal convictions when making employment decisions.[49] While the inquiry may be permitted, it is an unlawful discriminatory practice

[43] ROCHESTER, N.Y., MUN. CODE § 63-13.

[44] ROCHESTER, N.Y., MUN. CODE § 63-14(F); *see* N.Y. EXEC. LAW § 296(16).

[45] SUFFOLK CNTY., N.Y., CODE § 528-7(12).

[46] WESTCHESTER CNTY., N.Y. CODE § 700.03(a)(10).

[47] WESTCHESTER CNTY., N.Y. CODE § 700.03(a)(10).

[48] WESTCHESTER CNTY., N.Y. CODE § 700.03(a)(10).

for an employer to deny employment to an applicant or take adverse action against an employee due to a criminal conviction history, or because the employer finds the individual lacks "good moral character," *unless*: (1) there is a direct relationship between the criminal offense(s) and the job sought; or (2) the granting of employment would involve an unreasonable risk to property, or to the safety or welfare of specific individuals or the general public.[50] Under this statute, referred to as Article 23-A of the Correction Law (Article 23-A), *direct relationship* "means that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question."[51]

When evaluating whether an applicant's application should be denied because of a criminal conviction under Article 23-A, employers must consider the following factors:

- public policy, which encourages the employment of prior convicts;
- the actual duties and responsibilities of the position in question;
- the bearing, if any, that the prior offense will have on the applicant's fitness or ability to perform the duties and responsibilities of the position in question;
- how much time has passed since the offense of conviction;
- the applicant's age at the time of the offense;
- the seriousness of the offense;
- any information provided by, or on behalf of, the applicant concerning their rehabilitation and good conduct; and
- the employer's legitimate interest in protecting property, as well as the safety and welfare of specific individuals or the public.[52]

If, having considered these factors, the employer decides to deny employment, it must provide a written explanation for the decision to the applicant. The applicant is entitled to such an explanation only upon their request, and within thirty days thereof.[53]

Notifications. Employers must provide any applicant or employee for whom they receive a background check report, that contains any criminal history, with a copy of Article 23-A.[54] In addition, individuals for whom an employer has requested, with respect to an offer of employment, a background check report must—in addition to any other required notices—provide the applicant with a copy of Article 23-A.[55]

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[49] N.Y. EXEC. LAW § 296(16).

[50] N.Y. EXEC. LAW §§ 296(1), 296(15); N.Y. CORRECT. LAW § 752.

[51] N.Y. CORRECT. LAW § 750(3).

[52] N.Y. CORRECT. LAW § 753 (further noting that a certificate of good conduct creates a presumption of rehabilitation that must be considered by the employer).

[53] N.Y. CORRECT. LAW § 754

[54] N.Y. GEN. BUS. LAW § 380-g(d).

[55] N.Y. GEN. BUS. LAW § 380-c(b)(2).

Employers must also post conspicuously a copy of both Article 23-A, and any regulations promulgated under it, in an area accessible to employees.[56]

Local Ban-the-Box Laws

In addition to Article 23-A at the statewide level, employers operating in certain cities must abide by local ordinances on this topic.

New York City Fair Chance Act. Under the Fair Chance Act, employers may not ask about or use conviction information until after a conditional offer is made.[57] After a conditional offer is made, an employer may ask an applicant about their convictions or arrest history if, *before taking any adverse employment action* based on the inquiry, the employer:

1. provides a written copy of the inquiry to the applicant;
2. performs an analysis of the applicant pursuant to N.Y. Correction Law section 23-A and provides a written copy of the analysis to the applicant, which must include but not be limited to supporting documents that formed the basis for the adverse action and a statement of reasons for the decision; and
3. after giving the applicant the inquiry and analysis in writing, allows the applicant a reasonable time to respond (not less than three business days), and during this time, holds the position open for the applicant.[58]

A *conditional offer of employment* means an offer of employment, promotion or transfer which may only be revoked based on one of the following: (1) the results of a criminal background check, conducted in accordance with the provisions of the NYC Human Rights Law; (2) the results of a medical exam as permitted by the Americans With Disabilities Act; or (3) other information the employer could not have reasonably known before making the conditional offer, if the employer can show as an affirmative defense that, based on the information, it would not have made the offer regardless of the results of the criminal background check.[59]

An employer that hires an applicant and does not otherwise take adverse action after learning about their conviction, is not required to take any additional action or perform any analysis.[60]

The New York City Commission on Human Rights emphasizes, however, that an employer may never ask about: "arrests that did not lead to convictions; convictions that were sealed, expunged, or reversed on appeal; convictions for violations, infractions, or other petty offenses such as 'disorderly conduct;'

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[56] N.Y. LAB. LAW § 201-f.

[57] N.Y.C., N.Y., ADMIN. CODE § 8-107(11-a).

[58] N.Y.C., N.Y., ADMIN. CODE § 8-107(10), (11-a). Information and guidance about the Fair Chance Act, as well as a sample notice is available from the New York City Commission on Human Rights, http://www1.nyc.gov/site/cchr/media/fair-chance-act-campaign.page; *see also* N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 63 (2015)* (rev. June 24, 2016), *available at* http://www1.nyc.gov/site/cchr/law/fair-chance-act.page.

[59] N.Y.C., N.Y., ADMIN. CODE § 8-102.

[60] N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 63 (2015)* (rev. June 24, 2016).

resulted in a youthful offender or juvenile delinquency finding; or convictions that were withdrawn after completion of a court program."[61]

Buffalo Fair Employment Screening Ordinance. With certain exceptions, under Buffalo's ban-the-box ordinance, it is an unlawful discriminatory practice for an employer to ask about or require any person to disclose any criminal conviction either during the application process or before the first interview.[62]

The *application process* begins when the applicant inquires about the employment sought and ends when an employer has accepted an employment application. A *first interview* is defined as "any direct contact by the employer with the applicant whether in person or by telephone" to discuss the position being sought and the applicant's qualifications.[63]

If the employer does not conduct an interview, it must inform the applicant whether a criminal background check will be conducted before employment begins.[64]

When considering an applicant's prior criminal convictions, employers must still comply with the pertinent state law, Article 23-A.[65]

Rochester Fair Employment Screening Ordinance. With certain exceptions, Rochester's ban-the-box ordinance protects an applicant's criminal conviction record and bans employer inquiries regarding any criminal conviction information until after an initial interview.[66] *Interview* is defined as direct contact, by phone or in person, between the applicant and the prospective employer "to discuss the employment being sought or the applicant's qualifications."[67]

If the employer does not conduct an interview, the employer must inform the applicant whether a criminal background check will be conducted before employment is to begin and must wait until after it has extended a conditional offer of employment before conducting the background check or otherwise inquiring into the applicant's criminal history.[68]

When considering an applicant's prior convictions, employers must still comply with Article 23-A.[69]

Suffolk County Human Rights Law. As outlined in the previous section, employers of 15 or more employees in Suffolk County may not inquire or consider an applicant's conviction history until after the

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[61] N.Y.C. Comm'n on Human Rights, *Fair Chance Act: Frequently Asked Questions*, Question 2, *available at* http://www1.nyc.gov/site/cchr/media/fair-chance-faqs.page.

[62] BUFFALO, N.Y., CODE §§ 154-11, 154-27, 154-28 (exceptions).

[63] BUFFALO, N.Y., CODE § 154-27.

[64] BUFFALO, N.Y., CODE § 154-27. Generally speaking, the Buffalo ordinance broadly defines convictions and covers a wide range of employment relationships, including seasonal workers. BUFFALO, N.Y., CODE § 154-26.

[65] BUFFALO, N.Y., CODE § 154-27.

[66] ROCHESTER, N.Y., MUN. CODE §§ 63-13, 63-14.

[67] ROCHESTER, N.Y., MUN. CODE §§ 63-12 to 63-14.

[68] ROCHESTER, N.Y., MUN. CODE § 63-14.

[69] ROCHESTER, N.Y., MUN. CODE § 63-14.

applicant has submitted an application for employment or after an initial interview.[70] The application cannot make any inquiry or statement regarding the applicant's conviction history.[71]

Westchester County Human Rights Law. As outlined in the previous section, employers in Westchester County cannot inquire into or consider an applicant's conviction history until after the applicant has submitted an application for employment. The application cannot make any inquiry or statement regarding the applicant's conviction history.[72]

1.3(a)(v) *State Guidelines on Employer's Use of Sealed or Expunged Criminal Records*

Under New York state law, arrests that did not lead to convictions may be sealed. The arrested individual can deny the existence of the arrest, except where disclosure is specifically required or permitted by statute. The arrest or prosecution may not operate as a disqualification of any person accused to engage in any lawful activity, occupation, or profession.[73] Moreover, an employer may not inquire about or take any action based on sealed records.[74]

All violation convictions, with a handful of exceptions, are automatically sealed following termination of the criminal proceedings. These sealed violation conviction records are likewise not required to be disclosed by an applicant or employee.[75]

Juvenile Records. Unless specifically required or permitted by statute, an employer generally cannot inquire about or take adverse action based on a youthful offender adjudication.[76]

Local Ban-the-Box Laws

In addition to the statewide regulations, certain cities in New York have enacted their own ordinances on related topics.

New York City Fair Chance Act. Under the Fair Chance Act, employers are prohibited from inquiring about or taking any action based on sealed or expunged records, as well as any youthful offender or juvenile delinquency findings.[77]

Buffalo Fair Employment Screening Ordinance. Buffalo's ban-the-box ordinance does not include any provisions concerning the use of sealed or expunged records.

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[70] SUFFOLK CNTY., N.Y., CODE § 528-21.

[71] SUFFOLK CNTY., N.Y., CODE § 528-20.

[72] WESTCHESTER CNTY., N.Y. CODE § 700.03(a)(10).

[73] N.Y. CRIM. PROC. LAW §§ 160.50(1), 160.60; *see also* N.Y. State Dep't of Labor, *Employers - Know the Law*, at Sealing and Correcting Records, *available at* https://www.labor.ny.gov/careerservices/ace/employers.shtm (discussing the specific circumstances under which criminal records may be sealed, and the degree to which they may be sealed).

[74] N.Y. EXEC. LAW § 296(16).

[75] N.Y. CRIM. PROC. LAW §§ 160.55, 160.58; *see also* N.Y. EXEC. LAW § 296(16).

[76] N.Y. EXEC. LAW § 296(16); N.Y. CRIM. PROC. LAW § 720.35.

[77] N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 63 (2015)* (rev. June 24, 2016), *available at* http://www1.nyc.gov/site/cchr/law/fair-chance-act.page.

Rochester Fair Employment Screening Ordinance. The Rochester ordinance adopts, but does not add to, the existing state prohibition on the use of sealed, expunged, and juvenile records.[78]

Suffolk County Human Rights Law. The Suffolk County ordinance prohibits an employer from requiring an applicant to disclose information regarding the applicant's sealed convictions.[79]

1.3(a)(vi) *State Enforcement, Remedies & Penalties*

The New York Human Rights Commission adjudicates complaints of discrimination based on previous conviction records brought against employers. If discrimination is found to have occurred, the Commissioner may order damages and other appropriate relief.[80]

Local Ban-the-Box Laws

Penalties also arise under the local ban-the-box ordinances.

New York City Fair Chance Act. The Fair Chance Act includes a specific provision authorizing the imposition of civil penalties for unlawful discriminatory practices.[81]

Buffalo Fair Employment Screening Ordinance. The Buffalo ordinance governing the use of conviction histories in employment also provides for civil penalties. Aggrieved individuals may also bring a civil action for injunctive relief, damages, and other appropriate relief.[82]

Rochester Fair Employment Screening Ordinance. Rochester, too, authorizes the imposition of penalties for violations of its ban-the-box ordinance. Aggrieved individuals may also bring a civil action for injunctive relief, damages, and other appropriate relief.[83]

Suffolk County Human Rights Law. The Suffolk County ordinance authorizes an individual alleging a violation of the ordinance to file a complaint with the Suffolk County Human Rights Commission within one year after the alleged unlawful discriminatory practice occurred. An individual alleging a violation may also file a civil action.[84]

Westchester County Human Rights Law. The law does not provide for any penalties that specifically apply to violation of the ban-the-box provisions. An individual alleging a violation of the ordinance may file a complaint with the Westchester County Human Rights Commission within one year after the alleged unlawful discriminatory practice occurred.[85]

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[78] ROCHESTER, N.Y., MUN. CODE § 63-14(F).

[79] SUFFOLK CNTY., N.Y., CODE § 528-7(A)(12).

[80] N.Y. EXEC. LAW § 297.

[81] N.Y.C., N.Y., ADMIN. CODE § 8-126.

[82] BUFFALO, N.Y., CODE § 154-29.

[83] ROCHESTER, N.Y., MUN. CODE § 63-16.

[84] SUFFOLK CNTY., N.Y. CODE §§ 528-13, 528-23.

[85] WESTCHESTER CNTY., N.Y. CODE §§ 700.03(a)(10), 700.11.

1.3(b) *Restrictions on Credit Checks*

1.3(b)(i) *Federal Guidelines on Employer's Use of Credit Information & History*

The Fair Credit Reporting Act (FCRA). The FCRA[86] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[87] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

The FCRA establishes procedures that an employer must strictly follow when using a consumer report for employment purposes. For example, before requesting a consumer report from a consumer reporting agency, the employer must notify the applicant or employee in writing that a consumer report will be requested and obtain the applicant's or employee's written authorization before obtaining the report. An employer that intends to take an adverse employment action, such as refusing to hire the applicant, based wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

Many states have enacted their own version of the FCRA, referred to as "mini-FCRAs." While these laws often mirror the FCRA's requirements, there may be important distinctions between federal and state requirements.

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[88]

1.3(b)(ii) *State Guidelines on Employer's Use of Credit Information & History*

New York has enacted a mini-FCRA, the New York Fair Credit Reporting Act, which limits the procurement of both consumer reports and investigative consumer reports.[89]

The statute defines *consumer report* as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or

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[86] 15 U.S.C. §§ 1681 *et seq*.

[87] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 15 U.S.C. § 1681a(f). A *consumer report* is any communication by a consumer reporting agency bearing on an individual's "creditworthiness, credit standing, character, general reputation, personal characteristics or mode of living" that is used for employment purposes. 15 U.S.C. § 1681a(d).

[88] EEOC, *Pre-Employment Inquiries and Financial Information*, *available at* https://www.eeoc.gov/laws/practices/financial_information.cfm (emphasis in original).

[89] N.Y. GEN. BUS. LAW §§ 380 *et seq*.

expected to be used or collected in whole or part for the purpose of serving as a factor in establishing the consumer's eligibility for" employment, promotion, reassignment or retention.[90]

An *investigative consumer report* is a consumer report based in part on "personal interviews with neighbors, friends, or associates of the consumer . . . or with others with whom he is acquainted or who may have knowledge concerning any such items of information."[91]

Finally, *employment purposes*, when used in connection with a consumer report, means a report used for the purpose of evaluating an individual for employment, promotion, reassignment, or retention.[92]

Consumer Reports. An employer cannot request a consumer report in connection with an application for employment *unless* the applicant is first informed in writing, or in the same manner in which the application is made, that: (1) a consumer report may be requested in connection with such application; and (2) the applicant, upon request, will be informed whether or not a consumer report was requested, and if such report was requested, will be informed of the name and address of the consumer reporting agency that furnished the report.[93]

If the employer's notice provided to the applicant explains that "subsequent consumer reports, other than investigative consumer reports, may be requested or utilized in connection with an update, renewal, or extension" of employment, no additional notice to the employee will be required at the time the subsequent report is requested.[94]

Investigative Consumer Reports. An employer cannot request an investigative consumer report *unless* it: (1) first provides notice; and (2) receives authorization for the preparation or procurement of an investigative consumer report.[95] The notice must be written if the application was written, but may be either in writing or oral under other circumstances.[96]

The notice to the applicant must inform the applicant that: (1) an investigative consumer report may be requested; (2) the applicant, upon written request, will be informed whether this type of report was requested, and, if so, the name and address of the consumer reporting agency to whom the request was made; and, (3) the applicant may inspect and receive a copy of the report by contacting the reporting agency.[97]

Importantly, any such notice to an applicant for employment concerning the potential request for an investigative consumer report must also include a copy of Article 23-A, which, as discussed in **1.3**, addresses the consideration of criminal convictions in evaluating employment applications.[98]

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[90] N.Y. GEN. BUS. LAW § 380-a(c)(1).

[91] N.Y. GEN. BUS. LAW § 380-a(d). This type of report may *not* include facts taken from an individuals' credit record obtained directly from a creditor or a consumer reporting agency. N.Y. GEN. BUS. LAW § 380-a(d).

[92] N.Y. GEN. BUS. LAW § 380-a(g).

[93] N.Y. GEN. BUS. LAW § 380-b(b).

[94] N.Y. GEN. BUS. LAW § 380-b(c).

[95] N.Y. GEN. BUS. LAW § 380-c(a) to (c).

[96] N.Y. GEN. BUS. LAW § 380-c(b).

[97] N.Y. GEN. BUS. LAW § 380-c(b).

[98] N.Y. GEN. BUS. LAW § 380-c(b)(2).

If any applicant refuses to authorize the employer to procure an investigative consumer report, the employer can decline employment on those grounds.[99]

1.3(b)(iii) *Local Guidelines on Employer's Use of Credit Information & History*

New York City Stop Credit Discrimination in Employment Act. The Stop Credit Discrimination in Employment Act (SCDEA), which applies to employers with four or more employees, renders it illegal to request, obtain, or use an applicant's or employee's consumer credit history in employment decisions—even if no adverse action is taken.[100] Numerous exemptions apply, such as for financial services, intelligence, digital security, and police employment, and employers claiming an exemption must show the position falls under one of the exempted categories.[101] According to interpretative guidance issued by the Commission on Human Rights, New York City employers are not prohibited from researching applicants' background and experience through online searching, or from evaluating references and resumes.[102]

1.3(b)(iv) *State Enforcement, Remedies & Penalties*

Although the state mini-FCRA authorizes the recovery of actual damages and costs (as well as punitive damages for willful violations) to aggrieved applicants, it does not impose penalties.[103]

New York City Stop Credit Discrimination in Employment Act. Employers that violate the SCDEA will be civilly fined by the Commission on Human Rights. Remedies available to aggrieved parties include back and front pay, as well as compensatory and punitive damages.[104]

1.3(c) *Restrictions on Access to Applicants' Social Media Accounts*

1.3(c)(i) *Federal Guidelines on Access to Applicants' Social Media Accounts*

There is no federal law governing an employer's ability to request access to applicants' or employees' social media accounts. However, various federal laws, or federal agencies' interpretations and enforcement of these laws, may impact employer actions. For example:

- Preemployment action taken against an applicant, or post-employment action taken against an employee, based on information discovered via social media may run afoul of federal civil

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[99] N.Y. GEN. BUS. LAW § 380-c(d).

[100] N.Y.C., N.Y., ADMIN. CODE §§ 8-102(5), (29), 8-107(9)(d), and 8-107(24); *see also* Rules of the City of New York Comm'n on Human Rights §§ 2-01, 2-05. Additional information about the SCDEA is available from the New York City Commission on Human Rights at http://www1.nyc.gov/site/cchr/media/credit-check-law.page.

[101] N.Y.C., N.Y., ADMIN. CODE § 8-107(24)(b); *see also* Rules of the City of New York Comm'n on Human Rights §§ 2-01, 2-05; N.Y.C. Comm'n on Human Rights, *NYC Commission on Human Rights Legal Enforcement Guidance on the Stop Credit Discrimination in Employment Act,* NYC ADMIN. CODE §§ 8-102(29), 8-107(9)(d), (24); Local Law No. 37 (2015), at 5 (rev. Nov. 5, 2015), *available at* http://www1.nyc.gov/assets/cchr/downloads/pdf/CreditHistory-InterpretiveGuide-LegalGuidance.pdf.

[102] N.Y.C. Comm'n on Human Rights, *NYC Commission on Human Rights Legal Enforcement Guidance on the Stop Credit Discrimination in Employment Act,* NYC ADMIN. CODE §§ 8-102(29), 8-107(9)(d), (24); Local Law No. 37 (2015), at 2 (rev. Nov. 5, 2015).

[103] N.Y. GEN. BUS. LAW §§ 380-l, 380-m, and 380-o.

[104] N.Y.C. Comm'n on Human Rights, *NYC Commission on Human Rights Legal Enforcement Guidance on the Stop Credit Discrimination in Employment Act,* NYC ADMIN. CODE §§ 8-102(29), 8-107(9)(d), (24); Local Law No. 37 (2015), at 5-6 (rev. Nov. 5, 2015).

rights law (*e.g.*, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).

- The National Labor Relations Board, which is charged with enforcing federal labor laws, has taken an active interest in employers' social media policies and practices, and has concluded in many instances that, regardless of whether the workplace is unionized, the existence of such a policy or an adverse employment action taken against an employee based on the employee's violation of the policy can violate the National Labor Relations Act.
- Accessing an individual's social media account without permission may potentially violate the federal Computer Fraud and Abuse Act or the Stored Communications Act.

For additional information on federal law related to background screening, see **LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING**.

1.3(c)(ii) *State Guidelines on Access to Applicants' Social Media Accounts*

A covered employer is prohibited from requesting, requiring, or coercing any employee or applicant for employment to:

- disclose any user name and password, password, or other authentication information for accessing a personal account through an electronic communications device;
- access the employee's or applicant's personal account in the presence of the employer; or
- reproduce in any manner photographs, video, or other information contained within a personal account obtained by the means prohibited by the law.[105]

Concerning private employment, a *covered employer* is defined as "a person or entity engaged in a business, industry, profession, trade or other enterprise" in New York, and includes an agent, representative or designee of an employer.[106] Under the law, *electronic communications device* is defined as "any device that uses electronic signatures to create, transmit, and receive information, including, but not limited to computers, telephones, personal digital assistants and other similar devices."[107] *Personal account* means "an account or profile on an electronic medium where users may create, share, and view user-generated content, including uploading or downloading videos or still photographs, blogs, video blogs, podcasts, instant messages, or internet website profiles or locations that is used by an employee or an applicant exclusively for personal purposes."[108]

The law prohibits an employer from discharging, disciplining, or otherwise penalizing or threatening an employee for an employee's refusal to disclose any protected information. Further, an employer cannot refuse to hire an applicant as a result of the applicant's refusal to disclose any protected information.[109] However, it is an affirmative defense to an action under the law that the employer acted in compliance with requirements of a federal, state, or local law.[110]

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[105] N.Y. Lab. Code § 201-i(2)(a)).

[106] N.Y. Lab. Code § 201-i(1)(c).

[107] N.Y. Lab. Code § 201-i(1)(b).

[108] N.Y. Lab. Code § 201-i(1)(d).

[109] N.Y. Lab. Code § 201-i(3).

[110] N.Y. Lab. Code § 201-i(4).

Exceptions: Notwithstanding the above prohibitions, the law allows an employer to require an employee to disclose any user name, password, or other means for accessing non-personal accounts that provide access to the employer's internal computer or information systems. However, "access" does not include an employee or applicant voluntarily adding an employer, agent of the employer, or employment agency to their list of contacts associated with a personal internet account.[111]

An employer can request or require an employee to disclose access information to an account provided by the employer where the account is used for business purposes, and the employee was provided prior notice of the employer's right to request or require access to the account information or to an account known to an employer to be used for business purposes.[112]

In addition, employers can access an electronic communications device paid for in whole or in part by the employer, where providing or paying for the device was conditioned on the employer's right to access the device and the employee was provided prior notice of and explicitly agreed to these conditions. However, the law does not allow an employer to access any personal accounts on the electronic communications device.[113]

Further, an employer is not prohibited from restricting or prohibiting an employee's access to certain websites while using an employer's network or while using an electronic communications device paid for in whole or party by the employer, where providing or paying for the electronic communications device was conditioned on the employer's right to impose these restrictions.[114]

An employer complying with a court order in obtaining or providing information from, or access to, an employee's accounts as the court order may require is exempt from the law's requirements.[115] The law does not prevent an employer from complying with the requirements of federal law for the purposes of screening employees or applicants.[116]

Finally, the law also does not prohibit or restrict an employer from viewing, accessing, or utilizing information that is publicly available for the purposes of investigating or obtaining reports of misconduct. In addition, an employer is allowed view and utilize information that is voluntarily shared by an employee, a client, or another third party who has voluntarily been provided access by the employee subject to the investigation or report.[117]

1.3(d) *Polygraph / Lie Detector Testing Restrictions*

1.3(d)(i) *Federal Guidelines on Polygraph Examinations*

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[118] The law bars most private-sector employers from requiring, requesting, or suggesting that an

[111] N.Y. Lab. Code § 201-i(2)(b).

[112] N.Y. Lab. Code § 201-i(5)(a).

[113] N.Y. Lab. Code § 201-i(5)(a).

[114] N.Y. Lab. Code § 201-i(5)(a).

[115] N.Y. Lab. Code § 201-i(5)(a).

[116] N.Y. Lab. Code § 201-i(5)(b).

[117] N.Y. Lab. Code § 201-i(5)(c).

[118] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dep't of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

The EPPA further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant:

- for refusing to take a lie detector test;
- based on the results of such a test; and
- for taking any actions to preserve employee rights under the law.

There are some limited exceptions to the general ban. The exception applicable to most private employers allows a covered employer to test current employees reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business. There is also a narrow exemption for prospective employees of security guard firms and companies that manufacture, distribute, or dispense controlled substances.

Notably, the EPPA prohibits only mechanical or electrical devices, not paper-and-pencil tests, chemical tests, or other nonmechanical or nonelectrical means that purport to measure an individual's honesty. For more information on federal restrictions on polygraph tests, including specific procedural and notice requirements and disclosure prohibitions, see **LITTLER ON EMPLOYMENT TESTING**.

Most states have laws that mirror the federal law. Some of these state laws place greater restrictions on testing by prohibiting lie detector "or similar" tests, such as pencil-and-paper honesty tests.

1.3(d)(ii) *State Guidelines on Polygraph Examinations*

New York employers cannot require, request, suggest, or knowingly permit any applicant or employee to submit to a psychological stress evaluator examination.[119] Employers cannot administer or use the results of any such test inside or outside of New York for any reason.[120] In fact, these protections extend even to applicants or employees *in other states* who are subjected to such testing within New York state.[121]

The labor code regulates the use of a *psychological stress evaluator examination*, which includes polygraphs, and is defined as:

> (a) the questioning or interviewing of an employee or prospective employee for the purpose of subjecting the statements of such employee or prospective employee to analysis by a psychological stress evaluator; (b) the recording of statements made by an employee or prospective employee for the purpose of subjecting such statements to analysis by a psychological stress evaluator; or (c) analyzing, with a psychological stress

[119] N.Y. LAB. LAW § 735.

[120] N.Y. LAB. LAW § 735.

[121] N.Y. LAB. LAW § 737 (providing that no individual can administer an examination in New York to any applicant seeking work either inside or outside the state).

evaluator, statements made by an employee or prospective employee for the purpose of determining the truth or falsity of such statements.[122]

Antiretaliation Provisions. An employee cannot be discharged, disciplined, or discriminated against in any manner for complaining about any testing imposed by an employer.[123]

1.3(d)(iii) *State Enforcement, Remedies & Penalties*

Initial violation of the polygraph prohibition is a Class B misdemeanor, and any subsequent violation is a Class A misdemeanor.[124] Aggrieved applicants or employees can file a private lawsuit for damages.[125]

1.3(e) *Drug & Alcohol Testing of Applicants*

1.3(e)(i) *Federal Guidelines on Drug & Alcohol Testing of Applicants*

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation industries.[126] The Drug-Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[127] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

For the most part, workplace drug and alcohol testing is governed by state law, and state laws differ dramatically in this area and continue to evolve.

1.3(e)(ii) *State and Local Guidelines on Drug & Alcohol Testing of Applicants*

New York law contains no express provisions regulating preemployment drug or alcohol screening by private employers.

New York City. New York City specifically prohibits employers, labor organizations, employment agencies, or their agents from requiring prospective employees "to submit to testing for the presence of any tetrahydrocannabinols or marijuana in such prospective employee's system as a condition of employment." The law provides exceptions for individuals applying for work:

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[122] N.Y. LAB. LAW § 733(5). A *psychological stress evaluator* is defined as "any mechanical device or instrument which purports to determine the truth or falsity of statements made by an employee or prospective employee on the basis of vocal fluctuations or vocal stress." N.Y. LAB. LAW § 733(4).

[123] N.Y. LAB. LAW § 736.

[124] N.Y. LAB. LAW §§ 735, 737.

[125] N.Y. LAB. LAW § 738.

[126] These industries are covered by the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration (FMSCA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); and the Pipeline and Hazardous Materials Safety Administration (PHMSA). In addition, the U.S. Department of Defense, the Coast Guard, and the Nuclear Regulatory Commission, as well as other government agencies, have adopted regulations requiring mariners, employers, and contractors to maintain a drug-free workplace.

[127] 41 U.S.C. §§ 8101 *et seq.*; *see also* 48 C.F.R. §§ 23.500 *et seq*.

- in law enforcement positions, such as police officers, peace officers, or investigators with the department of investigation;
- as laborers, mechanics, workers, contractors, or other persons working on a public work site;
- for any position that requires compliance with Section 3321 of the NYC Building Code;
- for any position requiring a commercial driver's license;
- for any position requiring the supervision or care of children, medical patients, or vulnerable persons as defined by Section 488(15) of the New York Social Services Law; or
- for any position that could "significantly impact the health or safety of employees or members of the public," as determined by the Department of Citywide Administrative Services, or identified in regulations issued by the city's Commission on Human Rights.

The law also provides exclusions where drug testing of prospective employees is required in accordance with regulations issued by the United States Department of Transportation and/or the New York State or New York City Departments of Transportations, any contracts or grants from the federal government to an employer, federal or state statutes; or a collective bargaining agreement.[128]

1.3(f) *Additional State Guidelines on Preemployment Conduct*

1.3(f)(i) *State Restrictions on Fingerprints & Photographs*

With exceptions, New York law precludes private employers from requiring fingerprinting of applicants or employees "as a condition of securing employment or of continuing employment."[129] Fingerprinting can be requested, as a condition of employment, only where otherwise permitted by law or for: (1) state or municipal employees; (2) "the employees of legally incorporated hospitals, supported in whole or in part by public funds or private endowment;" (3) employees working at medical colleges affiliated with those hospitals; or (4) "employees of private proprietary hospitals."[130]

1.3(f)(ii) *State Restrictions on Genetic Testing*

While there are many laws governing genetic testing, New York specifically bans any employer, union, or employment agency from soliciting genetic information as a condition of employment or as part of a job application.[131] Employers may neither require genetic testing or the disclosure of such information, nor may they purchase or otherwise acquire the results of any testing.[132]

Testing is permissible at the request of a consenting employee for limited purposes, such as pursuant to a workers' compensation claim.[133] Testing may also be allowed if it is "directly related to the

[128] N.Y.C., N.Y., ADMIN. CODE §§ 8-102, 8-107.

[129] N.Y. LAB. LAW § 201-a.

[130] N.Y. LAB. LAW § 201-a.

[131] N.Y. EXEC. LAW § 296(19).

[132] N.Y. EXEC. LAW § 296(19)(a).

[133] N.Y. EXEC. LAW § 296(19)(c).

occupational environment," such that it would be helpful for assessing whether the applicant might be at a greater risk for disease because of the environment.[134]

1.3(f)(iii) *State Restrictions on Physical Examinations of Females*

If a physical examination is required for a female applicant or employee, she is entitled to have a doctor or surgeon of her own sex perform the exam, or to be accompanied by another female if a male physician or surgeon makes the examination. In addition, the employer must post a notice informing the female party of this right.[135]

1.3(f)(iv) *State Restrictions on Salary History Inquiries*

New York State, as well as a few local jurisdictions within the state, has enacted restrictions on an employer's ability to discuss an applicant's salary history.

New York State. Under the statewide law, employers of one or more employees are prohibited from:

- relying on the wage or salary history of an applicant in determining whether to offer employment to the applicant or in determining the wages or salary for the applicant;
- orally or in writing seeking, requesting, or requiring an applicant's wage or salary history as a condition of being interviewed, or as a condition of continuing to be considered for an offer of employment, or as a condition of employment or promotion;
- orally or in writing seeking, requesting, or requiring the wage or salary history of an applicant or current employee from a current or former employer, current or former employee, or agent of the applicant or current employee's current or former employer, except to confirm the individual's wage or salary history she or he provided in response to an offer of employment;
- refusing to interview, hire, promote, otherwise employ, or otherwise retaliating against an applicant or current employee based upon prior wage or salary history;
- refusing to interview, hire, promote, otherwise employ, or otherwise retaliating against an applicant or current employee because the applicant or current employee did not provide wage or salary history in accordance with the statute; and
- refusing to interview, hire, promote, otherwise employ, or otherwise retaliating against an applicant or current or former employee because the applicant or current or former employee filed a complaint with the Department of Labor alleging a violation of the statute.[136]

An employer may confirm wage or salary history only if at the time an offer of employment with compensation is made, the applicant or current employee responds to the offer by providing prior wage or salary information to support a wage or salary higher than offered by the employer.[137]

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[134] N.Y. EXEC. LAW § 296(19)(b).

[135] N.Y. LAB. LAW § 206-a.

[136] N.Y. LAB. LAW § 194-a.

[137] N.Y. LAB. LAW § 194-a.

The statute does not prevent an applicant or current employee from voluntarily, and without prompting, disclosing, or verifying wage or salary history, including but not limited to for the purposes of negotiating wages or salary. In addition, the statute does not diminish an applicant's or current or former employee's rights under any other law or regulation or under any collective bargaining agreement or employment contract. The statute also does not supersede any federal, state, or local law enacted prior to January 6, 2020 that requires the disclosure or verification of salary history information to determine an employee's compensation.[138]

1.3(f)(v) *Local Restrictions on Salary History Inquiries*

New York City. Under the New York City Human Rights Law, it is an unlawful discriminatory practice for employers to inquire about the salary history of a prospective employee. Specifically, New York City employers may not make any salary inquiry of an applicant, or the applicant's current or former employer, or a current or former employee or agent of the applicant's current or prior employer. Employers are also prohibited from conducting any form of search through publicly available information for a prospective employee's salary history.[139] For these purposes, *salary history* includes not only an applicant's current or prior wage, but also benefits and any other form of compensation the applicant may have received.

In addition, New York City employers may not rely upon an applicant's salary history in evaluating the potential salary, benefits, or other compensation to be offered the applicant, unless the applicant offers the information "voluntarily and without prompting."[140] This information, for example, may not be used for negotiating a contract with the candidate. If salary history is offered voluntarily, an employer may consider it and may also verify that information.[141]

These protections do not extend to current employees who may be "applicants for internal transfer or promotion."[142] Additional exceptions apply, including where such inquiries are authorized by law and for public employees covered by a collective bargaining agreement.[143] Moreover, employers can discuss salary and compensation in general. Thus, an employer can inform an applicant about the anticipated salary or compensation package for the position and can ask about the applicant's salary expectations.[144]

The New York City Commission on Human Rights enforces the New York City Human Rights Law, including this new provision. Therefore, an employee alleging a violation of the Human Rights Law may file an administrative complaint with the New York City Commission on Human Rights within one year of the alleged violation.[145] The commission may impose a civil penalty of up to $125,000 for an unintentional violation, and up to $250,000 for a "willful, wanton or malicious act."[146] In addition, an individual may bring a civil lawsuit for violations of the law. The full range of relief available under the

[138] N.Y. LAB. LAW § 194-a.

[139] N.Y.C., N.Y., ADMIN. CODE § 8-107(25)(a), (b)(1).

[140] N.Y.C., N.Y., ADMIN. CODE § 8-107(25)(b)(2), (d).

[141] N.Y.C., N.Y., ADMIN. CODE § 8-107(25)(b)(2), (d).

[142] N.Y.C., N.Y., ADMIN. CODE § 8-107(25)(e)(2).

[143] N.Y.C., N.Y., ADMIN. CODE § 8-107(25)(e).

[144] N.Y.C., N.Y., ADMIN. CODE § 8-107(25)(c).

[145] N.Y.C., N.Y., ADMIN. CODE § 8-109.

[146] N.Y.C., N.Y., ADMIN. CODE § 8-126(a).

New York City Human Rights Law will be available in such a lawsuit, including back pay, compensatory damages, and attorneys' fees.

Albany County. The Albany County ordinance amends the county Human Rights Law and prohibits employers of four or more employees from:

- screening job applicants based on their wage, including benefits or other compensation or salary histories, including by requiring that an applicant's prior wages, including benefits or other compensation or salary history, satisfy minimum or maximum criteria;
- requesting or requiring as a condition of being interviewed, or as a condition of continuing to be considered for an offer of employment, that a job applicant disclose prior wages or salary history; or
- seeking the applicant's salary history from any current or former employer.[147]

After the employer extends an offer of employment with compensation to the job applicant, the applicant may provide written authorization to the employer or employment agency to confirm prior wages, including benefits or other compensation or salary history.[148]

An individual alleging a violation of the Albany County Human Rights Law may file an administrative complaint with the Albany County Commission on Human Rights within one year of the alleged violation. An individual may alternatively elect to bring a civil action in a court of competent jurisdiction for injunctive relief and/or damages within three years of the alleged violation.[149]

Suffolk County. Like the New York City and Albany County ordinances, the Suffolk County ordinance amends the county Human Rights Law. The ordinance prohibits employers of four or more employees from:

- inquiring, whether in any form of application or otherwise, about a job applicant's wage or salary history, including but not limited to, compensation and benefits; or
- relying on the salary history of an applicant for employment in determining the wage or salary amount for such applicant at any stage in the employment process including the offer or contract.[150]

Inquire means to ask an applicant or former employer orally, in writing, or otherwise, or to conduct a search of publicly available records or reports.[151]

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[147] ALBANY CNTY., N.Y., LOCAL LAW No. 1 for 2000 (Omnibus Human Rights Law for Albany County) as amended by LOCAL LAW No. P for 2016 § 7(1)(i).

[148] ALBANY CNTY., N.Y., LOCAL LAW No. 1 for 2000 (Omnibus Human Rights Law for Albany County) as amended by LOCAL LAW No. P for 2016 § 7(1)(i).

[149] ALBANY CNTY., N.Y., LOCAL LAW No. 1 for 2000 (Omnibus Human Rights Law for Albany County) as amended by LOCAL LAW No. P for 2016 § 7(1)(i).

[150] SUFFOLK CNTY., N.Y. CODE OF ORDINANCES §§ 528-6, 528-7(13).

[151] SUFFOLK CNTY., N.Y. CODE OF ORDINANCES § 528-7(13).

The above prohibitions do not apply to:

- any actions taken by an employer, employment agency, employee, or agent thereof pursuant to any federal, state, or local law that requires the disclosure or verification of salary for employment purposes; or
- the exercise of any right of an employer or employee pursuant to a collective bargaining agreement.[152]

Westchester County. [Note: this ordinance automatically sunsetted on January 6, 2020] Like the ordinances above, the Westchester County ordinance amended the county Human Rights Law and prohibits employers of four or more employees from:

- relying on a prospective employee's wage history from any current or former employer in determining wages for the prospective employee;
- requesting or requiring, orally or in writing, as a condition of being interviewed or as a condition of continuing to be considered for an offer of employment, or as a condition of employment, that a prospective employee disclose information about their wages from any current employer;
- seeking, orally or in writing, a prospective employee's previous wages from any current or former employer; and
- refusing to hire or otherwise retaliating against an employee or prospective employee based upon prior wage or salary history or because the employee or prospective employee has opposed any act or practice prohibited in this ordinance.[153]

However, an employer may rely on a prospective employee's wage or salary history if the prospective employee voluntarily provides it in order to support a higher wage than that offered by the employer. In addition, an employer may seek to confirm a prospective employee's prior wage information only after extending an offer of employment with compensation to the prospective employee, and the prospective employee responds to the offer by providing wage information to support a higher wage than that offered by the employer. The employer must obtain the prospective employee's written authorization to seek their prior wage information.[154]

An individual alleging a violation of the ordinance may file a verified complaint with the Westchester County Human Rights Commission within one year after the occurrence of the alleged unlawful discriminatory practice.[155]

Notably, in the event the state of New York enacts statewide legislation prohibiting employers from seeking a prospective employee's wage or salary history, the ordinance will become null and void upon enactment of the statewide law.[156] Thus, the Westchester County law automatically sunsetted on January 6, 2020.

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[152] SUFFOLK CNTY., N.Y. CODE OF ORDINANCES § 528-7(13).

[153] WESTCHESTER CNTY., N.Y. CODE OF ORDINANCES §§ 700.02, 700.03(9).

[154] WESTCHESTER CNTY., N.Y. CODE OF ORDINANCES § 700.03(9).

[155] WESTCHESTER CNTY., N.Y. CODE OF ORDINANCES §§ 700.11, 700.12.

[156] WESTCHESTER CNTY., N.Y. CODE OF ORDINANCES § 700.03(9).

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

Table 2 lists the documents that must be provided at the time of hire under federal law.

Table 2. Federal Documents to Provide at Hire

Category	Notes
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[157] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[158] if the employee purchases a qualified health plan through the exchange; and • that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.[159] The U.S. Department of Labor's Employee Benefits Security Administration provides a model notice for employers that offer a health plan to some or all employees and a separate notice for employers that do not offer a health plan.[160]
Benefits & Leave Documents: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Employers or group health plan administrators must provide written notice to employees and their spouses outlining their COBRA rights no later than 90 days after employees and spouses become covered under group health plans. Employers or plan administrators can develop their own COBRA rights notice or use the COBRA Model General Notice.[161]

[157] 26 U.S.C. § 36B.

[158] 42 U.S.C. § 18071.

[159] 29 U.S.C. § 218b.

[160] Model notices are available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice.

[161] The model notice is available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	Employers or plan administrators can send COBRA rights notices through first-class mail, electronic distribution, or other means that ensure receipt. If employees and their spouses live at the same address, employers or plan administrators can mail one COBRA rights notice addressed to both individuals; alternatively, if employees and their spouses do not live at the same address, employers or plan administrators must send separate COBRA rights notices to each address.[162]
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[163] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[164] Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.[165]
Immigration Documents: Form I-9	Employers must ensure that individuals properly complete Form I-9 section 1 ("Employee Information and Verification") at the time of hire and sign the attestation with a handwritten or electronic signature. Also, individuals must present employers documentation establishing their identity and employment authorization. Within three business days of the first day of employment, employers must physically examine the documentation presented in the employee's presence, ensure that it appears to be genuine and relates to the individual, and complete Form I-9, section 2 ("Employer Review and Verification"). Employers must also, within three business days of hiring, sign the attestation with a

[162] 29 C.F.R. § 2590.606-1.

[163] 29 C.F.R. § 825.300(a).

[164] The U.S. Department of Labor's Wage & Hour Division's model FMLA poster, which satisfies the notice requirement, is available at https://www.dol.gov/WHD/fmla/index.htm.

[165] 29 C.F.R. § 825.300(a).

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	handwritten or electronic signature. Employers that hire individuals for a period of less than three business days must comply with these requirements at the time of hire.[166] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.
Tax Documents	On or before the date employment begins, employees must furnish employers with a signed withholding exemption certificate (Form W-4) relating to their marital status and the number of withholding exemptions they claim.[167]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[168]
Wage & Hour Documents	To qualify for the federal tip credit, employers must notify tipped employees: (1) of the minimum cash wage that will be paid; (2) of the tip credit amount, which cannot exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements.[169]

2.1(b) *State Guidelines on Hire Documentation*

Table 3 lists the documents that must be provided at the time of hire under state law.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents	The New York State Secure Choice Savings Program (Secure Choice) is voluntary – no employer is required to participate in or otherwise implement this program. Moreover, employers retain the option at all times to set up any type of employer-sponsored retirement plan.[170] The board has designed employer informational materials and employee

[166] *See generally* 8 C.F.R. § 274a.2. The form is available at https://www.uscis.gov/i-9.

[167] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[168] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

[169] 29 C.F.R. § 531.59.

[170] N.Y. GEN. BUS. LAW § 1310.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	informational materials, which include background information on the program, and necessary disclosures as required by law for employees. The employee informational materials are available in English, Spanish, Haitian Creole, Chinese, Korean, Russian, Arabic, and any other language the board deems necessary. The employee informational materials include a disclosure form, which explains, but not be limited to, all of the following: • the benefits and risks associated with making contributions to the program; • the process for making contributions to the program; • how to cease participation in the program; • the process by which an employee can participate in the program with a level of employee contributions other than three percent; • that they are not required to participate or contribute more than three percent; • the process for withdrawal of retirement savings; • the process for selecting beneficiaries of their retirement savings; • how to obtain additional information about the program; • that employees seeking financial advice should contact financial advisors, that participating employers are not in a position to provide financial advice, and that participating employers are not liable for decisions employees make; • information on how to access any available financial literacy programs; and, • that the program fund is not guaranteed by the state. The employee informational materials also include a form for an employee to note their decision regarding participation in the program or election to participate with a level of employee contributions other than three percent. Participating employers must supply the employee informational materials to existing employees at least one month prior to the participating employers' facilitation of access to the program. Participating employers must supply the employee informational materials to new employees at the time of hiring.[171]
Electronic Monitoring	Employers that "monitor or otherwise intercept" their employees' telephone calls, email, or internet access or usage must provide written notice to employees who are subject to the monitoring and obtain their written acknowledgement of the notice. Employers must provide the

[171] N.Y. GEN. BUS. LAW § 1309.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	notice to employees at the time of hire. Thus, employers may deliver the notice and obtain the acknowledgment as part of the onboarding process. Employers may provide the notice and obtain an employee's acknowledgement electronically. Employers must also post the notice in a conspicuous place that is readily accessible to employees subject to electronic monitoring. Employers must also provide the notice to any employee who uses a personal device to transmit email through the corporate email server or to access the internet through the employer's internet connection. Language for the notice: Employers "shall advise" relevant employees that "any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means." **Exceptions.** The law excludes from the notice requirement several methods of workplace surveillance many employers commonly use. The law does not cover surveillance by video cameras or apply to location tracking. An employer's review of stored email and of voicemail left in an employee's corporate voicemail box falls outside the purview of the notice requirement. The law requires notice only when employers "monitor or otherwise intercept" employees' telephone, email and internet communications. The law expressly excludes from the notice requirement electronic monitoring conducted solely for computer system maintenance and/or protection. This exclusion would encompass, for example, use of data loss prevention (DLP) software and software that monitors internet traffic for malicious software.[172]
Fair Employment Practices Documents: New York State Lactation Policy	Every employer in the New York State is required to adopt a lactation accommodation policy, which must be distributed to each employee upon hire. The policy must inform employees of their rights under the Nursing Mothers in the Workplace Act, specify the means and/or procedures by which employees may request a room or location to pump breast milk, and require employers to respond within five business days to an employee's request for a room or location to express milk. The New York State Department of Labor has developed a model written policy.[173]
Fair Employment	Every employer in the New York State is required to adopt a sexual

[172] N.Y. CIV. RIGHTS LAW § 52-c .

[173] N.Y. LAB. LAW § 206-c; available at https://dol.ny.gov/system/files/documents/2024/06/p705-policy-on-the-rights-of-employees-to-express-breast-milk-in-the-workplace_-24-1.pdf.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Practices Documents: New York State Sexual Harassment Law	harassment prevention policy. An employer that does not adopt the model policy must ensure that the policy that they adopt meets or exceeds minimum standards. The employer must provide both the sexual harassment prevention policy and information presented at such employer's sexual harassment prevention training program to all employees in writing. The policy may be provided electronically. If a copy is made available on a work computer, workers must be able to print a copy for their own records. Employers must distribute the policy to employees at hire and during the annual sexual harassment prevention training. Employers must provide this information in English and in the language identified by each employee as his or her primary language. The state will publish templates of a model sexual harassment prevention policy that meets the law's minimum standard in languages other than English. New York employers are not required to provide their policy in another language, if the state has not published a template in that language.[174]
Fair Employment Practices Documents, New York City: Sexual Harassment Rights & Responsibilities Poster Law	New York City employers with one or more employees are required to issue a Stop Sexual Harassment Act Factsheet to all new hires at the time of hire. An employer may include this information in a handbook that is distributed to all new hires. Employers can decide not to use the fact sheet published by the NYC Commission on Human Rights, provided that they incorporate the same information into an employee handbook or free-standing policy that they distribute to employees.[175]
New York City: Earned Sick Time Act Documents	The New York City Earned Sick Time and Safe Time Act requires that all employers provide written notice to all new employees of their right to sick and safe time, including a description of the accrual and use thereof,

[174] N.Y. LAB. LAW § 201-g; New York State Department of Labor, *Combating Sexual Harassment: Frequently Asked Questions*, available at https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers. Model policies are available at https://www.ny.gov/combating-sexual-harassment-workplace/sexual-harassment-prevention-model-policy-and-training.

[175] The information must contain the following minimum requirements and must be made available in English and Spanish and any other language deemed appropriate by the Commission: an explanation of sexual harassment as a form of unlawful discrimination under local law; a statement that sexual harassment is also a form of unlawful discrimination under state and federal law; a description of sexual harassment, using examples; the complaint process available through the Commission, and directions on how to contact the Commission; the complaint process available through the New York State Division of Human Rights, and directions on how to contact the Division; the complaint process available through the federal Equal Employment Opportunity Commission, and directions on how to contact the EEOC; and, the prohibition against retaliation under the New York City Human Rights Law. N.Y.C., N.Y., ADMIN. CODE § 8-107(29)(b)(e). The model notice is available online from the New York City Commission on Human Rights at https://www1.nyc.gov/site/cchr/law/sexual-harassment-factsheets-posters.page.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	and their right to be free from retaliation from utilizing sick and safe time. Employers are obligated to provide the sick and safe time leave notice to each employee both in English and in the language identified by the employee as the employee's primary language if that language is the primary language of at least five percent of employees at the employee's location and, if a translation has been made available by the Department of Consumer Affairs. Additional notice may be given by posting a notice at the workplace, but individual written notice for each employee upon hiring is mandatory.[176] Special notice requirements apply to employment agencies that place household or domestic workers.[177] As well, employers must maintain sick and safe time policies in a single writing and follow such written policies. Every employer must distribute written policies personally upon commencement of employment, within 14 days of the effective date of any changes, and upon an employee's request. An employer cannot distribute the time of hiring notice or any other department writing in lieu of distributing and posting its own written sick time policies.[178]
New York City: Workers' Bill of Rights	New York City employers must provide employees with a workers' bill of rights describing the protections available under relevant federal, state, and local laws, as well as information on how to organize a union. This information must be provided to new hires on or before their first day of work.[179]
Westchester County Safe Time Leave Law	At the commencement of employment, an employer must give employees a copy of the law and written notice of how the law applies to that employee.[180]
Westchester County Earned Sick Leave Law	Employees in Westchester County are entitled to earned sick leave. On the date of first employment, employees will begin earning one hour of sick leave for every thirty hours worked. Employers must give written notice of employee rights under the Westchester County Earned Sick Leave Law to new employees at the

[176] N.Y.C., N.Y., ADMIN. CODE § 20-919. The notice of employee rights, as well as other information, is available at https://www1.nyc.gov/site/dca/businesses/paid-sick-leave-law-for-employers.page.

[177] N.Y.C., N.Y., ADMIN. CODE § 20-771.

[178] RULES OF THE CITY OF NEW YORK tit. 6 § 7-211(b).

[179] N.Y.C. ADMIN. CODE §§ 32-101, 32-102. The notice is available at https://www.nyc.gov/site/dca/workers/worker-rights.page.

[180] WESTCHESTER CNTY., N.Y. CODE § 586.07(1).

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	commencement of employment.[181]
New York City: Pregnancy Discrimination Notice	The New York City Human Rights Law requires that all covered employers (*i.e.*, with four or more employees) provide written notice to all new employees that they have the "right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions."[182] This notice can also be posted conspicuously, accessible to all employees at the workplace.
New York City: Employer Lactation Room Accommodation Policy Requirement	New York City employers with four or more employees must develop and implement a written policy regarding the provision of a lactation room and distribute the policy to all employees upon hiring. The policy must include a statement that employees have a right to request a lactation room, and identify a process by which employees may request a lactation room.[183]
New York Health and Essential Rights Act Safety Plan	The New York State Commissioner of Labor, in consultation with the New York State Department of Health, has created and published a model airborne infectious disease exposure prevention standard for all work sites, differentiated by industry, and establishing minimum requirements for preventing exposure to airborne infectious diseases in the workplace. The protocols address the following topics: • employee health screenings; • face coverings; • personal protective equipment (PPE) required by industry, to be provided at the employer's expense; • hand hygiene; • cleaning and disinfecting of shared work equipment and surfaces; • social distancing protocols; • mandatory or precautionary isolation or quarantine orders; • engineering controls; • assignment of enforcement responsibility of the safety plan and federal, state, and local protocols to one or more supervisory employees; • compliance with employee notice requirements; and • verbal review of standards, policies, and employee rights.

[181] WESTCHESTER CNTY., N.Y., CODE § 585.09(1). The Westchester Human Rights Commission provides a model Notice of Employee Rights, which is available at https://humanrights.westchestergov.com/images/stories/pdfs/2019slemployeenoticer.pdf.

[182] N.Y.C., N.Y., ADMIN. CODE § 8-107(22)(b). The Commission on Human Rights has prepared an approved poster for employer use, which is available at https://www1.nyc.gov/site/cchr/media/posters/pregnancy-employment-rights.page. It is available in English, Spanish, Chinese, French, Arabic, Urdu, Russian, and Korean.

[183] N.Y.C. ADMIN. CODE § 8-107(22).

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	Employers may either adopt the Commissioner's model airborne infectious disease exposure prevention plan or to create their own safety plan that meets or exceeds the minimum standards established by the Commissioner. If an employer chooses to establish its own airborne infectious disease exposure prevention standards, it must do so in consultation with collective bargaining representatives, or in a non-unionized workforce, with employee participation, and be customized to incorporate industry-specific hazards and worksite considerations. Employers are required to distribute the plan to employees in both English and in an employee's primary language, if other than English, upon hire and upon reopening after business closure due to an airborne infectious period.[184]
Tax Documents	Employers must maintain, and employees must complete, withholding exemption certificates in accordance with state regulations and instructions.[185] Employees may use a New York form, IT-2104, or the federal Form W-4, for this purpose.[186] If an employee has not completed a Form W-4, or wishes to claim different exemptions than indicated on a Form W-4, the employer must have a completed IT-2104 for that employee.[187]
Wage & Hour Documents: Commission Agreements	The agreed terms of employment for a *commissioned salesperson* must be in writing, signed by both the employer and salesperson. This requirement covers "any employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article of thing and whose earnings are based in whole or in part on commissions." It does not include, however, "any employee whose principal activity is of a supervisory, managerial, executive or administrative nature."[188] The agreement must include "a description of how wages, salary, drawing account, commissions and all other monies earned and payable are calculated."[189] The agreement must provide details pertinent to payment

[184] N.Y. LAB. LAW § 218-b. The New York Department of Labor has posted its model plans at https://dol.ny.gov/ny-hero-act.

[185] N.Y. TAX LAW § 671.

[186] N.Y. COMP. CODES R. & REGS. tit. 20, § 171.4.

[187] N.Y. COMP. CODES R. & REGS. tit. 20, § 171.4. The IT-2104 exemption certificates, and other materials, are available from the New York Department of Taxation and Finance at https://www.tax.ny.gov/forms/income_with_allow_forms.htm.

[188] N.Y. LAB. LAW § 190(6).

[189] N.Y. LAB. LAW § 191(1)(c).

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	of all such sums earned and payable in the case of termination of employment by either party. If the agreement provides for a recoverable draw, then it also must state the frequency of reconciliation.[190] The labor code also provides specific regulations for a principal that contracts with sales representatives to solicit wholesale orders within New York.[191] Principals must provide each such sales representative a signed copy of the written contract, and must obtain a signed receipt for the contract from each sales representative. The agreement must set for the method by which the commission will be computed and paid.
Wage & Hour Documents: Hospitality Industry Notice (Generally and Tipped Employees)	New York has a specific wage order applicable to the hospitality industry, which imposes a notice requirement applicable to all employees.[192] Moreover, pursuant to the wage order, a covered employer may take a tip credit towards the minimum wage only if a service employee or food service worker has been notified. Prior to the start of employment, an employer must give every employee written notice of the employee's regular hourly pay rate, overtime hourly pay rate, the regular payday, and the amount of tip credit, if any, to be taken from the basic minimum hourly rate. This pay notice must also state that extra pay is required if tips are insufficient to bring the employee up to the basic minimum hourly rate.[193] Importantly, an employer must provide notice in English and any other language spoken by the new employee as a primary language, so long as the Commissioner of Labor has made such notice available to employers in such language. An acknowledgment of receipt, signed by the employee, must be retained. The employer has the burden of proving compliance with this notification requirement.[194]
Wage & Hour Documents: Wage Theft Prevention Act Notice	At the time of hiring, private employers must provide a written notice containing the following information: • rate(s) of pay and basis thereof (*i.e.*, paid by the hour, shift, day, week, salary, piece, commission, or other); • allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; • regular payday designated by the employer;

[190] N.Y. LAB. LAW § 191(1)(c).

[191] N.Y. LAB. LAW § 191-b.

[192] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.3.

[193] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-2.2.

[194] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-2.2(d).

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	• employer's name; • any "doing business as" names used by the employer; • physical address of the employer's main office or principal place of business, and a mailing address if different; • employer's telephone number; and • other information the state labor department deems material and necessary.[195] New hire notice requirements under the WTPA also address employers covered by New York's prevailing wage law. Employers covered by the prevailing wage law must specify on an employee's new hire form the "prevailing wage supplements, if any, claimed as part of any prevailing wage or similar requirement pursuant to Article Eight of this Chapter." If the employer claims prevailing wage supplements, the employee's new hire notice must identify the following information: (1) the hourly rate claimed; (2) the type of supplement, including when applicable, but not to, pension or healthcare; (3) the names and addresses of the person or entity providing such supplement; and (4) the agreement, if any, requiring or providing for such supplement, together with information on how copies of such agreements or summaries thereof may be obtained.[196] Special requirements may apply in certain industries, such as agencies placing domestic workers.[197] *Rate of Pay Information*. Because there are numerous different pay structures, the notice provided to an employee should be tailored to their rate of pay. If more than one rate of pay applies, all rates should be included in the notice.[198] Exempt employees must receive a notice but it need not specify their exemption. Requirements are summarized below. • **Nonexempt Employees:** the notice must state the regular hourly rate and overtime rate of pay. • **Bonus / Incentive Plans:** if an employee initially was given a description of the plan or the payment is clearly shown on the wage statement for the period in which it is paid, no additional notice is

[195] N.Y. LAB. LAW § 195.

[196] N.Y. LAB. LAW § 195.

[197] N.Y. LAB. LAW §§ 691-92.

[198] Additional information on this law is available from the New York Department of Labor at https://dol.ny.gov/notice-pay-rate. The *Frequently Asked Questions* are available at https://dol.ny.gov/system/files/documents/2021/03/wage-theft-prevention-act-frequently-asked-questions_0.pdf [hereinafter "New York Dep't of Labor, *Wage Theft FAQs*"].

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	required. • **Commissioned Salespeople:** a separate law (see above) requires commissioned salespeople to receive and sign a copy of their commission agreement, which should be attached to the notice and a copy of each document kept by the employer. • **Unionized Workforce:** although pertinent bargaining agreements may cover wage rates for multiple titles and not give other information required by the law, individual workers must receive notice of the wage rates that apply to them.[199] *Form of Notice*. Notice can be given electronically, but there must be a system where the worker can acknowledge receipt of, and print a copy of, the notice. Additionally, the notice may be included in letters and/or employment agreements provided to new hires—but it must be on its own form.[200] *Model Notices & Languages*. Employers are obligated to provide the wage notice to each employee both in English and in the language identified by each employee as the employee's primary language. If the employee speaks another language, for which there is no approved template, the employer may provide a notice in English only.[201] *Waiver Prohibited*. A worker cannot waive the statutory notice requirement.[202] *Acknowledgement*. Employers must obtain from employees a signed and dated written acknowledgement—in English and in the employee's primary language. The acknowledgement must include an affirmation by the employee that the employee accurately identified their primary language to the employer, and that the notice provided by the employer to such employee was in the language so identified, and must conform to any additional requirements established by the state labor department. The acknowledgements must be retained.[203] If an employee refuses to sign an acknowledgement, the employer should give the notice, indicate

[199] New York Dep't of Labor, *Wage Theft FAQs*.

[200] New York Dep't of Labor, *Wage Theft FAQs*.

[201] N.Y. LAB. LAW § 195(1). Template Wage Theft Prevention Act forms, as well as other materials, are available from the New York Department of Labor at https://dol.ny.gov/notice-pay-rate. Notices are available in English as well as Spanish, Chinese, Haitian Creole, Korean, Polish, and Russian.

[202] New York Dep't of Labor, *Wage Theft FAQs*.

[203] N.Y. LAB. LAW § 195(1).

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	the employee's refusal on the form, and maintain the record as required.[204]
Warehouse Worker Protection Act Quota Notice	Each employer must provide to each employee, upon hire, a written description of each quota to which the employee is subject, including the quantified number of tasks to be performed or materials to be produced or handled, within the defined time period, and any potential adverse employment action that could result from failure to meet the quota.[205]

2.2 New Hire Reporting Requirements

2.2(a) *Federal Guidelines on New Hire Reporting*

The federal New Hire Reporting Program requires all states to establish new hire reporting laws that comply with federal requirements.[206] State new hire reporting laws must include these minimum requirements:

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[207]

These are only the minimum requirements that state new hire reporting laws must satisfy. States may enact new hire reporting laws that, for example, require additional information to be submitted or require a shorter reporting timeframe. Many states have also developed their own reporting form; however, its use is optional.

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[204] New York Dep't of Labor, *Wage Theft FAQs*.

[205] N.Y. LAB. LAW § 780.

[206] The New Hire Reporting Program is part of the Personal Responsibility and Work Opportunity Act of 1996. 42 U.S.C. §§ 651 to 669.

[207] 42 U.S.C. § 653a.

Multistate Employers. The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;
- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

If the company is reporting new hires on behalf of subsidiaries operating under different names and FEINs, it must list the names and FEINs, and the states where those subsidiaries have employees working.

Multistate employers can notify the HHS by mail, fax, or online as follows:

Table 4. Multistate Employer New Hire Information

Contact By Mail or Fax	Contact Online
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box -509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[208] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

2.2(b) *State Guidelines on New Hire Reporting*

The following is a summary of the key elements of New York's new hire reporting law.

Who Must Be Reported. All new hires who will be employed in the State of New York must be reported by their employers to the state directory.[209]

Report Timeframe. The report must be submitted within 20 calendar days from the date on which the employee was hired or re-hired. Employers that transmit reports magnetically or electronically more than once per month must ensure they are transmitted between 12 and 16 calendar days apart.[210]

[208] HHS offers the form online at http://www.acf.hhs.gov/programs/css/resource/multistate-employer-registration-form-instructions.

[209] N.Y. TAX LAW § 171-h.

Information Required. The report must include the employee's name, address, and Social Security number, as well as information on benefits available to an employee and their dependents and the date that the employee qualifies for those benefits. The notice must also contain the employer's name, address, and federal tax identification number.[211]

Form & Submission of Report. The report must be submitted on the employee's Form W-4 (along with the necessary benefits information), or, at the employer's election, an equivalent form. The report may be submitted by first-class mail, private delivery service, online, fax, magnetically, or electronically.[212]

Location to Send Information.

New York State
Department of Taxation and Finance
New Hire Notification
P.O. Box 15119
Albany, NY 12212-5119
(800) 972-1233
(800) 225-5829
(518) 869-3318 (fax)
https://www.nynewhire.com/index.jsp

Exceptions. Reports may not be required for employees of federal or state agencies, or for employees who perform intelligence or counterintelligence functions, under certain circumstances.[213]

Multistate Employers. The reporting regulations acknowledge that New York employers may also have employees in other jurisdictions. Any such employer, that transmits new hire reports either magnetically or electronically, "may designate New York or one of the other states in which such employer has employees as the state to which the employer will transmit the report to the state directory of new hires."[214] If the employer chooses to designate a state for new hire reporting, it must notify the federal HHS in writing of that designation.

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

2.3(a) *Federal Guidelines on Restrictive Covenants & Trade Secrets*

Restrictive covenants are limitations placed on an employee's conduct that remain in force after their employment has ended. Post-employment restrictions are designed to protect the employer and typically prevent an individual from disclosing the employer's confidential information or soliciting the employer's employees or customers. These restrictions may also prohibit individuals from engaging in competitive employment, including competitive self-employment, for a specific time period after the employment relationship ends. There is no federal law governing these types of restrictive covenants.

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[210] N.Y. TAX LAW § 171-h(3)(c).

[211] N.Y. TAX LAW § 171-h(3)(a).

[212] N.Y. TAX LAW § 171-h(3)(b).

[213] N.Y. TAX LAW § 171-h(2)(a) (excluding such workers "if the head of such agency has determined that a report made . . . could endanger the safety of the employee or compromise an ongoing investigation or . . . mission.").

[214] N.Y. TAX LAW § 171-h(3)(d).

Therefore, a restrictive covenant's ability to protect an employer's interests is dependent upon applicable state law and the type of relationship or covenant involved.

As a general rule, a covenant restraining competition (referred to as a "noncompete") is more likely to be viewed critically because restraints of trade are generally disfavored. The typical exception to this general rule is a reasonable restraint that has a legitimate business purpose, such as the protection of trade secrets, confidential information, customer relationships, business goodwill, training, or the sale of a business. Notwithstanding, state laws vary widely regarding which of these interests can be protected through a restrictive covenant. Even where states agree on the interest that can be protected, they may vary on what is seen as a reasonable and enforceable provision for such protection.

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[215] As such, the DTSA provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

For more information on these topics, see **LITTLER ON PROTECTION OF BUSINESS INFORMATION & RESTRICTIVE COVENANTS**.

2.3(b) *State Guidelines on Restrictive Covenants & Trade Secrets*

2.3(b)(i) *State Restrictive Covenant Law*

In New York, there is no general statute that limits the ability of employers and employees to enter into covenants not to compete. Rather, New York courts have announced general standards against which these types of restrictive covenants will be measured in situations where a litigant seeks to enforce or to set aside a covenant not to compete.

Courts in New York will enforce such covenants only when:

- the time and geographic scope of the restriction are reasonable;
- the restriction does not impose an undue hardship on the employee;
- the restriction does not harm the general public interest; and
- the restriction is necessary to protect a legitimate interest of the employer.[216]

New York courts have identified three legitimate interests that may be protected through a covenant not to compete. The first is when the employee's services are unique or extraordinary; the second involves the protection of customer relationships or goodwill; and the third is to stop the use or

[215] 18 U.S.C. §§ 1832 *et seq.*

[216] *See Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 70 (2d Cir. 1999); *Mathias v. Jacobs*, 167 F. Supp. 2d 606, 611 (S.D.N.Y. 2001); *International Paper Co. v. Suwyn*, 951 F. Supp. 445, 449 (S.D.N.Y. 1997); *Mallory Factor, Inc. v. Schwartz*, 536 N.Y.S.2d 752, 753 (N.Y. App. Div. 1989).

disclosure of trade secrets or confidential information.[217] To "establish such a [special, unique or extraordinary] quality, [more must be shown] than that the employee excels at his work or that his performance is of high value to his employer."[218]

With these principles in mind, the touchstone for New York courts is "reasonableness."[219] The courts have looked at a variety of factors to determine whether particular restrictions are reasonable, and hence enforceable. Courts have considered factors such as: whether the former employee provided unique services or had a special relationship with the former employer's customers;[220] whether the former employer itself engages in an unusual or specialized business;[221] whether the time restrictions would effectively alienate potential employers;[222] whether the geographic restrictions are consistent with the area where the employer does business;[223] and whether there is a low probability, even assuming the exercise of good faith, that the former employee could completely divorce themselves from knowledge of the former employer's trade secrets in their work for a new employer.[224] New York courts emphasize that in ascertaining the reasonableness of a particular covenant not to compete, the totality of the circumstances must be considered.[225]

As would be expected from the application of a reasonableness standard, covenants that have been enforced among New York courts vary significantly, depending upon the specific circumstances presented in each case.[226] Ultimately, courts will look to the balance of the benefits and burdens of the covenant presented in the specific case. What may be reasonable in time or scope in one case may be

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[217] *See IDG USA, L.L.C. v. Schupp*, 416 F. App'x 86, 87-88 (2d Cir. 2011) ("Under New York law, an employer has a legitimate interest in both its relationships with its customers and its trade secrets."); *Ticor Title Ins.*, 173 F.3d at 70; *Mathias*, 167 F. Supp. 2d at 612; *Natsource, L.L.C. v. Paribello*, 151 F. Supp. 2d 465, 472-74 (S.D.N.Y. 2001); *Purchasing Assocs*., *Inc. v. Weitz*, 196 N.E.2d 245, 248-49 (N.Y. 1963); *Scott, Stackrow & Co., C.P.A.'s, P.C. v. Skavina*, 780 N.Y.S.2d 675, 677 (N.Y. App. Div. 2004); *D&W Diesel*, *Inc. v. McIntosh*, 762 N.Y.S.2d 851, 852 (N.Y. App. Div. 2003) (concluding that restrictions imposed by 18-month noncompetition agreement were "*greater* than . . . required for the protection of the *legitimate interest* of . . ." the employer because former employee's sales position required no knowledge of trade secrets and former employee's talents were not unique or extraordinary).

[218] *SG Cowen Sec. Corp. v. Messih*, 2000 WL 633434, at *5 (S.D.N.Y. May 17, 2000), *aff'd*, 224 F.3d 79 (2d Cir. 2000) (quoting *American Inst. of Chem. Eng'rs v. Reber-Friel Co*., 682 F.2d 382, 390 n.9 (2d Cir. 1982) (second bracketed language added)).

[219] *See BDO Seidman v. Hirshberg*, 712 N.E.2d 1220, 1222-23 (N.Y. 1999).

[220] *See Natsource*, 151 F. Supp. 2d at 469; *Lumex, Inc. v. Highsmith*, 919 F. Supp. 624, 632 (E.D.N.Y. 1996).

[221] *See Webcraft Techs*., *Inc. v. McCaw*, 674 F. Supp. 1039, 1045-46 (S.D.N.Y. 1987).

[222] *See Lumex, Inc.*, 919 F. Supp. at 632.

[223] *See Natsource, L.L.C. v. Paribello*, 151 F. Supp. 2d 465, 471-72 (S.D.N.Y. 2001).

[224] 151 F. Supp. 2d at 469; *Monovis*, *Inc. v. Aquino*, 905 F. Supp. 1205, 1234 (W.D.N.Y. 1994).

[225] *Ivy Mar Co*., *Inc. v. C.R. Seasons*, *Ltd.*, 907 F. Supp. 547, 559 (E.D.N.Y. 1995), *abrogated on other grounds in Faiveley Transp. Malmo AB*, 559 F.3d 110, 118 (2d Cir. 2009).

[226] For example, courts in New York have enforced both a two-year covenant not to compete within a two-mile radius of the former employer's premises and a 12-month covenant not to compete anywhere in the continental United States. *See Innovative Networks*, *Inc. v. Satellite Airlines Ticketing Ctrs.*, 871 F. Supp. 709, 728-29 (S.D.N.Y. 1995) (enforcing a 12-month covenant of unlimited geographic scope in the continental United States given by a high-level employee of an airline service company with a natural client base); *Zellner v. Stephen D. Conrad*, *M.D.*, *P.C.*, 589 N.Y.S.2d 903, 907 (N.Y. App. Div. 1992) (enforcing a two-year covenant, given by an independent contractor ophthalmologist, not to compete with employer within a two-mile radius of employer's offices, and not to solicit or treat any of its patients during that period).

unreasonable in others due to the effect of other factors on the balance (*e.g.*, nature of the industry, profession of the employee, population of the area, etc.).[227]

Exception to Reasonableness: The "Employee Choice" Doctrine. In New York, there is an exception to the reasonableness requirements of noncompete covenants in the context of post-employment compensation or benefits plans. Some plans provide that an employee who resigns and goes to work for a competitor automatically forfeits any nonvested, deferred compensation. Such provisions are enforceable in New York, and are not considered disfavored, under the "employee choice" doctrine.

This doctrine provides that an employee who chooses to resign and violate their noncompetition obligations under a deferred compensation or benefits plan can be deemed to have waived any legal right to such compensation—regardless of whether those noncompete obligations are reasonable.[228] It "rests on the premise that if the employee is given the choice of preserving his rights under his contract by refraining from competition or risking forfeiture of such rights by exercising his right to compete, there is no unreasonable restraint upon an employee's liberty to earn a living."[229] Conversely, if the *employer* terminates the employment relationship without cause, no forfeiture may be imposed because the employee is essentially deprived of the opportunity to make a choice.[230]

Even where benefit plans do not make post-employment benefits contingent on the employee's satisfaction of a noncompete, the circumstances surrounding the employee's termination may render the covenant unenforceable. An employer may be unable to enforce a covenant not to compete if the employer breached its material obligations in the underlying contract.[231] At least one court has gone

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[227] *See Locke v. Tom James Co.*, 2013 WL 1340841, at *9 (S.D.N.Y. Mar. 25, 2013) (finding reasonable for a salesman of high-end custom clothing a two-year covenant not to compete within New York City, 50 miles outside of New York City, or any territory where he previously conducted business for the employer); *Battenkill Veterinary Equine P.C. v. Cangelosi*, 768 N.Y.S.2d 504, 506 (N.Y. App. Div. 2003) (finding that a three-year covenant not to compete, which restricted veterinarian from practicing a narrow area of veterinary medicine within a 35-mile radius of her former employer, was reasonable); *Doubleclick*, *Inc. v. Henderson*, 1997 WL 731413, at *8 (N.Y. Sup. Ct. Nov. 5, 1997) (holding that covenants longer than six months in duration are unreasonable in the internet technology industry due to its dynamic nature).

[228] *See Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 254 (2d Cir. 2002) ("New York courts will enforce a restrictive covenant without regard to its reasonableness if the employee has been afforded the choice between not competing (and thereby preserving his benefits) or competing (and thereby risking forfeiture)."); *Lenel Sys. Int'l, Inc. v. Smith*, 966 N.Y.S.2d 618, 621-22 (N.Y. App. Div. 2013).

[229] *Morris v. Schroder Capital Mgmt. Int'l*, 859 N.E.2d 503, 506-07 (N.Y. 2006) (holding that the well-established constructive discharge test should be used in the "employee choice" context to determine whether an employee's resignation was voluntary or whether the employee was deprived of choice).

[230] *See Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 397 N.E.2d 358, 360-61 (N.Y. 1979) ("where an employee is involuntarily discharged by his employer without cause and thereafter enters into competition with his former employer, and where the employer, based on such competition, would forfeit the pension benefits earned by his former employee, such a forfeiture is unreasonable as a matter of law and cannot stand"). *See also, Travelex Ins. Services, Inc. v. Barty*, 970 F.3d 1066 (8th Cir. 2020) (finding that *Post* does not establish a *per se* rule against enforcement of non-solicitation agreements when an employee is terminated without cause).

[231] *See Michael I. Weintraub*, *M.D., P.C. v. Schwartz*, 516 N.Y.S.2d 946, 948-49 (N.Y. App. Div. 1987) ("Assuming the plaintiffs have breached their own obligations under the contract, they would be precluded from seeking to enforce against the defendant even the reasonable portion of the restrictive covenant.").

further, holding that "[a]n essential element of the enforceability of a restrictive covenant . . . is the former employer's continued willingness to provide employment."[232]

2.3(b)(ii) *Consideration for a Noncompete*

Restrictive covenants require an employee to promise not to do something the employee would otherwise have been able to do. For example, by signing a noncompete agreement, an employee is giving up the right to open a competing business or work for an employer in a competing business. Therefore, employers need to provide an employee with "consideration" in return for the agreement to be binding. Providing *consideration* means giving something of value—*i.e.*, a promise to do something that the employer was not otherwise obligated to do—such as extending an offer of employment to a new employee or providing a bonus for an existing employee.

Initial or continued employment, standing alone, may constitute consideration to support a noncompete in New York. Courts have held that adequate consideration for a covenant not to compete exists where the employee began employment under a contract containing a restrictive covenant.[233] The consideration exchanged for the covenant not to compete is the offer to employ the individual, which is a "benefit" that the individual is otherwise not entitled to receive.

In addition, New York follows the rule that where an employee is asked to sign a covenant during their employment relationship, continued employment following the signing still constitutes "consideration . . . sufficient to support a covenant not to compete 'where discharge was the alternative or where the employee remained with the employer for a substantial time after the covenant was signed.'"[234] Continuing employee benefits—financial and/or intangible—may also constitute consideration to support a covenant not to compete in New York.[235]

2.3(b)(iii) *Ability to Modify or Blue Pencil a Noncompete*

When a restrictive covenant is found to be unreasonable in scope, some states refuse to enforce its terms entirely (sometimes referred to as the "all-or-nothing" rule), while others may permit the court to "blue pencil" or modify an agreement that is unenforceable as written. *Blue penciling* refers to the practice whereby a court strikes portions of a restrictive covenant it deems unenforceable. *Reformation*, on the other hand, refers to a court modifying a restrictive covenant to make it enforceable, which may include introducing new terms into the agreement (sometimes referred to as the "reasonableness" rule). By rewriting an overly broad restrictive covenant rather than simply deeming it unenforceable, courts attempt to effectuate the parties' intentions as demonstrated by their agreement to enter into a restrictive covenant in the first place.

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[232] *In re UFG Int'l, Inc. v. DeWitt Stern Grp., Inc.*, 225 B.R. 51, 55, 57 (Bankr. S.D.N.Y. 1998) (finding the restrictive covenants at issue unenforceable because the employees were not terminated "for cause").

[233] *See Gazzola-Kraenzlin v. Westchester Med. Grp., P.C.*, 782 N.Y.S.2d 115 (N.Y. App. Div. 2004); *Mallory Factor v. Schwartz*, 536 N.Y.S.2d 752 (N.Y. App. Div. 1989).

[234] *International Paper Co. v. Suwyn*, 951 F. Supp. 445, 448 (S.D.N.Y. 1997) (quoting *Zellner v. Stephen D. Conrad, M.D., P.C.*, 589 N.Y.S.2d 903, 907 (N.Y. App. Div. 1992)); *Ayco Co., L.P. v. Feldman*, 2010 WL 4286154, at *9 (N.D.N.Y. Oct. 22, 2010).

[235] *See Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63 (2d Cir. 1999) (employee received additional compensation and fringe benefits not provided to other sales representatives).

Courts in New York will blue pencil a covenant that is unenforceable as written, rewriting it to render it enforceable.[236] For example, one court in New York found that the absence of any geographic restriction made the covenant not to compete unreasonable.[237] Instead of refusing to enforce the covenant altogether, the court rewrote the covenant to limit it to the same geographic area where the employer's business operated.[238] Similarly, courts may also modify unreasonable time restrictions.[239]

A court's authority to modify a covenant is not unlimited. Where the intention of the parties to the agreement does not allow for its modification without speculation, the court generally will not enforce the agreement. For example, courts may invalidate and refuse to modify an overly broad noncompetition agreement where the agreement fails to contain language that makes the terms severable (*i.e.*, does not provide specifically that each of the terms of the agreement may stand on its own) because the parties have failed to state that they intended that they be severable. And courts may decline to blue pencil if an agreement, on the whole, has overreached.[240]

2.3(b)(iv) *State Trade Secret Law*

New York has not enacted legislation that generally defines a trade secret in the commercial or business context, or that provides any statutory protection to employers or employees regarding trade secrets. Instead, the New York courts rely on the definition of *trade secret* found in the Restatement (Second) of Torts and have continued to afford common-law protections and remedies in the trade secret area.[241] The Restatement defines *trade secrets* in the following manner:

> A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.[242]

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[236] *See BDO Seidman v. Hirshberg*, 690 N.Y.S.2d 854, 860 (N.Y. App. Div. 1999); *Malcolm Pirnie, Inc. v. Werthman*, 720 N.Y.S.2d 863, 863 (N.Y. App. Div. 2001).

[237] *See Deborah Hope Doelker, Inc. v. Kestly*, 449 N.Y.S.2d 52 (N.Y. App. Div. 1982).

[238] 449 N.Y.S.2d at 53. Courts are less likely to enforce restrictive covenants that contain no geographical limitations whatsoever. *See, e.g., Heartland Sec. Corp. v. Gerstenblatt*, 2000 WL 303274, at **7-8 (S.D.N.Y. Mar. 22, 2000); *Great Lakes Carbon Corp. v. Koch Indus., Inc.*, 497 F. Supp. 462, 471 (S.D.N.Y. 1980); *Garfinkle v. Pfizer, Inc.*, 556 N.Y.S.2d 322 (N.Y. App. Div. 1990).

[239] *See, e.g., National Elevator Cab & Door Corp. v. H & B, Inc.*, 282 F. App'x 885, 888 (2d Cir. 2008) (explaining that "[a] covenant will not be declared invalid merely because it is unlimited in duration if the other restrictions on geographic area and scope are limited and reasonable") (citation omitted).

[240] *See, e.g., Jay's Custom Stringing, Inc. v. Yu*, 2001 WL 761067, at **7-8 (S.D.N.Y. July 6, 2001); *Heartland Sec. Corp.*, 2000 WL 303274, at **9-10; *Webcraft Techs., Inc. v. McCaw*, 674 F. Supp. 1039, 1047 (S.D.N.Y. 1987) ("Too great a readiness on the part of courts to preserve the valid portions of overbroad restrictions would induce employers to draft such restrictions overbroadly, intimidating the sales force by the ostensible terms of the written contract and relying on courts to enforce the valid portion against an employee who is not intimidated.").

[241] *See, e.g., Norbrook Labs., Ltd. v. G.C. Hanford Mfg. Co.*, 297 F. Supp. 2d 463 , 481-483 (N.D.N.Y. 2003), *later proceeding*, 2004 U.S. Dist. LEXIS 5868 (N.D.N.Y. Apr. 7, 2004) (ordering company to post $4 million bond as security for court's entry of preliminary injunction against the defendant); *Wiener v. Lazard Freres & Co.*, 672 N.Y.S.2d 8, 16 (N.Y. App. Div. 1998).

[242] RESTATEMENT (SECOND) OF TORTS § 757 cmt. B.

Where an employer seeks relief for the unauthorized use or taking of its business information, New York courts consider several factors in evaluating a claim for misappropriation of a trade secret, including:

1. the extent to which the information is known outside of the business;
2. the extent to which [the information] is known by employees and others involved in the business;
3. the extent of measures taken by the business to guard the secrecy of the information;
4. the value of the information to the business and its competitors;
5. the amount of effort or money expended by the business in developing the information; and
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.[243]

The more valuable the information is shown to be and the greater care that is demonstrated to have been taken to protect it, the more likely it is that it will be deemed to be a protectable trade secret. As one court in New York stated, "a trade secret must first of all be secret."[244]

Employers should be aware that, beyond the generic definition of trade secret used by the courts, some New York statutes related to specific kinds of employment lend guidance by defining a trade secret for purposes of that particular statute. Examples arise under the Public Officers Law and the New York State Environmental Facilities Corporation Act.[245]

2.3(b)(v) *State Guidelines on Employee Inventions & Ideas*

Until recently, New York did not have statutory guidelines or laws addressing the ownership of employee inventions and ideas. Notably, effective September 15, 2023, an amendment to New York's Labor Law adds section 203-f, which provides that invention assignment provisions "shall not apply to an invention that the employee developed entirely on his or her own time without using the employer's equipment, supplies, facilities, or trade secret information," unless the inventions: (a) relate to the employer's business or "reasonably anticipated" research or development; or (b) result from work

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[243] *North Atl. Instruments, Inc. v. Haber*, 188 F.3d 38, 44 (2d Cir. 1999); *see also Norbrook Labs., Ltd.*, 297 F. Supp. 2d 463,483-484; *Thin Film Lab, Inc. v. Comito*, 218 F. Supp. 2d 513,520 (S.D.N.Y. 2002); *Cray v. Nationwide Mut. Ins. Co.*, 136 F. Supp. 2d 171, 176 (W.D.N.Y. 2001); *Ashland Mgmt. v. Janien*, 624 N.E.2d 1007, 1012 (N.Y. 1993).

[244] *Ashland Mgmt.*, 624 N.E.2d at 1012 (explaining that this determination is a question of fact and further affirming dismissal of claims against former employee, who developed a mathematical model based not on trade secrets but on criteria available to the public); *see also DK Fabrications, Ltd. v. Blaszczynski*, 2013 WL 5451810, at *3 (N.Y. Sup. Ct. Sept. 24, 2013) ("[k]nowledge of the intricacies of a business operation does not necessarily constitute a trade secret"); *ENV Servs., Inc. v. Alesia*, 2005 WL 3240478 (N.Y. Sup. Ct. Nov. 28, 2005) (finding that publicly available information, as well as information scattered throughout the office in unlocked files, were not trade secrets).

[245] *See, e.g.*, N.Y. PUB. AUTH. LAW § 1285-g(4)(b) (defining a *trade secret* as "any formula, plan, pattern, process, tool, mechanism, compound, procedure, customer lists, production data, or compilation of information within a commercial concern which is using it to fabricate, produce or compound an article of trade or service having commercial value, and which gives its owner or authorized user an opportunity to obtain a business advantage over competitors who do not know, use or have access to such data and information"); N.Y. COMP. CODES R. & REGS. tit. 16, § 6-1.3(a) (defining a *trade secret* as "any formula, pattern, device or compilation of information which is used in one's business, and which provides an opportunity to obtain an advantage over competitors who do not know or use it").

performed by the employee for the employer.[246] Furthermore, section 203-f renders unenforceable any provision requiring that an employee assign to the employer an invention outside the scope of assignments permitted by the law. The law does not provide for an express right of action, create monetary penalties for offending invention assignment provisions, nor provide for administrative oversight or enforcement by the State Department of Labor.

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

3.1(a)(i) *Federal Guidelines on Posting & Notification Requirements*

Several federal employment laws require that specific information be posted in the workplace. Posting requirements vary depending upon the law at issue. For example, employers with fewer than 50 employees are not covered by the Family and Medical Leave Act and, therefore, would not be subject to the law's posting requirements. Table 5 details the federal workplace posting and notice requirements.

Table 5. Federal Posting & Notice Requirements

Poster or Notice	Notes
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[247]
Equal Employment Opportunity (EEO) Act ("EEO is the Law" Poster)	Employers must post and keep posted in conspicuous places upon their premises, in an accessible format, a notice that describes the federal laws prohibiting discrimination in employment.[248]
Fair Labor Standards Act (FLSA)	Employers must post and keep posted a notice, summarizing employee rights under the FLSA, in conspicuous places in every establishment where employees subject to the FLSA are employed.[249]
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[250]
Migrant and Seasonal	Farm labor contractors, agricultural employers, and agricultural

[246] N.Y. LAB. LAW § 203-f.

[247] 29 C.F.R. § 801.6. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/eppa.htm.

[248] 29 C.F.R. §§ 1601.30 (Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act), 1627.10 (Age Discrimination in Employment Act). This poster is available in English, Spanish, Arabic, and Chinese at https://www1.eeoc.gov/employers/poster.cfm.

[249] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

[250] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Agricultural Worker Protection Act (MSPA)	associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language common to migrant or seasonal agricultural workers who are not fluent or literate in English.[251]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates must at all times display and make available to employees a poster explaining the conditions under which the special wage rate applies. Where an employer finds it inappropriate to post notice, directly providing the poster to its employees is sufficient.[252]
Occupational Safety and Health Act ("the Fed-OSH Act")	Employers must post a notice or notices informing employees of the Fed-OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[253]
Uniformed Service Employment and Reemployment Rights Act (USERRA)	Employers must provide notice about USERRA's rights, benefits, and obligations to all individuals entitled to such rights and benefits. Employers may provide notice by posting or by other means, such as by distributing or mailing the notice.[254]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[255] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy

[251] 29 C.F.R. §§ 500.75, 500.76. This poster is available in English, Spanish, Haitian Creole, Vietnamese, and Hmong at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.htm.

[252] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[253] 29 C.F.R § 1903.2. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

[254] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[255] 41 C.F.R. § 60-1.42; *see also* 41 C.F.R. § 60-741.5(a) (requiring all agencies and contractors to include an equal opportunity clause in contracts, in which the contractor agrees to post this notice). This poster is available at https://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	Statement (in addition to the required "EEO is the Law" Poster), which indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[256]
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[257]
Employee Rights Under the Service Contract or Walsh-Healey Public Contracts Acts Poster	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice, where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by attaching a notice to the contract, or may post the notice at the worksite.[258]
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is visible to prospective employees and all employees who are verified through the system.[259]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[260]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a

[256] 41 C.F.R. §§ 60-300.44, 60-741.44.

[257] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[258] 29 C.F.R. § 4.6(e); 29 C.F.R. § 4.184. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/sca.htm.

[259] U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., *E-Verify Memorandum of Understanding for Employers*, *available at* https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf. The poster is available at https://preview.e-verify.gov/sites/default/files/everify/posters/IER_RightToWorkPoster%20Eng_Es.pdf. According to the U.S. Citizenship and Immigration Services, this poster must be displayed in English and Spanish.

[260] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[261]
Office of the Inspector General's Fraud Hotline Poster	Certain government contractors must prominently post notice, where accessible to employees, addressing fraud and how to report such misconduct.[262]
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[263] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[264]
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[265]
Worker Rights Under	Employers that contract with the federal government under Executive

[261] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[262] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

[263] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

[264] 29 C.F.R. § 13.5.

[265] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	Order Nos. 13658 or 14026 must prominently post notice, where accessible to employees, summarizing the applicable minimum wage rate and other required information.[266]

3.1(a)(ii) *State Guidelines on Posting & Notification Requirements*

Table 6 details the state workplace posting and notice requirements applicable to private employers. In addition to required physical postings of workplace notices that are required by state or federal law, employers must make digital versions of all notices available through the employer's website or by email. Employers must also provide notice to employees that the physical postings are available electronically.[267] Employers should be aware that additional requirements, not addressed herein, apply to public-sector employers and for employers engaging in public works. While local ordinances are generally excluded from this publication, some local ordinances may have posting requirements, especially in the minimum wage or paid leave areas. Local posting requirements may be discussed in the table below or in later sections, but the local ordinance coverage is not comprehensive.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Benefits & Leave: **Blood Donation Leave**	Employers with 20 or more employees are required to grant leave time to employees for the purpose of donating blood. Notice of this leave must be made in a manner that will ensure that employees see it, such as a posting in a prominent spot in an area where employees congregate. Other acceptable notice options include statements accompanying paychecks, a handbook policy, or a mailing.[268]
Benefits & Leave: Paid Family Leave	Employers with one or more employees must display or post a typewritten or printed notice concerning proof of coverage for paid family leave in a form approved by the Chair of the Workers' Compensation Board. The notice must be displayed in plain view where all employees and applicants can readily see it.[269]

[266] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

[267] N.Y. LAB. LAW § 202.

[268] N.Y. LAB. LAW § 202-j (specifying how much leave time is mandated and prohibiting retaliation against employees who seek such leave). New York Department of Labor guidelines discussing this leave requirement (Form LS 703) are available at https://dol.ny.gov/system/files/documents/2023/11/ls703.pdf.

[269] N.Y. COMP. CODES R. & REGS. tit. 12, § 380-7.2.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Benefits & Leave: Voting Leave	Under certain circumstance, New York election law requires employers to grant employees paid time off (up to 2 hours) to give them sufficient time to vote. Not less than 10 working days before every election, all employers must post a conspicuous notice, with the applicable statutory provision, informing workers of their right to take voting leave if needed.[270]
Child Labor Law: Schedule of Hours	Employers employing minors must conspicuously post, for all minors employed, a schedule indicating starting and stopping time of work and meal breaks.[271]
Child Labor Law: Summary Poster	Employers that employ minors must conspicuously post a child labor law poster, which summarizes applicable laws and permitted working hours.[272]
Construction Industry: Fair Play Act	Construction employers must post prominent notice, in accessible locations at sites, informing workers of their rights and protections under the Fair Play Act, discussed in **1.1(b)**. The poster must be displayed in English and Spanish, and other languages if required. It must also be durable enough to withstand adverse weather.[273]
Electronic Monitoring	Beginning May 7, 2022, employers who electronically monitor employees must post notice that "any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means."[274]
Equal Pay Law	Recommended by the NY Department of Labor.[275]
Fair Employment Practices: New York State Sexual Harassment Law (Recommended)	Every employer in the New York State is required to adopt a sexual harassment prevention policy. The state Division of Human Rights recommends posting a copy of the policy in an area that is highly visible.[276]

[270] N.Y. ELEC. LAW § 3-110(4). A sample poster is available at https://elections.ny.gov/time-vote.

[271] N.Y. LAB. LAW § 144; N.Y. COMP. CODES R. & REGS. tit. 12, § 185.2.

[272] N.Y. LAB. LAW § 144; N.Y. COMP. CODES R. & REGS. tit. 12, § 185.2. The child labor law poster is available at https://dol.ny.gov/system/files/documents/2023/11/ls171.pdf.

[273] N.Y. LAB. LAW § 861-d. This poster is available at https://labor.ny.gov/legal/construction-industry-fair-play-act.shtm.

[274] N.Y. CIV. RIGHTS LAW § 52-c.

[275] N.Y. LAB. LAW § 194. This poster is available at https://dol.ny.gov/system/files/documents/2024/03/ls603.pdf.

[276] A model poster is available at https://www.ny.gov/combating-sexual-harassment-workplace/sexual-harassment-prevention-model-policy-and-training.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Fair Employment Practices: Prohibited Discrimination	Employers with one or more employees must post conspicuous notice informing employees about the Human Rights Law and how they may file complaints.[277]
Fair Employment Practices: Prohibited Discrimination in Certain Activities	New York law protects an individual's off-duty political activities off the premises and outside of working hours, legal use of consumable products, and legal recreational activities. It also covers an individual's right to union membership and prohibits employers from requiring employees to attend meetings covering employer opinions on religious or political matters. Employers must post a sign in every workplace, in locations where employee notices are normally posted, to inform employees of their rights under the law.[278]
Fair Employment Practices: Employment of Persons Previously Convicted	As discussed in **1.3(a)**, Article 23-A requires conspicuous posting of the law governing the use of criminal conviction history in employment decisions. Workers must be able to see and access the notice.[279]
Lactation Accommodation Policy	New York law grants certain rights to nursing mothers, to allow them to express milk in the workplace, for up to three years after childbirth. The employer must distribute its lactation accommodation policy annually to all of its employees and to employees as they return to work following the birth of a child.[280]
New York City: Pregnancy Discrimination Notice	The New York City Human Rights Law requires that all covered employers (*i.e.*, with four or more employees) provide written notice to all new employees that they have the "right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions."[281] This notice can also be posted conspicuously, accessible to all employees at the workplace.[282]
New York City: Predictive Scheduling	The city's predictive scheduling ordinance requires covered employers to post notice of employee's rights under the law in English and in any

[277] N.Y. EXEC. LAW § 296; N.Y. COMP. CODES R. & REGS. tit. 9, § 466.1. The posting, which includes the necessary information in English and Spanish, is available at https://dhr.ny.gov/system/files/documents/2024/06/poster.pdf.

[278] N.Y. LAB. LAW § 201-D.

[279] N.Y. CORRECT. LAW §§ 750-55; N.Y. LAB. LAW § 201-f. This poster is available at https://dol.ny.gov/system/files/documents/2024/02/correction-law-article-23a_0.pdf.

[280] N.Y. LAB. LAW § 206-c. The policy is available at https://dol.ny.gov/breast-milk-expression-workplace.

[281] N.Y.C., N.Y., ADMIN. CODE § 8-107(22)(b). The Commission on Human Rights has prepared an approved poster for employer use, which is available at https://www1.nyc.gov/site/cchr/media/posters/pregnancy-employment-rights.page. It is available in English, Spanish, traditional Chinese, French, Arabic, Urdu, Russian, and Korean.

[282] N.Y.C., N.Y., ADMIN. CODE § 8-107(22)(b).

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	language spoken as a primary language by at least 5% of the employees at a location, if such a translation is available from the city. A separate notice regarding temporary changes to work schedules for personal events should also be posted in the languages described above, though this requirement is not explicitly stated in the ordinance.[283]
New York City: Temporary Changes to Work Schedule	All employers must conspicuously post notice of employees' rights under the law at any workplace or job site where any employee works. The notice must be in English and any language spoken as a primary language by at least 5% of the employees at a location, if the Director has made notice available in that language.[284]
New York City: Workers' Bill of Rights	New York City employers must provide employees with a workers' bill of rights describing the protections available under relevant federal, state, and local laws, as well as information on how to organize a union. This information must be posted in the workplace and on the employer's website or mobile application.[285]
New York Health and Essential Rights Act Safety Plan	The New York State Commissioner of Labor, in consultation with the New York State Department of Health, has created and published a model airborne infectious disease exposure prevention standard for all work sites, differentiated by industry, and establishing minimum requirements for preventing exposure to airborne infectious diseases in the workplace. The protocols address the following topics: • employee health screenings; • face coverings; • personal protective equipment (PPE) required by industry, to be provided at the employer's expense; • hand hygiene; • cleaning and disinfecting of shared work equipment and surfaces; • social distancing protocols; • mandatory or precautionary isolation or quarantine orders; • engineering controls; • assignment of enforcement responsibility of the safety plan and federal, state, and local protocols to one or more supervisory employees; • compliance with employee notice requirements; and

[283] N.Y.C., N.Y. ADMIN. CODE § 20-1205. The required posters are available at https://www1.nyc.gov/site/dca/businesses/temporary-schedule-change-law-employers.page and https://www1.nyc.gov/site/dca/workers/workersrights/fastfood-retail-workers.page.

[284] N.Y.C., N.Y., ADMIN. CODE § 20-1205. The required notice is available at https://www.nyc.gov/assets/dca/downloads/pdf/workers/TemporaryScheduleChange-Notice-English.pdf.

[285] N.Y.C. ADMIN. CODE §§ 32-101, 32-102. The notice is available at https://www.nyc.gov/site/dca/workers/worker-rights.page.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	• verbal review of standards, policies, and employee rights. Employers may either adopt the Commissioner's model airborne infectious disease exposure prevention plan or to create their own safety plan that meets or exceeds the minimum standards established by the Commissioner. If an employer chooses to establish its own airborne infectious disease exposure prevention standards, it must do so in consultation with collective bargaining representatives, or in a non-unionized workforce, with employee participation, and be customized to incorporate industry-specific hazards and worksite considerations. Employers are required to distribute the plan to employees in both English and in an employee's primary language, if other than English, upon reopening after business closure due to an airborne infectious period. Employers must also post the plan at the worksite and incorporate the plan into an employee handbook if the employer maintains a handbook. Moreover, employers must make the plan available for review upon request.[286]
Physical Examination of Female Applicants or Employees	An employer that requires a physical examination of a female must post notice, informing her of the right to have the exam performed by a female physician or surgeon, or to have another female present during any exam performed by a male.[287]
Unemployment Compensation	Every employer liable for contributions under the Unemployment Insurance Law must post and maintain a notice from the New York Department of Labor concerning its registration. Employers that are not responsible for unemployment contributions may not post such notice.[288]
Veterans' Services and Benefits	Employers with more than 50 full-time employees to post a notice to be developed by the Department of Labor containing information on the following services available to veterans: • contact and website information for the division of veterans' services and the department's veterans' program; • substance abuse and mental health treatment; • educational, workforce, and training resources; • tax benefits; • New York state veteran drivers' licenses and non-driver identification cards;

[286] N.Y. LAB. LAW § 218-b. The New York Department of Labor has posted its model plans at https://dol.ny.gov/ny-hero-act.

[287] N.Y. LAB. LAW § 206-a.

[288] N.Y. COMP. CODES R. & REGS. tit. 12, § 472.7. Specific notices are provided by the New York State Department of Labor, but a sample is available at https://dol.ny.gov/system/files/documents/2023/05/ia133_0.pdf.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	• eligibility for unemployment insurance benefits under state and/or federal law; • legal services; and • contact information for the U.S. Department of Veterans Affairs Veterans Crisis Line. Covered employers must display the poster in a conspicuous place accessible to employees.[289]
Wages, Hours & Payroll: Employer Policy on Wage Disclosures	Employers that institute written policies restricting the time, place, and manner that employees may discuss their wages must notify employees of those policies. Notice may be accomplished through public workplace posting, or by electronic or paper copy to all employees.[290] See **3.7(b)(v)** for more information about the wage transparency law.
Wages, Hours & Payroll: Minimum Wage—General	Employers must conspicuously post either a summary of New York's general wage and hour law, or an appropriate minimum wage order, whichever applies based on their industry.[291]
Wages, Hours & Payroll: Minimum Wage—Hospitality Industry	Employers subject to the Hospitality Industry Wage Order must conspicuously post a summary of applicable rates and credits for the hospitality industry.[292]
Wages, Hours & Payroll: Tip Credits and Deductions Notices	Employers engaged in the sale or service of food or beverages must conspicuously post, where accessible to employees, two specific notices addressing illegal deductions from wages and tips: (1) Form LS 605 (Deductions from Wages); and (2) Form LS 204 (Tip Appropriation).[293]
Wages, Hours & Payroll: Wage Theft Prevention Notice & Notices of Employer Policies	As noted in **2.1(b)**, employers must comply with the notice requirements of the Wage Theft Prevention Act upon hiring of a new employee. These obligations can be met through a written statement, or if appropriate, a workplace poster. In addition, employers must either provide a written

[289] N.Y. LAB. LAW § 201-h. The poster is available at https://dol.ny.gov/system/files/documents/2024/02/p37-vets-benefits-and-services-2-22-24.pdf.

[290] N.Y. COMP. CODES R. & REGS. tit. 12, § 194-1.3; *see also* N.Y. LAB. LAW § 194(4).

[291] N.Y. LAB. LAW §§ 661, 679; N.Y. COMP. CODES R. & REGS. tit. 12, §§ 141-2.3, 142-2.8, 142-3.9. The standard (or "miscellaneous") minimum wage poster is available at https://dol.ny.gov/system/files/documents/2023/12/ls207.pdf. Additional wage order minimum wage posters, including posters in numerous other languages, are available at https://dol.ny.gov/minimum-wage-0.

[292] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-2.4. This poster is available in English at https://dol.ny.gov/system/files/documents/2023/12/ls207.3.pdf. It is also available in numerous other languages at https://dol.ny.gov/minimum-wage-0.

[293] N.Y. LAB. LAW §§ 193, 196-d, 198-d. Form LS 605 is available at https://dol.ny.gov/system/files/documents/2023/11/ls605.pdf Form LS 204 is available at https://labor.ny.gov/formsdocs/wp/LS204.PDF.. Form LS 204 is available at https://dol.ny.gov/system/files/documents/2021/02/ls204_tip_appropriation.pdf.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	notification, or post a notice, informing employees of all policies concerning on sick leave, vacation, personal leave, holidays, and hours. Moreover, amended notices must be posted to notify employees of any changes to these policies, terms, or conditions.[294]
Westchester County: Earned Sick Time Act	Employers must display a copy of the law and the appropriate poster in a conspicuous location accessible to an employee. The poster must be displayed in English, Spanish, and any other language deemed appropriate by the county.[295]
Westchester County: Safe Time Leave Law	Employers must display a copy of the law and the appropriate poster in a conspicuous location accessible to an employee. The poster must be displayed in English, Spanish, and any other language deemed appropriate by the county.[296]
Whistleblowing and Retaliation	Employers must post notice of employee protections, rights, and obligations under the law in a conspicuous place, which must be well-lighted, easily accessible, and customarily frequented by employees and applicants.[297]
Workers' Compensation: Compliance & Disability Benefits	Employers that have satisfied the obligation to secure workers' compensation insurance must post a notice in a conspicuous place notifying workers of this compliance. The proper notices will be available from the employer's insurance carrier: (1) Notice of Compliance (White) for Workers' Compensation; and (2) Notice of Compliance (Blue) for Disability Benefits. Special rules apply to certain types of employers.[298]
Workers' Compensation: Selection of Authorized Physician by Employee	Employers must provide conspicuous notice that employees requiring care are entitled to select the treating physician. Injured employees must also sign a notice, which must be witnessed and retained by the employer. While this posting is listed as required by statute, it is not

[294] N.Y. LAB. LAW § 195.

[295] WESTCHESTER CNTY., N.Y., CODE § 585.09(2).

[296] WESTCHESTER CNTY., N.Y., CODE § 586.07(2).

[297] N.Y. LAB. LAW § 740(8).

[298] N.Y. WORKERS' COMP. LAW §§ 51, 229. Two types of employers must comply using alternate posting arrangements. These include: (1) employers that own or operate automotive or horse-drawn vehicles and have no minimum staff of regular employees required to report for work at an established place of business; and (2) employers engaged in the business of moving household goods or furniture. These employers must post the required notices in each and every vehicle owned or operated by the employers, and failure to do so is considered presumptive evidence that the employer has failed to secure the coverage. Various workers' compensation forms are available at http://www.wcb.ny.gov/content/main/forms/AllForms.jsp.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	required by the Workers' Compensation Board. An employer will not be penalized if this poster is not displayed.[299]
Workplace Safety: Injuries & Illnesses	As with the federal requirement, employers must maintain a "Log and Summary of Occupational Injuries and Illnesses" (OSHA Form 300). A summary of the log (OSHA Form 300A) must be posted on February 1 of each year and must remain posted for three months.[300]
Workplace Safety: No Smoking Signs	Generally speaking, smoking is prohibited in indoor places of employment, including offices, warehouses, cafeterias, and company-owned vehicles.[301] "No Smoking," "No Vaping," and "Vaping" signs must be posted and properly maintained by employers.[302]
Workplace Safety: Right to Know	Employers are obligated to provide employees with conspicuous notice concerning their right to know about toxic substances in the workplace. The sign must be posted conspicuously where such notices are usually displayed.[303]

[299] N.Y. WORKERS' COMP. LAW § 13-a. Various forms and more information are available at http://www.wcb.ny.gov/content/main/forms/AllForms.jsp. The notice for injured workers, informing them of their right to select a treating physician, is available at https://www.wcb.ny.gov/content/main/forms/C3_1.pdf. Telephone Interview with Workers' Compensation Board expert (Jan. 23, 2018).

[300] *See* N.Y. LAB. LAW § 201. These forms are available at https://www.osha.gov/as/opa/worker/employer-responsibility.html. Additional information is also available at https://dol.ny.gov/system/files/documents/2024/03/ls603.pdf.

[301] N.Y. PUB. HEALTH LAW §§ 1399-n *et seq.*

[302] N.Y. PUB. HEALTH LAW § 1399-p. This poster is available at https://www.health.ny.gov/prevention/tobacco_control/clean_indoor_air_act/.

[303] N.Y. LAB. LAW § 876; *see, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 12, § 820.3 (similar requirement for public employers). A "Right to Know" poster has been approved and is required for public employers. This poster, which would appear to satisfy the requirement for private employers, is available at http://www.health.ny.gov/environmental/workplace/right_to_know/docs/rtk.pdf. The regulations for public employers further specify that the notice must be posted in alternate language, in addition to English, if a substantial number of employees speak another language and cannot understand the sign in English.

3.1(b) *Record-Keeping Requirements*

3.1(b)(i) *Federal Guidelines on Record Keeping*

Table 7 summarizes the federal record-keeping requirements.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act (ADEA): Payroll Records	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth; • occupation; • rate of pay; and • compensation earned each week.[304]	At least 3 years from the date of entry.
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[305]	At least 1 year from the date of the personnel action to which any records relate.
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[306]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the	*Employers must preserve any personnel or employment*	At least 1 year

[304] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

[305] 29 C.F.R. § 1627.3(b).

[306] 29 C.F.R. § 1627.3(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Americans with Disabilities Act (ADA): Personnel Records	*record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants; • other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and • selection for training or apprenticeship.[307]	from the date the records were made, or from the date of the personnel action involved, whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[308]	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[309]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an	At least 3 years following the date on which the polygraph examination was conducted.

[307] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[308] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[309] 29 C.F.R. § 1602.7.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.[310]	
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This includes vouchers, worksheets, receipts, and applicable resolutions.[311]	At least 6 years after documents are filed or would have been filed but for an exemption.
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[312]	3 years.
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[313]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of	3 years from the last day of entry.

[310] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[311] 29 U.S.C. § 1027.

[312] 29 C.F.R. § 1620.32(a).

[313] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	name on time or payroll records; • home address with zip code; • date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[314] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips; • weekly or monthly amounts reported by the employee to	

[314] 29 C.F.R. §§ 516.2, 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); • amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable federal minimum wage); • hours worked each workday in which an employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[315]	
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees, and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.[316]	3 years from the last day of entry.
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f)	At least 3 years from the last effective date.

[315] 29 C.F.R. § 516.28.

[316] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	or 7(j); • certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and • sales and purchase records.[317]	
Fair Labor Standards Act (FLSA): Other Records	*In addition to other FLSA requirements, employers must preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[318]	At least 2 years from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement.	At least 3 years.

[317] 29 C.F.R. § 516.5.

[318] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	Covered employers with no eligible employees must only maintain the following records: • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records required by the second series with respect to any secondary employees.* *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA must be maintained in	

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	accordance with the confidentiality requirements of Title II of GINA.[319]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration: ▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[320]	At least 4 years after the date the tax is due or paid, whichever is later.
Immigration	Employers must retain all completed Form I-9s.[321]	3 years after the date of hire or 1 year following the termination

[319] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

[320] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[321] 8 C.F.R. § 274a.2.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
		of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.[322]	Required to be maintained for "so long as the contents [of the records] may become material in the administration of any internal revenue law;" this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[323]	4 years after the return is due or the tax is paid, whichever is later.
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[324]	As long as it is in effect and at least 4 years thereafter.

[322] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[323] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[324] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[325]	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a	At least 30 years.

[325] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and • biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[326]	
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests; • medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:* • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[327]	Duration of employment plus 30 years.
Workplace Safety: Analyses Using Medical and Exposure	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual employee exposure or medical records, or information	At least 30 years.

[326] 29 C.F.R. § 1910.1020(d).

[327] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Records	collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[328]	
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[329]	5 years following the end of the calendar year that the record covers.
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and • AAP for the immediately preceding AAP year and documentation of good faith effort.[330]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position,	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not have a contract of at least $150,000,

[328] 29 C.F.R. § 1910.1020(d).

[329] 29 C.F.R. §§ 1904.33, 1904.44.

[330] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; ▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; ▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[331]	the minimum retention period is one year from the date of making the record or the personnel action, whichever occurs later.
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[332]	Until final disposition of the complaint, compliance review or action.
Minimum Wage	*Covered contractors and subcontractors performing work*	3 years.

[331] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[332] 41 C.F.R. §§ 60-1.12, 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Under Executive Orders Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	*must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s); • rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[333]	
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee to provide, including copies of any certification or documentation provided by an employee;	During the course of the covered contract as well as after the end of the contract.

[333] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract; • the regular pay and benefits provided to an employee for each use of paid sick leave; and • any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[334]	
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and • worker or employee employed in conjunction with the project.[335]	At least 3 years after the work.
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage; • fringe benefits; • total daily and weekly compensation; • the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation;	At least 3 years from the completion of the work records containing the information.

[334] 29 C.F.R. § 13.25.

[335] 29 C.F.R. § 5.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and • a copy of the contract.[336]	
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[337]	At least 3 years from the last date of entry.

3.1(b)(ii) *State Guidelines on Record Keeping*

Table 8 summarizes the state record-keeping requirements.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Employment Practices: Apprenticeship Materials	*Participating sponsor-employers must maintain adequate records about their applicants, including:* • summary of the qualifications of each applicant; • basis for evaluation and for selection or rejection of each applicant; • records pertaining to interviews of applicants; • original application for each applicant; • job assignment; • promotion, demotion, layoff, or termination; • rates of pay or other forms of compensation or conditions of work; and • hours, including hours of work and, separately, hours of	5 years.

[336] 29 C.F.R. § 4.6.

[337] 41 C.F.R. § 50-201.501.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	training. Records pertaining to individual applicants, selected or rejected, must be maintained to permit identification of minority and female (minority and nonminority) participants. *Records must also be kept concerning operation of all apprenticeship programs, including:* • all affirmative action plans, including all data and analyses; • qualification standards records; and • evidence that qualification standards have been validated.[338] All records must be made available to the New York Department of Labor (NYDOL) upon request.	
Freelance Isn't Free Act	A contract between a freelance worker and the hiring party must be in writing (physically or electronically) and retained by both parties and must contain at a minimum the following: • the name and mailing address of the hiring party and the freelance worker; • an itemization of all services to be provided by the freelance worker, the value of the services to be provided and the rate and method of compensation; • the date on which the hiring party must pay the contracted compensation or the mechanism by which the date of compensation will be determined; and • the date by which a freelance worker must submit a list of services rendered under such contract to the hiring party in order to meet any internal processing deadlines of the hiring party for purposes of timely compensation.[339]	No less than 6 years
Income Tax	*Employers required to deduct and withhold New York state personal income tax from employee wages must maintain records with the following information:* • amounts and dates of all wage payments subject to	4 years after taxes are due or the date the taxes were paid,

[338] N.Y. COMP. CODES R. & REGS. tit. 12, § 600.9.

[339] N.Y. GEN. BUS. LAW § 1412.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	state personal income tax; • names, addresses, and occupations of employees receiving such payments; • periods of each employees' employment; • periods for which they are paid by the employer while absent due to sickness or personal injuries and the amount and weekly rate of such payments; • Social Security numbers; • income tax withholding exemption certificates; • employer's identification number; • record of New York state employer withholding returns and reports filed; and • dates and amount of state personal income tax withholding payments made. A record of allocation must be kept for nonresident employees performing services partly within and partly outside New York state.[340]	whichever is later.
New York City: Earned Sick Time Act Records	Employers in New York City are subject to the city's Earned Sick Time Act and must maintain records documenting their compliance with the sick time law, including for example, distribution or posting of sick time policies.[341] See **3.9(b)(ii)** for information on the record-keeping requirements.	Not less than 3 years, and must be made available in furtherance of any investigation.
Unemployment Compensation	*Employers must maintain records about payments made to employees for purposes of establishing the employers' liability for unemployment insurance.[342] Records must include, for each payroll period:* • beginning and ending date of the period; • total amount of remuneration paid by the employer for the period as defined by Labor Code sections 470.2(b)(1) and (2);[343] and • total amount of compensation on which contributions	Not less than 3 years.

[340] N.Y. COMP. CODES R. & REGS. tit. 20, § 158.4.

[341] N.Y.C., N.Y., ADMIN. CODE § 20-920; N.Y.C. Earned Sick Time Rules § 7-12, *available at* https://www1.nyc.gov/assets/dca/downloads/pdf/about/Paid-Sick-Leave-Final-Rules.pdf. Additional information about the paid leave law is available at http://www1.nyc.gov/site/dca/about/paid-sick-leave-law.page.

[342] N.Y. LAB. LAW § 575; N.Y. COMP. CODES R. & REGS. tit. 12, § 472.2.

[343] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 470.2.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	are due under the New York Unemployment Insurance Law. *Records must include, for each employee:* • name and Social Security number; • remuneration paid to each employee during the pay period, showing separately remuneration paid in cash, money value of remuneration paid in another form, including reasonable money value of board, rent, housing, lodging, or similar advantage received, value of gratuities, and compensation on which contributions are due under the Unemployment Insurance Law; • calendar days on which each employee was employed reflecting the remuneration applicable to each such day; and • all reports of contributions and remuneration to be filed.[344]	
Wages, Hours & Payroll: Commissioned Salespeople Agreements	*The terms of employment for commissioned salespeople must be reduced to writing, signed by both the employer and the employee. Employers must retain that agreement.* Details concerning the specifics of the agreement are mentioned in **2.1(b)**. Documents must be made available to the NYDOL upon request.[345]	At least 3 years.
Wages, Hours & Payroll: Employer Policy on Wage Disclosures	Employers that institute written policies restricting the time, place, and manner that employees may discuss their wages must retain copies of such policies.[346] See **3.7(b)(v)** for more information about the wage transparency law.	While in effect, and for 6 years thereafter.
Wages, Hours & Payroll: Requirement to provide pay ranges	Employers are required to keep and maintain necessary records to comply with the requirements of the law including but not limited to, the history of compensation ranges for each job, promotion or transfer opportunity and the job descriptions for each position, if such descriptions exist.[347]	Not specified.
Wages, Hours & Payroll: General	*Employers must keep weekly payroll records for each employee, indicating:*	Not less than 6 years.

[344] *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 12, §§ 472.3, 472.4.

[345] N.Y. LAB. LAW § 191(1)(c).

[346] N.Y. COMP. CODES R. & REGS. tit. 12, § 194-1.3; *see also* N.Y. LAB. LAW § 194(4).

[347] Article 6, N.Y. LAB. LAW § 194-b.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• name, address, and Social Security number or other employee identification number; • regular and hourly wage rates; • number of hours worked daily and weekly, including the time of arrival and departure of each employee working a split shift or a spread of hours exceeding 10 hours; • when a piece-rate method is used: (1) number of units produced daily and weekly; and (2) the applicable piece rate and number of pieces completed at each piece rate, for each employee; • amount of gross wages; • deductions from gross wages; • allowances, if any, claimed as part of the minimum wage; • amount of net wages; • student classification;* • rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other basis; and • for all nonexempt employees: regular hourly rate(s) of pay, overtime rate(s) of pay, the number of regular hours worked, and the number of overtime hours worked.[348] *Employers must also maintain records of the following, for each employee who is working in an executive, administrative, or professional capacity:* • name, address, and Social Security number; • description of occupation; and • total wages and value of allowances for each pay period, for individuals working in an executive or administrative capacity. Payroll records, also to be maintained for six years, differ slightly for individuals working in the following industries: hospitality[349] and building services.[350] *for each individual for whom student status is claimed, a statement from the school which such individual attends	

[348] N.Y. LAB. LAW §§ 195, 661; N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.6.

[349] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-2.1.

[350] N.Y. COMP. CODES R. & REGS. tit. 12, § 141-2.1.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	indicating whether or not such individual: (1) is a student whose course of instruction is one leading to a degree, diploma or certificate; or (2) is completing residence requirements for a degree; and (3) is required to obtain supervised and directed vocational experience to fulfill curriculum requirements.	
Wages, Hours & Payroll: Hospitality Industry Notice (Generally and Tipped Employees)	As discussed in **2.1(b)**, New York has a specific wage order applicable to the hospitality industry, which imposes a notice requirement.[351] In addition, covered employers may take a tip credit only if a service employee or food service worker has been notified. Thus, prior to the start of employment, an employer must give every employee written notice of such matters as noted in **2.1(b)**.[352] In addition to the general wage retention requirements, hospitality industry employers must keep the following: • occupational classification; • tip credits claimed as part of the minimum wage; • meal and lodging credits if any, claimed as part of the minimum wage; • money paid in cash; and • whether employee has uniforms maintained by the employer.[353] An acknowledgment of receipt of these notifications, signed by the employee, must be retained by the employer.[354]	6 years.
Wages, Hours & Payroll: Public Works Contracts	Copies of required wage notices and wage statements provided to employees on public works contracts.[355]	Duration of retention period not specified.
Wages, Hours & Payroll: Wage Theft Prevention Act—General	As discussed in **2.1(b)**, employers must provide new hires with information under the Wage Theft Prevention Act and obtain an acknowledgement from each employee. Additional notices, and accompanying acknowledgements, are required for many employees upon any change in the information initially disclosed, as indicated in **3.7(b)(vi)**. All	Not less than 6 years.

[351] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.3.

[352] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-2.2.

[353] N.Y. COMP. CODES R. & REGS. tit. 12, § 141-2.1.

[354] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-2.2(d).

[355] N.Y. LAB. LAW §§ 195, 220.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	signed acknowledgments, in English and in the employee's primary language (if applicable), must be retained.[356]	
Wages, Hours & Payroll: Wage Theft Prevention Act—Temporary Help Firms	Temporary Help Firms are obligated to provide new hires with notifications under the Wage Theft Prevention Act, like other employers. The NYDOL has promulgated guidelines to assist such firms, as they may or may not have all of the necessary information to do so. Copies of the completed form must be retained by such employers.[357]	Not less than 6 years.
Wages, Hours & Payroll: Wage Payment Authorizations	Employers must keep employees' consent to receive wages via direct deposit or debit card.[358]	Duration of employment and for 6 years thereafter.
Wages, Hours & Payroll: Written Deduction Authorizations	Employers must keep, on the premises, employees' written authorizations for deductions (such as insurance premiums, pension or health benefits, union dues, discounted parking, and similar types of payments).[359]	Duration of employment and for 6 years thereafter.
Wages, Hours & Payroll: Paid Sick Leave	Employers must track the amount of sick leave provided to employees. That information must be kept for at least six years, together with other information that an employer is obligated to keep and maintain as part of its payroll records.[360]	At least 6 years.
Warehouse Worker Protection Act Records	Each employer must establish, maintain and preserve contemporaneous, true and accurate records to ensure compliance with employee or commissioner requests for data.[361]	3 years.
Workers' Compensation Records	*Employers must maintain records of any injuries or illnesses incurred by an employee in the course of employment, on a form that includes:* • name and nature of business of the employer;	Not less than 18 years.

[356] N.Y. LAB. LAW § 195(1).

[357] N.Y. LAB. LAW §§ 195(1), 916(5). Guidelines are available at https://dol.ny.gov/system/files/documents/2023/09/ls50_0.pdf. An approved form is available at https://dol.ny.gov/system/files/documents/2022/09/ls51.pdf.

[358] N.Y. COMP. CODES R. & REGS. tit. 12, § 192-2.2.

[359] N.Y. LAB. LAW § 193.

[360] N.Y. LAB. LAW § 196-b.

[361] Article 21-A, N.Y. LAB. LAW.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• location of its establishment or place of work; • name, address, and occupation of the injured employee; and • time, nature, and cause of the injury, or such other information as may be required by the Chair of the Workers' Compensation Board.[362] This recording requirement applies to any illness or injury that "has caused or will cause a loss of time from regular duties of one day beyond the working day or shift on which the accident occurred, or which has required or will require medical treatment beyond ordinary first aid or more than two treatments by a person rendering first aid."[363]	
Workplace Safety: Hazardous Communications	*Employers must keep the following information with respect to every employee who handles or uses a hazardous substance (as listed at 29 C.F.R. §§ 1910.1000–.1450):* • name, address, and Social Security number; and • which hazardous substance was handled or used.[364]	40 years. If the business ceases operations within the state, records must be sent to the state Department of Health.
New York Health and Essential Rights Act (Airborne Infectious Disease Exposure Prevention Standard)[365]	*Employers must retain records that exist between the employer and employee regarding a potential risk of exposure.*	2 years after the Commissioner of Health has determined the place of employment is no longer at high risk of disease.

[362] N.Y. WORKERS' COMP. LAW § 110.

[363] N.Y. WORKERS' COMP. LAW § 110(2).

[364] N.Y. LAB. LAW § 879.

[365] N.Y. ADMIN. CODE §840.1.

3.1(c) *Personnel Files*

3.1(c)(i) *Federal Guidelines on Personnel Files*

Federal law does not address access to personnel files for private-sector employees.

3.1(c)(ii) *State Guidelines on Personnel Files*

New York law does not address access to personnel files for private-sector employees.[366]

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

3.2(a)(i) *Federal Guidelines on Background Screening of Current Employees*

For information on federal law related to background screening of current employees, see 1.3.

3.2(a)(ii) *State Guidelines on Background Screening of Current Employees*

In New York, current employees are entitled to certain privacy protections, as are job applicants. A brief summary of these protections is included below; for more information on each topic, see 1.3(a) through 1.3(f).

Arrest and Conviction Records. Employees are protected by the New York Human Rights Law and local ban-the-box ordinances, discussed in 1.3. Thus, under the New York Human Rights Law, an employer cannot inquire about an employee's prior arrests or convictions or take any adverse action against an employee (*i.e.*, termination, denial of promotion) based on such history.

Consumer Reports. The New York mini-FCRA also extends to current employees as well as to applicants. It governs the use of consumer reports for *employment purposes*, which is defined to include "employment, promotion, reassignment or retention as an employee."[367] The New York City Stop Credit Discrimination in Employment Act (SCDEA), which prohibits discrimination against individuals on the basis of credit history, also explicitly applies to existing employees.[368]

Polygraph or Similar Testing. New York employers can neither request, nor require, current employees to submit to polygraph or similar examinations.[369]

Fingerprinting. New York law precludes private employers from requiring the fingerprinting of individuals as a condition of their continued employment. Such examinations are legal only where otherwise permitted by law or for: (1) state or municipal employees; (2) "the employees of legally incorporated hospitals, supported in whole or in part by public funds or private endowment;"

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366 N.Y. State Office of the Att'y Gen., *Workers' Rights Frequently Asked Questions*, *available at* https://ag.ny.gov/resources/individuals/workers-rights/job-termination (confirming, in response to a Job termination question, that it is legal for an employer to deny employees' access to personnel files).

367 N.Y. GEN. BUS. LAW § 380-a(g).

368 N.Y.C., N.Y. ADMIN. CODE § 8-107(24)(b) (prohibiting the request or use of credit history for employment purposes as to any "applicant for employment or employee").

369 N.Y. LAB. LAW §§ 733–39.

(3) employees working at medical colleges affiliated with those hospitals; or (4) "employees of private proprietary hospitals."[370]

Genetic Testing. New York specifically bans any employer from soliciting genetic information as a condition of employment.[371] Employers may neither require genetic testing or the disclosure of such information, nor may they purchase or otherwise acquire the results of any testing.[372] As discussed in **1.3(f)(ii)**, testing is permitted under certain circumstances.

Physical Examinations of Females. If a physical examination is required for a female employee, she is entitled to have a doctor or surgeon of her own sex perform the exam, or to be accompanied by another female if a male physician or surgeon conducts the examination.[373]

3.2(a)(iii) *Local Guidelines on Background Screening of Current Employees*

In New York City, it is an unlawful employment practice for an employer to take adverse action against any employee based on an arrest or criminal accusation that is pending against the employee, or because the employee has been convicted during their employment of one or more criminal offenses, or due to a finding the person lacks "good moral character" due to the arrest, criminal accusation, or conviction, unless, after considering the relevant fair chance factors, the employer determines that either:

- there is a direct relationship between the criminal conviction and the employment held by the person; or
- the continuation of the employment would involve an unreasonable risk to property, or to the safety or welfare of specific individuals or the general public.[374]

Placing an employee on unpaid leave for a reasonable time while the employer conducts the fair chance analysis is not considered to be an adverse action.[375] An employer is not prohibited from taking adverse action against an employee who is found to have made intentional misrepresentations regarding their arrest or conviction history, provided that the adverse action is not based on a failure to divulge information that a person may not be required to divulge, and so long as the employer provides the employee with a copy of the documents that formed the basis of the determination that an intentional misrepresentation was made and gives the person a reasonable time to respond.[376]

The Buffalo and Rochester ban-the-box ordinances, however, do not protect current employees; instead, they forbid inquiry into criminal convictions of applicants only, prior to a first interview. Nonetheless, employers in those jurisdictions remain subject to the state law and the requirements of Article 23-A.

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[370] N.Y. LAB. LAW § 201-a.

[371] N.Y. EXEC. LAW § 296(19).

[372] N.Y. EXEC. LAW § 296(19)(a).

[373] N.Y. LAB. LAW § 206-a.

[374] N.Y.C., N.Y. ADMIN. CODE § 8-107(10)(b), (c).

[375] N.Y.C., N.Y. ADMIN. CODE § 8-107(10)(d).

[376] N.Y.C., N.Y. ADMIN. CODE § 8-107(10)(g).

3.2(b) *Drug & Alcohol Testing of Current Employees*

3.2(b)(i) *Federal Guidelines on Drug & Alcohol Testing of Current Employees*

For information on federal laws requiring drug testing of current employees, see **1.3(e)(i)**.

3.2(b)(ii) *State Guidelines on Drug & Alcohol Testing of Current Employees*

There are no statutory limitations on an employer's right to conduct drug testing of applicants or employees in New York. Nonetheless, for the reasons discussed in **3.2(c)(ii)**, employers should be careful when considering adverse action against employees who test positive for marijuana if they are patients certified to use medical marijuana.

3.2(c) *Marijuana Laws*

3.2(c)(i) *Federal Guidelines on Marijuana*

Under federal law, it is illegal to possess or use marijuana.[377]

3.2(c)(ii) *State Guidelines on Marijuana*

New York State has both a medical marijuana law and a recreational marijuana law. Additionally, there are relevant provisions in New York City.

Both types of marijuana laws contain anti-discrimination protections. Under the medical marijuana law, being a certified patient means a person has a "disability" under state human rights and civil rights law.[378] Under the recreational marijuana law, unless otherwise provided by law, employers and employment agencies cannot refuse to hire, employ or license, discharge or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:

- An individual's legal use of consumable products, including cannabis in accordance with state law, prior to the beginning or after the conclusion of the employee's work hours – all time, including paid and unpaid breaks and meal periods, that the employee is suffered, permitted or expected to be engaged in work, and all time the employee is actually engaged in work – and off the employer's premises and without use of the employer's equipment or other property.[379]

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[377] 21 U.S.C. §§ 811-12, 841 *et seq*.

[378] N.Y. PUB. HEALTH LAW § 3369 (Repeal pending); N.Y. CANNABIS LAW § 42(2). *But see, e.g.*, *Scholl v. Compass Grp. USA, Inc.*, 2022 WL 2716950 (S.D.N.Y. July 13, 2022) (granting summary judgment to defendant, New York City Human Rights Law does not recognize a person's status as a certified medical marijuana patient as a basis for a claim of disability discrimination) & *Gordon v. Consol. Edison Inc.*, 190 A.D.3d 639 (N.Y. App. Div. 2021) (In *dicta*, observing, "The State [Human Rights Law] defines status as a medical marijuana patient as a protected disability, but the City [Human Rights Law] does not.").

[379] The state labor department addresses how the applies when employees are on call or on leave, and the law as it relates to remote work and restrictions involving company vehicles. New York State Department of Labor, *Adult Use Cannabis and the Workplace* (Oct. 8, 2021), *available at* https://dol.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf.

- An individual's legal recreational activities, including cannabis in accordance with state law, outside work hours, off the employer's premises and without use of the employer's equipment or other property.[380]

However, employers can take action related to cannabis use if an employee is impaired by the use of cannabis, meaning the employee manifests specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy work place, free from recognized hazards, as required by state and federal occupational safety and health law.[381] In corresponding guidance, the state labor department notes that "[t]here is no dispositive and complete list of symptoms of impairment. Rather, articulable symptoms of impairment are objectively observable indications that the employee's performance of the duties of the position of their position are decreased or lessened," while cautioning "that such articulable symptoms may also be an indication that an employee has a disability."[382] Additionally, it states that "[o]bservable signs of use that do not indicate impairment on their own cannot be cited as an articulable symptom of impairment," and "[t]he smell of cannabis, on its own, is not evidence of articulable symptoms of impairment."[383] Per the Department, "a test for cannabis usage cannot serve as a basis for an employer's conclusion that an employee was impaired by the use of cannabis, since such tests do not currently demonstrate impairment."[384]

Both the medical and recreational marijuana law contains carve-outs related to federal law, contracts, or funding. Under the medical marijuana law, employers need not do any act that would put them in direct violation of federal law or cause them to lose a federal contract or funding.[385] Similarly, under the recreational marijuana law, employers can take action related to cannabis use if their actions would require them to commit an act that would cause them to violate federal law or would result in the loss of a federal contract or federal funding.[386]

Additionally, under the recreational marijuana law, employers can take action related to cannabis use if a state or federal statute, regulation, ordinance, or other state or federal governmental mandate requires them to take such action.[387]

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[380] N.Y. LAB. LAW § 201-d(2)(b)-(c), (1)(c). *See also* N.Y. CANNABIS LAW § 127(4) (employers must adhere to policies regarding cannabis use in accordance with N.Y. LAB. LAW § 201-d).

[381] N.Y. LAB. LAW § 201-d(4-a).

[382] New York State Department of Labor, *Adult Use Cannabis and the Workplace* (Oct. 8, 2021), *available at* https://dol.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf.

[383] New York State Department of Labor, *Adult Use Cannabis and the Workplace* (Oct. 8, 2021), *available at* https://dol.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf.

[384] New York State Department of Labor, *Adult Use Cannabis and the Workplace* (Oct. 8, 2021), *available at* https://dol.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf. Note that the guidance also discusses more generally how drug testing interacts with the law, but it may raise additional questions which should be vetted with qualified counsel.

[385] N.Y. CANNABIS LAW § 42(2).

[386] N.Y. LAB. LAW § 201-d(4-a).

[387] N.Y. LAB. LAW § 201-d(4-a).

Under both laws, there are restrictions on where individuals can smoke or vape cannabis.[388] Additionally, other prohibitions, like not allowing individuals to drive while under the influence, remain in place, notwithstanding the medical and recreational marijuana laws.[389]

Under the medical marijuana law, employees who use medical cannabis must be afforded the same rights, procedures and protections that are available and applicable to injured workers under the workers' compensation law, rules or regulations, when injured workers are prescribed medications that may prohibit, restrict, or require the modification of the performance of their duties.[390]

While employers have latitude in enforcing drug policies in the workplace, they must also bear in mind that, as noted above, certified patients who qualify for medical marijuana are considered to have a "disability" within the meaning of the state human rights and civil rights laws.[391] The New York Human Rights Law, in turn, makes it unlawful for an employer to discriminate against an individual with a disability or to refuse reasonable accommodations to the known disabilities of an applicant or employee.[392] Under that law, therefore, covered employers may not take adverse employment action against an individual based on that person's status as a patient certified to use medical marijuana. While an employer need not allow marijuana possession or consumption at the workplace, it must engage in the necessary interactive dialogue with a certified patient employee to see if reasonable accommodation can be identified with respect to the employee's underlying medical condition and needs.

For example, a state appellate division panel affirmed, in relevant part, the trial court denying defendant's motion for summary judgment on plaintiff's failure to accommodate claims under state and local human rights laws,[393] while also holding there was no standalone private right of action under the state medical marijuana law itself.[394]

In December, the employee consulted a physician, who said medical marijuana (MM) could help with her disability. On December 17, the employee used marijuana. On December 18, the employee contacted a different physician about an appointment to certify her MM treatment. On December 21,

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388 N.Y. PUB. HEALTH LAW §§ 1399-o(1)(a), 1399-n(8); N.Y. PENAL LAW § 222.10(1).

389 *See, e.g.*, N.Y. VEH. & TRAFFIC LAW § 1227(1).

390 N.Y. CANNABIS LAW § 42(6). This statutory language mirrors case outcomes under the earlier version of the medical marijuana law. *See, e.g.*, *Matter of Barretta v. Pal Envtl. Safety*, 207 A.D.3d 925, 172 N.Y.S.3d 771 (2022), *Matter of Quigley v. Village of E. Aurora*, 142 N.Y.S.3d 636 (N.Y. Sup. Ct. 2021); *Matter of Young Adult Institute, Inc.*, 2018 WL 3773654 (Mar. 15, 2021); *Matter of Jones Apparel Group*, 2021 NY Wrk. Comp. 80000914 (N.Y. Workers' Comp. Bd. June 8, 2021); *Matter of McLean v. Time Warner Cable, Inc.*, 197 A.D.3d 1371 (N.Y. App. Div. 2021) (affirming Workers' Compensation Board's decision to grant requested variance to treat chronic pain with medical marijuana). *But see GM Powertrain*, 2022 WL 141221(N.Y. Workers' Comp. Bd. Jan. 5, 2022) (reversing workers' compensation judge's decision to grant a variance to treat claimant with medical marijuana pending claimant's receipt of certification for the medical marijuana program, the workers' compensation board held that the absence of the medical marijuana card rendered the variance request defective). Note that a provision under the law before 2021 amendments stated an insurer or health plan need not provide coverage for medical marijuana, but this provision is to be repealed.

391 N.Y. PUB. HEALTH LAW § 3369(2).

392 N.Y. EXEC. LAW § 296.

393 *Gordon v. Consolidated Edison Inc.*, 140N.Y.S.3d 512 (N.Y. Sup. Ct. 2021).

394 N.Y. PUB. HEALTH LAW § 3369.

the employee failed a random drug test. On December 27, the physician certified the employee's MM treatment. On December 29, the state approved the employee as an MM patient. On January 5, the employee discussed her pre-MM-certification marijuana use with the in-house medical review officer (MRO), who concluded marijuana use violated company policy. On January 9, the employee received her MM card. On January 10 and 11, the employee told HR and her supervisor about being a MM patient. On January 11, the company fired the employee.

Per the panel, concerning the employee's state law claim:

> questions of fact exist as to whether defendant improperly cut the dialogue process short when it discovered that plaintiff was a probationary employee, and refused to consider accommodating her — as it regularly did for permanent employees — by, for example, giving her discipline short of termination, or simply overlooking the one-time technical violation in light of her contemporaneously acquired status as a medical marijuana patient.

Additionally, concerning the employee's local law claim, the panel held:

> issues of fact exist as to whether defendant should have permitted plaintiff to treat her [disability through the medical use of marijuana, as a reasonable accommodation. In that regard, a further issue of fact exists as to whether the accommodation would reasonably extend to excusing the single pre-certification use of marijuana, and whether defendant fulfilled its duty to engage in an interactive dialogue with plaintiff aimed at reaching a reasonable accommodation for her disabling condition.

3.2(c)(iii) *Local Guidelines on Marijuana*

In New York City,[395] except as otherwise provided by law, an employer, labor organization, employment agency, or agent thereof commits an unlawful discriminatory practice by, as a condition of employment, requiring an applicant to submit to testing for the presence of marijuana or any tetrahydrocannabinols in the individual's system. However, the prohibition does not apply to persons applying to work:

- of certain construction workers (position requires compliance with NYC Building Code § 3321 or N.Y. Lab. Law § 220-h);
- in any position requiring a commercial driver's license;
- in any position requiring the supervision or care of children, medical patients, or vulnerable persons (N.Y. Soc. Srvs. Law § 488(15)); or
- in any position with the potential to significantly impact the health or safety of employees or members of the public.

A position has a significant impact on health or safety if: (1) it requires an employee regularly, or within one week of beginning employment, to work on an active construction site; (2) it requires an employee to regularly operate heavy machinery; (3) it requires an employee to regularly work on or near power or gas utility lines; (4) it requires an employee to operate a motor vehicle on most work shifts; (5) it requires work relating to fueling an aircraft, providing information regarding aircraft weight and balance, or maintaining or operating aircraft support equipment; or (6) impairment would interfere with the

[395] N.Y.C., N.Y. ADMIN. CODE § 8-107(31)(a)-(b).

employee's ability to take adequate care in the carrying out of the job duties and would pose an immediate risk of death or serious physical harm to the employee or to other people. However, a significant impact on health and safety does not include concerns that a positive test for tetrahydrocannabinols or marijuana indicates a lack of trustworthiness or lack of moral character.[396]

Additionally, the restrictions do not apply to drug testing required pursuant to:

- any federal Department of Transportation (DOT) regulation that requires testing of an applicant (49 C.F.R. pt. 40) or any New York (state or city) DOT rule adopting such regulation to enforce that regulation's requirements with respect to intrastate commerce;
- any contract entered into between the federal government and an employer or any grant of financial assistance from the federal government to an employer that requires drug testing of applicants as a condition of receiving the contract or grant;
- any federal or state statute, regulation, or order that requires drug testing of applicants for safety or security purposes; or
- any applicants whose prospective employer is a party to a valid collective bargaining agreement that specifically addresses applicant pre-employment drug testing.

3.2(d) *Data Security Breach*

3.2(d)(i) *Federal Data Security Breach Guidelines*

Federal law does not contain a data security breach notification statute. However, of interest to employers that provide identity theft protection services to individuals affected by a data security breach, whether voluntarily or as required by state law:

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.
- An individual whose personal information may have been compromised in a data breach is not required to include in their gross income the value of the identity protection services.
- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[397]

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;
- identity protection services provided for reasons other than as a result of a data breach, such as identity protection services received in connection with an employee's compensation benefit package; or
- proceeds received under an identity theft insurance policy.[398]

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[396] N.Y.C., N.Y. RULES § 47-2-07.

[397] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015), *available at* https://www.irs.gov/pub/irs-drop/a-15-22.pdf.

3.2(d)(ii) *State Data Security Breach Guidelines*

Like most states, New York has enacted a statute governing employer obligations in the event of a data security breach involving the unauthorized access of employee information. Under the pertinent statute, *breach* is defined to include "unauthorized access to or acquisition of, or access to or acquisition without valid authorization, of computerized data that compromises the security, confidentiality, or integrity of private information maintained by a business. Good faith access to, or acquisition of private information by an employee or agent of the business for the purposes of the business is not a breach of the security of the system, provided that the private information is not used or subject to unauthorized disclosure."[399]

Covered Entities & Information. New York law requires employers that own or license computerized data concerning their employees to notify state resident employees whenever electronically stored personal and private information concerning such employee has been accessed by someone, or is reasonably believed to have been accessed by someone, who was not validly authorized to acquire such information.[400] Under the relevant statute, *personal information* includes any information concerning a natural person which, because of name, number, personal mark or other identifier, can be used to identify that person.[401] *Private information* is defined to include Social Security numbers, driver's license numbers, identification card numbers, or account, credit or debit card numbers in combination with security codes, and access codes or passwords that would permit access to an individual's financial account.[402] *Private information* also includes: (1) an account number or credit or debit card number, if circumstances exist where the number could be used to access an individual's financial account without additional identifying information, security code, access code, or password; (2) biometric information, meaning data generated by electronic measurements of an individual's unique physical characteristics, such as a fingerprint, voice print, retina, or iris image, or other unique physical representation or digital representation of biometric data used to authenticate or ascertain the individual's identity; or (3) username or email address in combination with a password or security question and answer that would permit access to an online account.[403]

Content & Form of Notice. Notice to affected New York resident employees must include the following: (1) the employer's contact information; and (2) "a description of the categories of information that were, or are reasonably believed to have been, acquired by a person without valid authorization, including specification of which of the elements of personal information and private information were, or are reasonably believed to have been, so acquired."[404] Notice must also include the telephone numbers and websites to any relevant state and federal agencies that provide information regarding security breach response and identity theft protection information.

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[398] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015).

[399] N.Y. GEN. BUS. LAW § 899-aa(1)(c).

[400] N.Y. GEN. BUS. LAW § 899-aa.

[401] N.Y. GEN. BUS. LAW § 899-aa(1).

[402] N.Y. GEN. BUS. LAW § 899-aa(1). Private information does not include data that is encrypted or that is lawfully, publicly available through government records.

[403] N.Y. GEN. BUS. LAW § 899-aa(1).

[404] N.Y. GEN. BUS. LAW § 899-aa(7).

The necessary notification must be delivered to each affected employee in one of the following methods:

- written notice;
- electronic notice, provided that the employee has freely and expressly consented to receiving electronic notice in writing without any connection to the employee's continued employment and provided that the employer keeps a log of each notification;
- telephone notification, provided that a log of each such notification is kept by the employer; or
- substitute notice if the covered entity proves to the state attorney general that:
  - the class of affected employees exceeds 500,000;
  - actual notification would cost more than $250,000; or
  - it lacks sufficient contact information to reach the employees.[405]

Substitute notice must consist of the following:

- email notice if the business has an email address for the affected individuals;
- conspicuous posting on the employer's website, if it maintains a website; and
- notification through major statewide media.[406]

Notice is not required if the exposure of private information was due to an inadvertent disclosure by persons authorized to access private information, and the person or business reasonably determines such exposure will not likely result in misuse of such information, or financial harm to the affected persons or emotional harm in the case of unknown disclosure of online credentials. This determination must be documented in writing and maintained for at least five years. If the incident affects over 500 residents, the person or business must provide written determination to the state attorney general within 10 days after the determination.

Timing of Notice. The notice requirement is triggered when a covered entity discovers, or is notified of, a breach. In determining when a breach has occurred, employers may consider indications that the information: (1) "is in the physical possession and control of an unauthorized person, such as a lost or stolen" device; (2) "has been downloaded or copied;" or (3) has been "used by an unauthorized person, such as fraudulent accounts opened or instances of identity theft reported."[407]

Once triggered, notice must be provided in the most expedient time possible and without unreasonable delay, consistent with the employer's legitimate need to take measures to determine the scope of the unauthorized access and to restore the reasonable integrity of the computer system accessed.[408]

[405] N.Y. GEN. BUS. LAW § 899-aa(5).

[406] N.Y. GEN. BUS. LAW § 899-aa(5)(d).

[407] N.Y. GEN. BUS. LAW § 899-aa(1)(c).

[408] N.Y. GEN. BUS. LAW § 899-aa(2).

Notification also may be delayed if law enforcement determines that notice would impede a criminal investigation.[409]

Additional Provisions. Additional, separate notifications are required if the employer will be notifying New York residents of the breach. In addition to notifying affected individuals, employers must also inform the New York Attorney General, Consumer Protection Board, and Office of Cyber and Critical Infrastructure Coordination as to the timing, content, and distribution of the notices and the approximate number of affected persons.[410] Moreover, this information must also be shared with nationwide consumer reporting agencies whenever more than 5,000 New York employees are to be notified at one time.[411] These notifications must be made "without delaying notice to affected New York residents."[412]

State Enforcement, Remedies & Penalties. The attorney general may seek injunctive relief if the attorney general believes an employer has failed to comply with the notification law.[413] A court may award damages for actual costs or losses, including consequential financial losses, to a person who should have (but did not) receive notice of an information security breach as required under the law. If the court finds that an employer violated the law knowingly or recklessly, the court may impose a civil penalty equal to the greater of: (a) $5,000; or (b) $10 per instance of failed notification, up to $150,000.[414]

Data Security Protections. Any person or business that owns or licenses computerized data that includes a state resident's private information must develop, implement, and maintain reasonable safeguards to protect the security, confidentiality, and integrity of the private information including, but not limited to, disposal of data. A person or business complies with the law if it complies with requirements of other more stringent laws or implements a data security program including the following:

- reasonable alternative safeguards where the entity designates one or more employees to coordinate security programs, identifies reasonably foreseeable risks, assesses the sufficiency of the safeguards to control the risks, trains and manages employees in the security program, selects service providers capable of maintaining safeguards, and adjusts the security program in light of business changes or circumstances;
- reasonable technical safeguards where the entity assesses risk in network design, software design, information processing, transmission, and storage, detects, prevents, and responds to attacks or system failures, and regularly tests and monitors the effectiveness of key controls, systems, and procedures; and
- reasonable physical safeguards where the entity assesses risks of information storage and disposal, detects, prevents, and responds to intrusions, protects against unauthorized access

409 N.Y. GEN. BUS. LAW § 899-aa(4).

410 N.Y. GEN. BUS. LAW § 899-aa(8)(a).

411 N.Y. GEN. BUS. LAW § 899-aa(8)(b).

412 N.Y. GEN. BUS. LAW § 899-aa(8)(a), (b).

413 N.Y. GEN. BUS. LAW § 899-aa(6).

414 N.Y. GEN. BUS. LAW § 899-aa(6).

of private information, and disposes of private information within a reasonable time after it is no longer needed for business purposes.

Any small business must maintain security programs that have reasonable administrative, technical, and physical safeguards that are appropriate for the size and complexity of the small business, the nature and scope of the business's activities and the sensitivity of the personal information that the business collects. *Small business* is defined as any business with fewer than 50 employees, less than $3,000,000 in gross revenue and less than $5,000,000 in total assets.

Any person or business that fails to comply with this law may be enjoined and brought to action by the attorney general. However, this section does not create a private right of action.[415]

3.2(e) *Additional State Privacy Protections*

3.2(e)(i) *State Guidelines on the Use & Retention of Social Security Numbers*

In addition to the breach notification procedures, New York regulates the use, retention, and destruction of employee personal identifying information. Indeed, there are several laws on the books concerning employer access to such data, particularly as to Social Security numbers.

Labor Law Restrictions on Access & Use of Social Security Numbers. The New York labor law prohibits an employer from divulging any *personal identifying information* about its employees, which is defined to include a "[S]ocial [S]ecurity number, home address or telephone number, personal electronic mail address, Internet identification name or password, parent's surname prior to marriage, or drivers' license number."[416] This law makes it unlawful for an employer to:

1. communicate such personal identifying information to the public;
2. publicly post an employee's Social Security number;
3. visibly print a Social Security number "on any identification badge or card, including any time card;" or
4. include a Social Security number in a file with unrestricted access.[417]

Violations are presumed to be "knowing" if the employer has neglected to adopt policies or procedures to safeguard against disclosure, including procedures to notify employees of the law.[418] Employers that commit knowing violations may be subject to a civil penalty of up to $500 for each violation.[419]

Broader Restrictions on Access & Use of Social Security Numbers. New York has enacted two overlapping statutes concerning the confidentiality and disclosure of Social Security numbers in general—inside and outside the employment context.[420] The first of these laws was passed in 2006 and

[415] N.Y. GEN. BUS. LAW § 899-bb.

[416] N.Y. LAB. LAW § 203-d(1)(d).

[417] N.Y. LAB. LAW § 203-d(1).

[418] N.Y. LAB. LAW § 203-d(3).

[419] N.Y. LAB. LAW § 203-d(3).

[420] N.Y. GEN. BUS. LAW § 399-ddd. Both statutes appear at the same code provision, even though they have different text. For clarity, we will refer to their statutory titles as well for future citations.

prohibits all nongovernmental organizations from engaging in certain conduct.[421] Specifically, such entities may not:

1. intentionally communicate a Social Security number to the general public;
2. print a number on any card or tag needed for that person to access products, services, or benefits (including health care, for example);
3. require anyone to transmit a number over the internet, unless encrypted;
4. require anyone to use their Social Security number to access a website, unless other security measures are taken;
5. print a number on any mailing where the number itself would be visible; or
6. embed a number in or on a card or document, such as a bar code, chip, or other technology.[422]

This 2006 law requires persons and entities that possess Social Security account information to take reasonable measures to ensure that access to the information is restricted to those who have a legitimate reason to view it.[423] Employers therefore must implement safeguards to prevent unauthorized access to Social Security account numbers and to protect the confidentiality of such information.[424]

The law does not apply to an individual who intentionally communicates their Social Security number to the public. Nor does it apply to the collection, use, or release of a Social Security number as required by federal or state law or to the use of such information for internal verification, fraud investigation, or administrative functions.[425]

The state attorney general is exclusively authorized to enforce the 2006 law and to seek injunctive relief, restitution and/or significant civil penalties.[426] The potential penalties may include up to $1,000 for a first and single violation and up to $100,000 if multiple violations result from a "single act or incident." For all subsequent violations, the penalties may increase up to $5,000 for each single violation or $250,000 if multiple violations result from one act or incident. No violation shall be deemed to have occurred, however, if it was an unintentional, *bona fide* error that occurred despite the adoption of procedures to avoid such an error.[427]

The second of the overlapping statutes was passed in 2012 and prohibits requesting or requiring an individual to provide their Social Security number for any purpose in connection with almost any activity.[428] There are some employment-related exceptions, including where the request is "for purposes

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[421] N.Y. GEN. BUS. LAW § 399-ddd (Confidentiality of social security account number).

[422] N.Y. GEN. BUS. LAW § 399-ddd(2) (Confidentiality of social security account number).

[423] N.Y. GEN. BUS. LAW § 399-ddd(4) (Confidentiality of social security account number).

[424] N.Y. GEN. BUS. LAW § 399-ddd(4) (Confidentiality of social security account number).

[425] N.Y. GEN. BUS. LAW § 399-ddd(3) (Confidentiality of social security account number). The law also does not apply to functions authorized by the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6802 *et seq*.

[426] N.Y. GEN. BUS. LAW § 399-ddd(7) (Confidentiality of social security account number).

[427] N.Y. GEN. BUS. LAW § 399-ddd(7) (Confidentiality of social security account number).

[428] N.Y. GEN. BUS. LAW § 399-ddd(2), (3) (Disclosure of social security number).

of employment" or in connection with a lawful request for a background check by a consumer reporting agency.[429]

Like the 2006 legislation, this 2012 law does not provide a private right of action but instead authorizes the state attorney general to bring suit for injunctive relief, restitution, and/or civil penalties.[430] Courts may impose a civil penalty of up to $500 for each initial violation of this law, and up to $1,000 for each subsequent violation. Also, like the 2006 law, unintentional, *bona fide* errors that occur despite adoption of procedures to avoid them will not constitute violations.[431]

Disposal of Records Including Personal Identifying Information. Finally, employers that lawfully possess employee Social Security information are obligated to securely dispose of it. Pursuant to a New York statute, all persons, businesses, partnerships, and corporations (excluding not-for-profits and municipal governments) are required to take one of the following steps when disposing of records containing personal identifying information:

1. shred the record before disposing it;
2. destroy the personal identifying information contained in the record;
3. modify the record to render the personal data unreadable; or
4. take other action "consistent with commonly accepted industry practices" that is reasonably believed to ensure that no unauthorized access can occur.[432]

This disposal statute defines *record* broadly to mean "any information kept, held, filed, produced or reproduced by, with or for a person or business entity, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, or computer tapes or discs."[433] *Personally identifying information* encompasses any information that can be used to identify a person in combination with any one or more of the following, when either is not encrypted or the encryption key in contained in the same record:

1. Social Security number;
2. driver's license number or nondriver identification card number; or
3. mother's maiden name, financial services account number or code, savings or checking account number or code, debit card number or code, automated teller machine number or code, electronic serial number or personal identification number.[434]

Penalties for noncompliance with the law are substantial. The attorney general may seek immediate injunctive relief, and the court may award such relief upon five days' notice without requiring proof of

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[429] N.Y. GEN. BUS. LAW § 399-ddd(3)(e), (g) (Disclosure of social security number).

[430] N.Y. GEN. BUS. LAW § 399-ddd(4) (Disclosure of social security number).

[431] N.Y. GEN. BUS. LAW § 399-ddd(5) (Disclosure of social security number).

[432] N.Y. GEN. BUS. LAW § 399-h(2).

[433] N.Y. GEN. BUS. LAW § 399-h(1)(b).

[434] N.Y. GEN. BUS. LAW § 399-h(1)(d). "'Personal identification number' means any number or code which may be used alone or in conjunction with any other information to assume the identity of another person or access financial resources or credit of another person." N.Y. GEN. BUS. LAW § 399-h(1)(e).

any actual injury or damage.[435] The court also may levy civil penalties of up to $5,000 per violation.[436] Nonetheless, a business may avoid liability if it can show that it exercised due diligence in attempting to properly dispose of records containing personally identifying information.[437]

3.2(e)(ii) *State Guidelines on Biometric Privacy*

As discussed in **1.3(f)(i)**, New York's Labor Law prohibits employers from requiring employee fingerprinting. In 2010, the New York Department of Labor (NYDOL) issued a response to a "Request for Opinion" on whether the use of a biometric timeclock device violates this law.[438] The NYDOL explained that the statute prohibits: (1) requiring employees to use a biometric timeclock that requires a fingerprint to clock in will likely violate section 201-a, even if the device does not store the actual fingerprint; (2) taking adverse action against an employee who refuses to use a fingerprint to clock in; and (3) "coercing" employees to use a biometric timeclock that requires a fingerprint to clock in. However, the NYDOL clarified that the statute permits voluntary fingerprinting of employees, as well as instruments that measure the geometry of a hand that do not scan the surface details of the hand and fingers.

3.3 Minimum Wage & Overtime

3.3(a) *Federal Guidelines on Minimum Wage & Overtime*

The primary source of federal wage and hour regulation is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime, and child labor standards for covered employers. The FLSA applies to businesses that have: (1) annual gross revenue exceeding $500,000; and (2) employees engaged in commerce or in the production of goods for commerce, or employees that handle, sell, or otherwise work on goods or material that have been moved in or produced for commerce. For more information on this topic, see **LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS**.

As a general rule, federal wage and hour laws do not preempt state laws.[439] Thus, an employer must determine whether the FLSA or state law imposes a more stringent minimum wage, overtime, or child labor obligation and, if so, apply the more stringent of the two standards. If an employee is exempt from either federal or state law, but not both, then the employee must be paid for work in accordance with whichever law applies.

3.3(a)(i) *Federal Minimum Wage Obligations*

The current federal minimum wage is $7.25 per hour for most nonexempt employees.[440]

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage

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[435] N.Y. GEN. BUS. LAW § 399-h(3).

[436] N.Y. GEN. BUS. LAW § 399-h(3). Acts arising out of the same incident or occurrence are deemed to constitute a single violation of the law.

[437] N.Y. GEN. BUS. LAW § 399-h(3).

[438] N.Y. State Dep't of Labor, RO-10-0024, *Request for Opinion: Fingerprinting* (Apr. 22, 2010).

[439] 29 U.S.C. § 218(a).

[440] 29 U.S.C. § 206.

of $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[441]

An employer cannot keep tips received by employees for any purpose, including allowing managers or supervisors to keep a portion of employees' tips, regardless of whether the employer takes a tip credit.[442]

3.3(a)(ii) *Federal Overtime Obligations*

Nonexempt employees must be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a workweek.[443] For more information on exemptions to the federal minimum wage and/or overtime obligations, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.3(b) *State Guidelines on Minimum Wage Obligations*

The principal sources of a private employer's minimum wage and overtime obligations under New York law are the wage orders issued by the state Commissioner of Labor. These orders govern payment of minimum wages and overtime; exemptions from overtime obligations; allowances for gratuities, meals, lodging, apparel, and other items; and certain record-keeping and notice obligations. For example, wage orders have been issued for: the "Hospitality Industry," which includes both restaurants and hotels;[444] the "Building Service Industry;"[445] "Miscellaneous Industries and Occupations;"[446] and nonprofit institutions.[447]

Most employees are covered by the Miscellaneous Industries and Occupations Wage Order, which governs all employees except those who are covered by a specific industry wage order, and those employees of certain nonprofit organizations that have elected to be exempt from coverage under a minimum wage order by certifying they will pay their employees the statutory minimum wage exclusive of any allowances.[448] In all instances, the New York state minimum wage is higher than the federal minimum and must be obeyed.

3.3(b)(i) *State Minimum Wage*

General Principles. The minimum wage rate applicable to New York employees varies depending on their work location and the type of employer. Table 9 summarizes the various wage rates across the state, including scheduled increases. Beginning on January 1, 2027, and on January 1 of each subsequent year, the state will adjust the minimum wage based on the rate of inflation; however, it is also possible that the state could pause, for no more than two consecutive calendar years, an increase to the

[441] 29 U.S.C. §§ 203, 206.

[442] 29 U.S.C. § 3(m)(2)(B).

[443] 29 U.S.C. § 207.

[444] N.Y. COMP. CODES R. & REGS. tit. 12, pt. 146.

[445] N.Y. COMP. CODES R. & REGS. tit. 12, pt. 141.

[446] N.Y. COMP. CODES R. & REGS. tit. 12, pt. 142.

[447] N.Y. COMP. CODES R. & REGS. pt. 142, subpt. 142-3, and pt. 143.

[448] N.Y. COMP. CODES R. & REGS. pt. 142, subpt. 142-1.1; *see* N.Y. LAB. LAW § 652(3)(b).

minimum wage should the applicable inflation calculation produce a negative result or if unemployment reaches a certain level.[449]

Fast Food Workers. New York also has enacted separate state-mandated rates for certain fast food workers. New York law defines *fast food employee* to include "any person employed or permitted to work at or for a fast food establishment by any employer where such person's job duties include at least one of the following: customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning, or routine maintenance."[450]

In turn, *fast food establishment* refers to any establishment:

> (1) which has as its primary purpose serving food or drink items; (2) where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out, or delivered to the customer's location; (3) which offers limited service; (4) which is part of a chain; and (5) which is one of 30 or more establishments nationally, including: (i) an integrated enterprise which owns or operates 30 or more such establishments in the aggregate nationally; or (ii) an establishment operated pursuant to a franchise where the franchisor and the franchisee(s) of such franchisor owns or operates 30 or more such establishments in the aggregate nationally.

This definition explicitly includes restaurants located within other nonfast food establishments, such as a chain sandwich shop located in an airport.[451] Further details are explained at the NYDOL website, which includes a "Frequently Asked Questions" feature specific to fast food workers.[452]

Table 9 summarizes the minimum wage requirements for most nonexempt workers across the state, including domestic workers and, as indicated, fast food workers.[453] This table does not address tipped employees or workers covered by the building service or nonprofit wage orders.

Table 9. Minimum Wage in New York

Date	New York City, Fast Food Worker,[454] and Nassau, Suffolk & Westchester Counties	Remainder of State
01/01/24	$16.00	$15.00[455]

[449] N.Y. LAB. LAW § 652(1-b).

[450] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-3.13(a).

[451] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-3.13(b). The law also defines *chain* and *integrated enterprise*, along with franchise relationships. N.Y. COMP. CODES R. & REGS. tit. 12, § 146-3.13(c)-(g). New York has provided some examples of fast food establishments, see Minimum Wage for Fast Food Workers (Nov. 2023), *available* at https://dol.ny.gov/system/files/documents/2023/12/p716_11-23_0.pdf.

[452] This information is available at https://dol.ny.gov/minimum-wage-fast-food-workers-frequently-asked-questions [hereinafter "*Fast Food FAQs*"].

[453] N.Y. LAB. LAW § 652; N.Y. COMP. CODES R. & REGS. tit. 12, §§ 146-1.2, 146-1.3. Additional information, including wage orders, frequently asked questions, and posters, is available at https://dol.ny.gov/wage-orders.

[454] Before July 1, 2021, there were different rates applicable to fast food workers inside and outside New York City.

[455] For *Remainder of the State* minimum wage, beginning December 31, 2021, and each December 31 after, the Remainder of State minimum wage will be annually adjusted (to the nearest 5 cents) until it reaches $15.00 per hour.

Table 9. Minimum Wage in New York		
01/01/25	$16.50	$15.50
01/01/26[456]	$17.00	$16.00
01/01/27	TBD	TBD

3.3(b)(ii) *Tipped Employees*

General Principles. Tipped employees are paid differently than other types of workers. Employees who receive tips may be paid a lower hourly wage by the employer (known as the *cash wage*), because the combined total of the tip plus the cash wage meets or exceeds the mandated hourly wage rate. The discount on the cash wage to the employer is known as the *tip credit* or *tip allowance*.

As mentioned in **2.1(b)**, no tip credit can be taken in New York unless the employer provided the required notice(s) to the employee about this arrangement prior to the start of employment.[457] Additionally, tip credits count towards the minimum wage only where: (1) tips are customary for the occupation at issue; (2) "substantial evidence is provided that the employee received in tips at least the amount of the allowance claimed;"[458] and (3) the tip allowance is recorded on a weekly basis.[459]

If the minimum cash wage and maximum tip credit added together do not make up at least the minimum wage per hour, an employer must make up the difference so that the employee earns at least the minimum hourly wage. The employer bears the burden of proving it has taken tip credits appropriately, *i.e.*, that it did not take a credit larger than the amount of tips actually received by an employee.

Tipped Employees in the Hospitality Industry. Many tipped employees in New York are covered by the wage order applicable to the hospitality industry. This group of employees includes workers who customarily receive tips: service employees, resort hotel service employees, and food service workers, such as wait staff and bartenders.

To be clear, this group does not include fast food workers. Although covered by the Hospitality Industry Wage Order, fast food employers may not compensate fast food employees with a tip credit. It is worth noting, however, that fast food workers who happen to receive tips are entitled to keep them.[460]

Service Employees

For tipped service employees in the hospitality industry, the employer's ability to claim a tip credit turns on whether the employee receives a threshold amount of tips, indicated in the charts below as a *tip threshold* (TT). If the employee makes, on a weekly basis, an average amount of tips that satisfies this

[456] These rates will apply under the minimum wage under the federal Fair Labor Standards Act is greater. *See* N.Y. LAB. LAW § 652(1-a).

[457] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-2.2.

[458] Such evidence would include a "statement signed by the employee that he actually received in tips the amount of the allowance claimed." N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.5(b)(1)(ii).

[459] N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.5(b)(1).

[460] *Fast Food FAQs*, *available at* https://dol.ny.gov/minimum-wage-fast-food-workers-frequently-asked-questions.

threshold, the employer may claim a *tip credit* up to the hourly credit rate (TC), if it pays a *cash wage* (CW) sufficient to bring the employee up to or past the *minimum wage* (MW).

Additionally, special rules apply for resort hotel service employees. These employees have a higher tip threshold rate than other service employees, which is indicated as "TT(R)" in the accompanying tables. Moreover, employers may not claim a tip credit *at all* for resort hotel service employees, unless the employee receives tips equal to or exceed a certain amount per hour.[461]

Tables 10 and 11 summarize the regulations governing tip credits for service employees.

Table 10. Tip Credits for Service Employees: New York City and Nassau, Suffolk & Westchester Counties

Date	MW	TC	TT	TT (R)	CW
12/31/22	$15.00	$2.50	$3.25	$8.40	$12.50
01/01/24[462]	$16.00	$2.65	$3.45	$8.95	$13.35
01/01/25	$16.50	$2.75	$3.55	$9.25	$13.75
01/01/26	$17.00	$2.85	$3.65	$9.55	$14.15
01/01/27	TBD	TBD	TBD	TBD	TBD

Table 11. Tip Credits for Service Employees: Remainder of State

Date	MW	TC	TT	TT (R)	CW
01/01/24	$15.00	$2.50	$3.20	$8.40	$12.50
01/01/25	$15.50	$2.60	$3.30	$8.70	$12.90
01/01/26	$16.00	$2.70	$3.40	$9.00	$13.30
01/01/27	TBD	TBD	TBD	TBD	TBD

Food Service Employees

A specific rule also applies to tip credits applicable to food service workers. There is no separate tip threshold requirement, however, as with service employees.

Tables 12 and 13 summarize the regulations governing tip credits for food service employees.

[461] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.3(a)(4) (conditioning the credit on whether "the tips received equal or exceed at least $5.05 per hour").

[462] Although the rates for 2024 through 2026 are technically "proposed," more likely than not the "final" rates should not change, which is why we have included them. See New York State Department of Labor, Proposed Regulatory Text, *available* at https://dol.ny.gov/system/files/documents/2023/09/mw-orders-update-9.20.23.pdf.

Table 12. Tip Credits for Food Service Employees: New York City and Nassau, Suffolk & Westchester Counties			
Date	**MW**	**TC**	**CW**
01/01/24	$16.00	$5.35	$10.65
01/01/25	$16.50	$5.50	$11.00
01/01/26	$17.00	$5.65	$11.35
01/01/27	TBD	TBD	TBD

Table 13. Tip Credits for Food Service Employees: Remainder of State			
Date	**MW**	**TC**	**CW**
01/01/24	$15.00	$5.00	$10.00
01/01/25	$15.50	$5.15	$10.35
01/01/26	$16.00	$5.30	$10.70
01/01/27	TBD	TBD	TBD

Tipped Employees in the Building Service Industry. Workers covered by the Building Service Industry Wage Order (who may receive tips from tenants, for example), may not be compensated using a tip credit. Employers covered by that wage order must pay the applicable hourly minimum wage in its entirety, even if employees receive gratuities.[463]

Tipped Employees in Miscellaneous Industries and Occupations. For employees not covered by either the Hospitality Industry or Building Service Industry Wage Orders, tip credits are governed by the general wage order. However, as of December 31, 2020, the wage order no longer allows tip credits, so employees must be paid the full minimum wage.[464]

3.3(b)(iii) *Minimum Wage Exceptions & Rates Applicable to Specific Groups*

Excluded from New York's minimum wage requirements are:

- persons working in a *bona fide* executive, administrative, or professional capacity;
- farm laborers;
- outside salespersons;
- taxicab drivers;
- members of a religious order;
- certain individuals performing work for religious or charitable institutions;

[463] N.Y. COMP. CODES R. & REGS. tit. 12, § 141-1.7 (stating that "gratuities from tenants and others shall not be counted as part of the minimum wage" for employees falling under the Building Service Industry Wage Order).

[464] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 142-2.5(b), 142-2.21.

- staff counselors in a children's camp;
- students working in or for certain fraternities, sororities, or student or faculty associations;
- part-time babysitters; and
- federal, state, or municipal employees.[465]

Under limited circumstances, volunteers providing services at recreational or amusement events run by businesses that operate such events are also excluded from the definition of "employee" under the New York Minimum Wage Act.[466]

Farm Workers. Separate laws, along with a special Minimum Wage Order for Farm Workers, govern wages paid to farm workers.[467] Excluded from the definition of "farm employee" are a number of persons, including members of the employer's immediate family, persons performing domestic service in the employer's home, and certain minors working as hand harvest workers.[468]

3.3(b)(iv) *State Meal & Lodging Allowances*

Similar to tip credits, some New York employers are permitted to take credits when calculating the minimum wage for employees who receive meals or lodging from the employer. Thus, for example, if a restaurant furnishes meals to employees, that employer may include a set value representing that meal as part of the employees' wages. Likewise, employers that provide housing for employees may take an allowance towards the minimum wage.

Meal Credits. Meal credits are available for certain types of employees covered by the Hospitality Industry and Miscellaneous Industries and Occupations Wage Orders, including employees working for nonprofits that choose to remain covered by a wage order.[469]

Meal credits may be taken by employers covered by the Miscellaneous Industries and Occupations Wage Order, per meal provided, as long as each meal does not exceed the rates set forth in Table 14.

Table 14. Meal Credits for Miscellaneous Industries Employees

Effective Date	New York City	Nassau, Suffolk, and Westchester Counties	Remainder of State
12/31/20	$5.15	$4.80	$4.30
12/31/21	$5.15	$5.15	$4.55
12/31/22			$4.90*

[465] N.Y. LAB. LAW § 651(5).

[466] N.Y. LAB. LAW § 651(5).

[467] N.Y. LAB. LAW §§ 670 *et seq.*; N.Y. COMP. CODES R. & REGS. tit. 12, pt. 190.

[468] N.Y. LAB. LAW § 671.

[469] The Building Service Industry Wage Order does not appear to provide for meal allowances. In addition, nonprofits that elect to become exempt from wage orders through the certification process must pay their employees the minimum wage, exclusive of any allowances.

*While, technically, this amount is "proposed"[470] to take effect on December 31, 2022, we do not expect the "final" amount to be different.

Meal credits also may be taken by employers covered by the Hospitality Industry Wage Order, per meal provided. Different rates apply, depending on: (1) the type of worker (food service, service, or other); and (2) the location of the employer. In addition, and as indicated below, different rates apply to resort hotels than those applicable to restaurants and all-year hotels.[471]

Meal credits available to restaurant and all-year hotel employers are set forth below, per meal, for each type of employee as designated in Table 15.

Table 15. Meal Credits for Restaurant and All-Year Hotel Employees

Effective Date	New York City	Nassau, Suffolk, and Westchester Counties	Remainder of State
12/31/20	Food Service – $3.60 Service – $4.15 Other – $5.15	Food Service – $3.45 Service – $3.90 Other – $4.80	Food Service – $3.15 Service – $3.45 Other – $4.30
12/31/21	Food Service – $3.60 Service – $4.15 Other – $5.15	Food Service – $3.60 Service – $4.15 Other – $5.15	Food Service - $3.35 Service - $3.65 Other - $4.55
12/31/22			Food Service - $3.60 Service - $3.90 Other - $4.90*

*While, technically, these amounts are "proposed"[472] to take effect on December 31, 2022, we do not expect the "final" amounts to be different.

Meal credits available to resort hotel employers are set forth below, per meal, for each type of employee as designated in Table 16.

Table 16. Meal Credits for Resort Hotel Employees

Effective Date	New York City	Nassau, Suffolk, and Westchester Counties	Remainder of State
12/31/20	Food Service – $3.95 Service – $5.40 Other – $6.75	Food Service – $3.75 Service – $5.05 Other – $6.30	Food Service – $3.45 Service – $4.50 Other – $5.65
12/31/21	Food Service – $3.95 Service – $5.40	Food Service – $3.95 Service – $5.40	Food Service - $3.65

[470] *See* https://dol.ny.gov/system/files/documents/2022/09/proposed_regulatory_text_2022.pdf.

[471] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.9.

[472] *See* https://dol.ny.gov/system/files/documents/2022/09/proposed_regulatory_text_2022.pdf.

Table 16. Meal Credits for Resort Hotel Employees			
Effective Date	**New York City**	**Nassau, Suffolk, and Westchester Counties**	**Remainder of State**
	Other – $6.75	Other – $6.75	Service - $4.75 Other - $5.95
12/31/22			Food Service - $3.90 Service - $5.10 Other - $6.40*

*While, technically, these amounts are "proposed"[473] to take effect on December 31, 2022, we do not expect the "final" amounts to be different.

Lodging Credits. Employers may also take lodging credits if they provide housing to employees. These credits are available under the Building Service, Hospitality, and Miscellaneous Industries and Occupations Wage Orders, including employees working for nonprofits that choose to remain covered by a wage order. These credits may be considered as part of an employee's wages as long as they do not exceed set hourly, daily, or weekly amounts.

Under the Building Service Industry Wage Order, for example, credits for lodging and for utilities (including telephone) are available. These credits are fairly complex. Available credits take into account numerous factors, including the size of the apartment building in question, whether or not the apartment includes a refrigerator, where the employee's apartment is located within a building, and where the building is located within the State of New York.[474] In general, the apartment allowance is based on a percentage of a rental value of the apartment (as compared to similar units in the building) as of June 1, 1975.[475] Given the variety and complexity of these allowances, employers are encouraged to carefully review the regulations, and consult counsel, when claiming apartment and utility credits.

Under the Hospitality Industry Wage Order, credits for lodging are available, with different rates applicable to: (1) restaurants; (2) hotels and resorts without meals; and (3) resort hotels with meals.[476] These credits are also fairly complicated.

By way of example, however, Table 17 summarizes the lodging credits available to restaurant employers, for the various types of workers employed across the state.[477]

Table 17. Lodging Credits for Restaurant Employees			
Effective Date	**New York City**	**Nassau, Suffolk, and Westchester Counties**	**Remainder of State**
12/31/20	[Maintain previous levels	Food Service – $2.05/day	Food Service –

[473] *See* https://dol.ny.gov/system/files/documents/2022/09/proposed_regulatory_text_2022.pdf.

[474] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 141-1.5 (apartment), 141.1.6 (utilities).

[475] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 141-1.5.

[476] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.9.

[477] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.9(b) (lodging credits in restaurants).

Table 17. Lodging Credits for Restaurant Employees			
Effective Date	**New York City**	**Nassau, Suffolk, and Westchester Counties**	**Remainder of State**
	and now no distinction between small and large employers: Food Service – $2.15/day or $13.85/week Service – $2.90/day or $18.85/week Other – $3.65/day or $23.35/week]	or $13.15/week Service – $2.70/day or $17.60/week Other – $3.40/day or $21.80/week	$1.90/day or $12.10/week Service – $2.45/day or $15.70/week Other – $3.05/day or $19.45/week
12/31/21		Food Service – $2.15/day or $13.85 Service – $2.90/day or $18.85/week Other – $3.65/day or $23.35/week	Food Service - $2.00/day or $12.80/week Service - $2.60/day or $16.60/week Other - $3.20/day or $20.55/week
12/31/22			Food Service - $2.15/day or $13.75/week Service - $2.80/day or $17.85/week Other - $3.45/day or $22.10/week*

*While, technically, these amounts are "proposed"[478] to take effect on December 31, 2022, we do not expect the "final" amounts to be different.

Under the Miscellaneous Industries and Occupations Wage Order, lodging credits are available to employers in general, as well as for nonprofit employers.[479] For employers in general, different rates apply to lodging, as opposed to a house or apartment that includes utilities.[480] By way of example, Table 18 summarizes the credits available to employers, per day, for lodging as well as for housing plus utilities.

Table 18. Lodging Credits for Miscellaneous Industries Employees			
Effective Date	**New York City**	**Nassau, Suffolk, and Westchester Counties**	**Remainder of State**

[478] *See* https://dol.ny.gov/system/files/documents/2022/09/proposed_regulatory_text_2022.pdf.

[479] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 142-2.5, 142-3.5(a).

[480] N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.5(a)(1)(ii), (a)(2).

Table 18. Lodging Credits for Miscellaneous Industries Employees			
Effective Date	**New York City**	**Nassau, Suffolk, and Westchester Counties**	**Remainder of State**
12/31/20	Lodging – $6.35 House/Apt + Util – $12.00	Lodging – $5.90 House/Apt + Util – $11.20	Lodging – $5.30 House/Apt + Util – $10.00
12/31/21	Lodging – $6.35 House/Apt + Util – $12.00	Lodging – $6.35 House/Apt + Util – $12.00	Lodging - $5.60 House/Apt + Util – $10.55
12/31/22			Lodging - $6.00 House/Apt + Util – $11.35*

*While, technically, these amounts are "proposed"[481] to take effect on December 31, 2022, we do not expect the "final" amounts to be different.

Employers are encouraged to carefully review the regulations, and consult counsel, when claiming lodging credits, given the variety and complexity of these allowances.

3.3(c) *State Guidelines on Overtime Obligations*

As with the FLSA, New York law requires that all nonexempt employees receive one-and-a-half times their regular rate for all hours in excess of 40 hours in a single workweek.[482] The regular rate, of course, may exceed the state minimum wage. This law applies equally to employees who earn tips, as well as to fast food employees.[483]

3.3(d) *State Guidelines on Overtime Exemptions*

As under the FLSA, there are several categories of workers who are exempt from the minimum wage and overtime regulations. These individuals are expressly excluded from the definition of *employee* under the wage laws.[484] As outlined in **3.3(b)(iii)**, these exempt workers include individuals working in a *bona fide* executive, administrative, or professional capacity, as well as commissioned and outside salespeople.

The statutory exemption, however, also covers farm laborers, taxicab drivers, members of a religious order, certain individuals performing work for religious or charitable institutions, staff counselors in a children's camp, students working in or for certain fraternities, sororities or faculty associations,

[481] *See* https://dol.ny.gov/system/files/documents/2022/09/proposed_regulatory_text_2022.pdf.

[482] N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2.

[483] *See Fast Food FAQs*, *available at* https://dol.ny.gov/minimum-wage-fast-food-workers-frequently-asked-questions.

[484] N.Y. LAB. LAW § 651(5).

volunteers under specific circumstances, and part-time babysitters. Government employees—federal, state, or municipal—are also exempt.[485]

In addition, nonprofit institutions can take certain steps to become exempt from the overtime requirement. If a nonprofit certifies that it will pay all of its employees the general minimum wage applicable in its location, it can opt out of an otherwise applicable wage order and need not pay any employee overtime.[486] In that event, the specified exclusions (*i.e.*, executives, volunteers, farm laborers, taxi drivers, clergy, etc.) continue to operate with respect to minimum wage only.[487]

Before turning to specific exemptions under New York law, it is important to reiterate that federal wage and hour laws do not preempt state laws[488] and that the law most beneficial to the employee will apply. Therefore, even if an employee meets one of the exemptions discussed below under federal law, if the employee does not meet the requirements under New York law, including the salary thresholds discussed in Tables 20 and 21, then the employee will not qualify as exempt.

3.3(d)(i) *Executive Exemption*

There are two ways in which an employee can qualify for the *bona fide* executive exemption under New York law.

First, an employee is covered by this exemption if:

1. the employee's "primary duty consists of the management of the enterprise . . . or a customarily recognized department;"
2. the employee "customarily and regularly directs the work of two or more employees;"
3. the employee "has the authority to hire or fire other employees" or whose opinion on such issues has "particular weight;"
4. the employee "customarily and regularly exercise[s] discretionary powers;" and
5. the employee receives a salary, including board, lodging, or other allowances and facilities, in a minimum amount specified by the regulations.[489]

The salary level required for a New York employee to qualify for the executive exemption varies by location, and is scheduled to increase over time, as indicated in Table 19.

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[485] N.Y. LAB. LAW § 651(5); N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.14.

[486] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 143.1–143.2.

[487] N.Y. COMP. CODES R. & REGS. tit. 12, § 143.1 (defining exclusions from the term "employee" for nonprofit organizations that have certified that they will pay the minimum wage).

[488] 29 U.S.C. § 218(a).

[489] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 142-2.14 (describing this option for workers covered by the miscellaneous wage order), 142-3.12 (discussing exemptions applicable to nonprofit institutions that agree to be covered by minimum wage orders), 143.1 (discussing exemptions applicable to nonprofit institutions that opt out of wage order coverage), 141-3.2 (discussing exemptions applicable to the building service industry), and 146-3.2 (discussing exemptions applicable to the hospitality industry).

Table 19. Salary Level for Executive Exemption		
Date	**New York City and Nassau, Suffolk & Westchester Counties**	**Remainder of State**
12/31/22	$1,125 weekly	$1,064.25 weekly
01/01/24[490]	$1,200 weekly	$1,124.20 weekly
01/01/25	$1,237.50 weekly	$1,161.65 weekly
01/01/26	$1,275 weekly	$1,199.10 weekly
01/01/27	TBD	TBD

Second, the exemption appears to apply if the individual meets the requirements of the executive exemption under the FLSA[491] *and* is also paid the state minimum wage and overtime at one-and-a-half times the state minimum wage rate. This option differs from the first formulation because, here, the executive may not earn as much in salary as required for the first exemption (as indicated in the above chart), but the employee performs executive functions and receives wages that include at least the state minimum wage as well as overtime at that rate. Note that the definition for this exemption option does not require that the executive receive overtime at one-and-a half times their *regular rate*, which would be the traditional overtime rule; rather, to qualify for the exemption, the employee must be paid such that the employee receives one-and-a half times the *state minimum wage* for hours over 40. This exemption approach is based on a close—but unproven—reading of the general wage order. In addition, employers relying on this approach may need to track the hours of exempt employees, to show that their salaries were sufficient to cover the state overtime requirement. As a result, employers are cautioned to consult with counsel before relying on this second approach to pay exempt white collar workers a salary less than the state thresholds identified above.

This second option, moreover, is not available to employers covered by the Building Service Industry or Hospitality Industry Wage Orders.[492]

3.3(d)(ii) *Administrative Exemption*

As with the executive exemption, there are two ways in which an employee can qualify for the *bona fide* administrative exemption under New York law.

[490] Although the rates for 2024 through 2026 are technically "proposed," more likely than not the "final" rates should not change, which is why we have included them. See New York State Department of Labor, Proposed Regulatory Text, *available* at https://dol.ny.gov/system/files/documents/2023/09/mw-orders-update-9.20.23.pdf.

[491] The federal exemption is similar but not identical to the New York version. It includes nearly identical factors as the New York test, except that the federal test: (1) does not include the factor concerning the regular exercise of discretion; and (2) sets a different amount for the salary basis. *See, e.g.*, 29 C.F.R. § 541.100.

[492] N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2 (drawing distinction between overtime rates for nonexempt employees and those exempt under FLSA Section 13); *see also* N.Y. COMP. CODES R. & REGS. tit. 12, §§ 141-3.2, 142-2.14, and 146-3.2.

First, an employee is covered by this exemption if:

1. the employee's "primary duty consists of the performance of office or nonmanual field work directly related to management policies or general operations;"
2. the employee "customarily and regularly exercises discretion and independent judgment;"
3. the employee "regularly and directly assists an employer, or an employee employed in a *bona fide* executive or administrative capacity (*e.g.*, employment as an administrative assistant); or who performs, under only general supervision, work along specialized or technical lines requiring special training, experience or knowledge;" and
4. the employee receives a salary, including board, lodging, or other allowances and facilities, in a minimum amount specified by the regulations.[493]

As with the executive exemption, the salary level required for a New York employee to qualify for the administrative exemption varies by location, and is scheduled to increase over time.

Table 20. Salary Level for Administrative Exemption

Date	New York City and Nassau, Suffolk & Westchester Counties	Remainder of State
01/01/24	$1,200 weekly	$1,124.20 weekly
01/01/25	$1,237.50 weekly	$1,161.65 weekly
01/01/26	$1,275 weekly	$1,199.10 weekly
01/01/27	TBD	TBD

Second, the exemption appears to apply if the individual meets the requirements of the administrative exemption under the FLSA[494] *and* is also paid the state minimum wage and overtime at one-and-a-half times the state minimum wage rate. This second formulation is different from the first for the same reasons discussed above as to the executive exemption. This method may be required for certain administrative employees, but should not be adopted for most white collar exempt employees. As noted earlier, employers are cautioned to consult with counsel before relying on this second approach to pay

[493] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 142-2.14 (describing this option for workers covered by the miscellaneous wage order), 142-3.12 (discussing exemptions applicable to nonprofit institutions that agree to be covered by minimum wage orders), 143.1 (discussing exemptions applicable to nonprofit institutions that opt out of wage order coverage), 141-3.2 (discussing exemptions applicable to the building service industry), and 146-3.2 (discussing exemptions applicable to the hospitality industry).

[494] The federal exemption is similar but not identical to the New York version. It includes nearly identical factors as the New York test, except that the federal test: (1) does not include the factor concerning the regular assistance of an employer or executive, or performance of specialized or technical work; and (2) sets a different amount for the salary basis. *See, e.g.*, 29 C.F.R. § 541.200.

exempt workers a salary less than the state thresholds identified above. Finally, this second option is not available to employers covered by the Building Service Industry or Hospitality Industry Wage Orders.[495]

3.3(d)(iii) *Professional Exemption*

There are two ways in which an employee can qualify for the *bona fide* professional exemption under New York law.

First, an employee is covered by this exemption if:

1. the employee's "primary duty consists of the performance of work: requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study" or of work "original and creative in character in a recognized field of artistic endeavor . . . and the result of which depends primarily on the invention, imagination or talent of the employee;"
2. the employee's work "requires the consistent exercise of discretion and judgment;" and
3. the employee's work is "predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time."[496]

Under this first approach, there is no minimum salary requirement.

Second, the exemption appears to apply if the individual meets the requirements of the professional exemption under the FLSA[497] *and* is also paid the state minimum wage and overtime at one-and-a-half times the state minimum wage rate. This second formulation again ensures the employee receives overtime based on the state minimum wage, but not necessarily based on their regular rate of pay. And, as noted in **3.3(d)(i)**, employers are cautioned to consult with counsel before relying on this second approach to pay exempt workers a salary less than the state thresholds identified above. Finally, this second option is not available to employers covered by the Building Service Industry or Hospitality Industry Wage Orders.[498]

Hourly Computer Employees. New York does not have an exemption for hourly computer professionals. The FLSA does, however, and it falls under the professional exemption. The federal exemption includes a salary basis for professionals, including a specific rate for hourly computer employees.[499] Hourly

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[495] N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2 (drawing distinction between overtime rates for nonexempt employees and those exempt under FLSA Section 13); *see also* N.Y. COMP. CODES R. & REGS. tit. 12, §§ 141-3.2, 142-2.14, and 146-3.2.

[496] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 142-2.14 (describing this option for workers covered by the miscellaneous wage order), 142-3.12 (discussing exemptions applicable to nonprofit institutions that agree to be covered by minimum wage orders), 143.1 (discussing exemptions applicable to nonprofit institutions that opt out of wage order coverage), 141-3.2 (discussing exemptions applicable to the building service industry), and 146-3.2 (discussing exemptions applicable to the hospitality industry).

[497] The federal exemption is similar but not identical to the New York version. *See, e.g.*, 29 C.F.R. § 541.300.

[498] N.Y. COMP. CODES R. & REGS. tit.12 , § 142-2.2 (drawing distinction between overtime rates for nonexempt employees and those exempt under FLSA Section 13); *see also* N.Y. COMP. CODES R. & REGS. tit. 12, §§ 141-3.2, 142-2.14, and 146-3.2.

[499] 29 C.F.R. § 541.400(b).

computer employees cannot qualify for the professional exemption unless they are paid at least $27.63 per hour.

Of course, employers with such employees must consider both state and federal pay laws. If an FLSA-exempt computer employee's regular rate of pay in New York equals or exceeds one-and-a-half times the applicable minimum wage for hours worked in excess of 40, the New York overtime law is satisfied.[500] Accordingly, if an employee earns at least $27.63 per each hour worked (as necessary for the FLSA exemption), that amount should comply with both federal and state law.[501]

3.3(d)(iv) *Commissioned Sales Exemption*

The FLSA provides an exemption for commissioned retail or service sales employees, which New York expressly adopted in its general wage order.[502]

To establish the exemption, however, an employer must meet three elements, including that "the regular rate of pay of such employee is in excess of one-and-a-half times the minimum hourly rate applicable to him [or her]" as set forth in the FLSA.[503] Given some ambiguity in the state wage order, however, it is unclear whether the minimum hourly rate used for determining applicability of this exemption is the FLSA minimum wage or the applicable New York minimum wage.[504]

The exemption for commissioned salespeople is not available in the Building Service Industry or Hospitality Industry Wage Orders.[505]

3.3(d)(v) *Outside Sales Exemption*

A specific exemption applies for outside sales personnel, which appears in the labor code as well as the general wage order.[506] There are two ways in which an employee can qualify for this exemption under New York law.

First, an employee is covered by the outside sales exemption if the employee "is customarily and predominantly engaged away from the premises of the employer, and not at any fixed site and location, for the purpose of: (i) making sales; (ii) selling and delivering articles or goods; or (iii) obtaining orders or contracts for service or for the use of facilities."[507] For the outside sales exemption, there is no minimum salary requirement.

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[500] N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2.

[501] 29 C.F.R. § 541.400(b); N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2; *see, e.g.*, N.Y. State Dep't of Labor, Op. Ltr., File No. RO-08-0031 (Apr. 17, 2008), *available at* https://labor.ny.gov/legal/counsel/pdf/Overtime/RO-08-0031%20Overtime%20Wages%20-%20Our%20Letter,%20Original%20Request%20and%20enclosed%20Previous%20Opinions.pdf.

[502] 29 U.S.C. § 207(i); N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2.

[503] 29 U.S.C. § 207(i).

[504] *See, e.g.*, *Johnson v. Wave Comm GR L.L.C.*, 4 F. Supp. 3d 423, 434& n.8 (N.D.N.Y. 2014) (noting that the analysis for the federal and state exemptions differ "as to the third prong—whether each installer was paid one and one-half times the regular rate of pay").

[505] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 141-1.1 *et seq*., 146-1.1 *et seq*.

[506] N.Y. LAB. LAW § 651(5) (excluding "an outside salesman" from the definition of "employee").

[507] N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.14.

Second, the exemption applies if the individual meets the requirements of the outside sales exemption under the FLSA *and* is also paid the state minimum wage and overtime at one-and-a-half times the state minimum wage rate.[508] This second option is not available to employers covered by the Building Service Industry or Hospitality Industry Wage Orders.[509]

3.4 Meal & Rest Period Requirements

3.4(a) *Federal Meal & Rest Period Guidelines*

3.4(a)(i) *Federal Meal & Rest Periods for Adults*

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last 30 minutes or more) are not considered "hours worked" and can be unpaid.[510] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[511]

3.4(a)(ii) *Federal Meal & Rest Periods for Minors*

The FLSA does not include any generally applicable meal and rest period requirements for minors. The principles described above as to what constitutes "hours worked" for meal and rest periods applies to minors as well as to adults.

3.4(a)(iii) *Lactation Accommodation Under Federal Law*

The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), which expands the FLSA's lactation accommodation provisions, applies to most employers.[512] Under the FLSA, an employer must provide a reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth, each time the employee needs to express milk. The employer is not required to compensate an employee receiving reasonable break time for any time spent during the workday for the purpose of expressing milk unless otherwise required by federal, state, or local law. Under the PUMP Act, break time for expressing milk is considered hours worked if the employee is not completely relieved from duty during the entirety of the break.[513] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from

[508] The federal exemption is similar but not identical to the New York version. *See, e.g.*, 29 C.F.R. § 541.500.

[509] *See* N.Y. COMP. CODES R. & REGS. tit. 12, §§ 141-3.2, 142-2.14, and 146-3.2.

[510] 29 C.F.R. § 785.19.

[511] 29 C.F.R. § 785.18.

[512] 29 U.S.C. § 218d.

[513] 29 U.S.C. § 218d(b)(2).

coworkers and the public, which may be used by an employee to express breast milk.[514] Exemptions apply for smaller employers and air carriers.[515]

The Pregnant Workers Fairness Act (PWFA), enacted in 2022, also impacts an employer's lactation accommodation obligations. The PWFA requires employers of 15 or more employees to make reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related medical conditions.[516] Lactation is considered a related medical condition.[517] Reasonable accommodation related to lactation includes, but is not limited to breaks, space for lactation, and accommodations related to pumping and nursing during work hours.[518] For more information on these topics, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.4(b) *State Meal & Rest Period Guidelines*

3.4(b)(i) *State Meal & Rest Periods for Adults*

Meal Periods. New York requires employers to provide a meal break. The meal period law covers all categories of employees, including, for example, management as well as blue collar workers.[519]

In general, all individuals employed in a mercantile establishment, or other occupation covered by the labor laws, are entitled to a break of at least 30 minutes during the noonday meal period (*i.e.*, between 11:00 A.M. and 2:00 P.M.).[520] This rule applies also to employees who work a shift of more than six hours, which extends through the noonday meal period. Employees who work a shift beginning before 11:00 A.M. and continuing later than 7:00 P.M. must be permitted another meal break, of at least 20 minutes, between 5:00 P.M. and 7:00 P.M.[521] Every person employed for a shift of more than six hours, starting between 1:00 P.M. and 6:00 A.M., must be allowed at least a 45-minute meal period, taken midway between the beginning and end of the shift.[522]

Special rules apply to factory workers. Factory employees are entitled to a one-hour lunch break for their noonday meal.[523] In addition, factory workers employed for a shift of more than six hours, starting between 1:00 P.M. and 6:00 A.M., must receive at least an hour for a meal period, taken midway between the beginning and end of the shift.[524]

Meal Period Waivers. Public policy in New York does not preclude waiver or modification of these meal break requirements, as long as the underlying legislative purpose is not contravened.

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[514] 29 U.S.C. § 218d(a).

[515] 29 U.S.C. § 218d(c), (d).

[516] 42 U.S.C. § 2000gg–1.

[517] 29 C.F.R. § 1636.3.

[518] 29 C.F.R. § 1636.3.

[519] *See* N.Y. State Dep't of Labor, *Meal Period Guidelines*, *available at* https://dol.ny.gov/day-rest-and-meal-periods*see also* N.Y. State Dep't of Labor, Op. Ltr., File No. RO-07-0130 (Oct. 27, 2008).

[520] N.Y. LAB. LAW § 162(2).

[521] N.Y. LAB. LAW § 162(3).

[522] N.Y. LAB. LAW § 162(4).

[523] N.Y. LAB. LAW § 162(1).

[524] N.Y. LAB. LAW § 162(4).

To be valid, however, a negotiated waiver of a meal break must be made: (1) "freely, knowingly and openly;" (2) without hint of duress or coercion; (3) in exchange for a benefit to the employee; and (4) without the involvement of bad faith.[525] The New York Department of Labor (NYDOL) appears to be fairly stringent when interpreting the meal break rules. For example, the NYDOL has opined that allowing employees the option of leaving early instead of taking a meal break was an unlawful waiver.[526]

That being said, the NYDOL can grant permission for shorter meal periods in certain circumstances. Indeed, the NYDOL may grant a written permit allowing a shorter break period (*i.e.*, 20 minutes) in special or unusual situations, after it has conducted an investigation.[527] This permit must be "conspicuously posted in the main entrance of the establishment" and can be revoked.[528]

Shorter meal periods may be permitted in "one-employee" cases. In such scenarios, the employee can eat on the job, without being relieved by another person, if: (1) there is only one person on duty; and (2) there is only person working in that specific occupation. In that event, the employee may voluntarily agree to the arrangement—but employers must provide an uninterrupted break upon request.[529]

According to the NYDOL website, employers may offer a shorter, 30-minute meal period, without application from the employer, "if it causes no hardship to employees."[530]

Rest Periods. New York has not enacted any generally applicable rest period requirements for adults.

3.4(b)(ii) *State Meal & Rest Periods for Minors*

There are no independent meal or rest period requirements for minor employees in New York—the adult standards apply.[531]

3.4(b)(iii) *State Enforcement, Remedies & Penalties*

The New York labor law includes an enforcement mechanism for transgressions of the meal break requirements. If the NYDOL determines that a violation has occurred, it can impose a civil penalty of up to $1,000 for a first violation, $2,000 for a second violation, or $3,000 for a third or any subsequent

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[525] *Capital Newspapers Div.-Corp. v. Hartnett*, 571 N.Y.S.2d 584, 586 (N.Y. App. Div. 1991); *see also In re Am. Broad. Cos., Inc.*, 461 N.E.2d 856, 859 (N.Y. 1984).

[526] N.Y. State Dep't of Labor, Op. Ltr., File No. RO-07-0130 (Oct. 27, 2008); *see also* N.Y. State Dep't of Labor, Op. Ltr., File No. RO-10-0085 (Feb. 1, 2011).

[527] N.Y. LAB. LAW § 162(5); N.Y. State Dep't of Labor, *Meal Period Guidelines*, *available at* https://dol.ny.gov/day-rest-and-meal-periods.

[528] N.Y. LAB. LAW § 162(5).

[529] N.Y. State Dep't of Labor, *Meal Period Guidelines*. The New York State Department of Labor has issued some guidance on when this "one-employee" exception might apply. *See* N.Y. State Dep't of Labor, Op. Ltr., File No. RO-10-0050 (Jan. 12, 2011); N.Y. State Dep't of Labor, Op. Ltr., File No. RO-10-0132 (Jan. 18, 2011), *available at* https://labor.ny.gov/legal/counsel/pdf/Meal%20Periods%20%28Sec.%20162%29/RO-10-0132%20Meal%20Periods.pdf.

[530] N.Y. State Dep't of Labor, *Meal Period Guidelines*.

[531] *See* N.Y. State Dep't of Labor, *Meal Period Guidelines*; *see also* N.Y. State Dep't of Labor, Op. Ltr., File No. RO-07-0130 (Oct. 27, 2008).

violation.[532] Any such penalty will be in addition to any other authorized remedy, and may apply concurrently.[533] The law does not afford a private right of action.[534]

3.4(b)(iv) *Lactation Accommodation Under State Law*

Generally speaking, a mother may breast feed her baby in any location, public or private, where she is otherwise authorized to be.[535]

With respect to the workplace, employers must accommodate nursing mothers when they return to work. Specifically, employers must grant reasonable unpaid break time, or allow an employee to use paid break or meal time, so that the employee may express breast milk for her child.[536] Beginning in June 2024, an employer must provide 30 minutes of paid break time specifically for expressing breast milk. An employee may also use other available paid break time or meal time for any time in excess of the 30-minute paid lactation break. Employers must grant this break time on a daily basis for up to three years following the child's birth. Moreover, an "employer shall make reasonable efforts to provide a room or other location, in close proximity to the work area, where an employee can express milk in privacy."[537]

Notice of employee rights under this law must be provided, as mentioned in **0**, either individually to affected employees or through posting or publication.[538]

In addition to this mandated break time, employers may not discriminate against nursing mothers.[539] To the contrary, employers must provide reasonable accommodation to an employee or applicant with a pregnancy-related condition (see **3.9(c)(ii)**).[540]

Employers are subject to expanded lactation accommodation requirements[541] similar to those already in place in New York City. Under the expanded law, an employer must provide reasonable unpaid break time or permit an employee to use paid break time or meal time to allow the employee to express breast milk for her nursing child each time the employee has a reasonable need to express breast milk for up to three years following childbirth.

Upon request of an employee who chooses to express breast milk in the workplace, the employer must designate a room or other location to be made available for use by the employee to express breast milk. The room or other location must be a place that is:

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[532] N.Y. LAB. LAW § 218(1).

[533] N.Y. LAB. LAW § 218(4).

[534] *McElroy v. City of New York*, 270 N.Y.S.2d 113, 115 (N.Y. Sup. Ct. 1966); *see Browne v. IHOP*, 2005 WL 1889799, at **1-2 (E.D.N.Y. Aug. 2, 2005); *In re Carrube v. New York City Transit Auth.*, 738 N.Y.S.2d 67 (N.Y. App. Div. 2002).

[535] N.Y. CIV. RIGHTS LAW § 79-e.

[536] N.Y. LAB. LAW § 206-c.

[537] N.Y. LAB. LAW § 206-c.

[538] Additional guidance about lactation accommodation is available from the NYDOL at https://dol.ny.gov/system/files/documents/2023/03/ls702.pdf (addressing what constitutes reasonable break time, guidelines for privacy, and suggesting employer activities).

[539] N.Y. LAB. LAW § 206-c.

[540] N.Y. EXEC. LAW §§ 292, 296.

[541] N.Y. LAB. LAW § 206-c , as amended by S.B. 4844 (N.Y. 2022).

- in close proximity to the work area;
- well lit;
- shielded from view; and
- free from intrusion from other people in the workplace or the public.

The room or other location must 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 for this purpose cannot be a restroom or toilet stall. If the workplace has access to refrigeration, the employer must permit employees access to the refrigeration for the purpose of storing expressed milk.

If the sole purpose or function of the room or other location is not dedicated for use by employees to express breast milk, it must be made available to a nursing employee when needed and cannot be used for any other purpose or function while in use by that employee. The employer must provide notice to all employees as soon as practicable when the room or other location has been designated for use by employees to express breast milk.

If providing a compliant room or location is impracticable because it would impose an undue hardship on the employer, the employer must make reasonable efforts to provide a room or other location, other than a restroom or toilet stall, that is in close proximity to the work area where an employee can express breast milk in privacy. Undue hardship means that it would cause significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business. Regardless, an employer cannot be exempt from the requirement to permit an employee to use break time to express milk each time the employee needs to do so.

An employer must provide the state-published notice of rights of employees to express milk in the workplace to each employee upon hire and annually thereafter, and must also provide the notice of rights to an employee returning to work following the birth of a child. The policy must include the following information:

- a statement of rights provided by this law;
- a description of how an employee may submit a request to the employer for a room or other location for use by employees to express breast milk; and
- an explanation of the requirement that an employer must respond to employee requests within a reasonable timeframe not to exceed five business days.

An employer is prohibited from discharging, threatening, penalizing, or in any other manner discriminating or retaliating against any employee because the employee has exercised their rights afforded under this law. An employer cannot discriminate in any way against an employee who chooses to express breast milk in the workplace.

3.4(b)(v) *Lactation Accommodation Under Local Law*

New York City. Employers of four or more employees must provide reasonable time for an employee to express breast milk and may not limit the amount of time that an individual can use to express milk unless the employer can demonstrate that the time needed presents an undue hardship to the employer. Where an employer already provides compensated breaks, an employee who uses that break

time to express milk must be compensated in the same way that other employees are compensated for break time.[542]

In addition, guidance from the NYC Commission on Human Rights provides that absent undue hardship, an employer must provide a clean, sanitary, and private space, other than a bathroom, that is shielded from view and free from public intrusion from coworkers, along with a refrigerator to store breast milk in the workplace. A lactation space must be conveniently located and reasonably near the employee's workstation. An employee who wishes to express milk at their usual workstation shall be permitted to do this so long as it does not create an undue hardship for the employer, regardless of whether a coworker, client, or customer expresses discomfort.[543]

Employers of four or more employees must provide the following to accommodate an employee needing to express breast milk:

- a lactation room in reasonable proximity to the employee's work area; and
- a refrigerator suitable for breast milk storage in reasonable proximity to the employee's work area.[544]

Lactation room means a sanitary place, other than a restroom, that can be used to express breast milk shielded from view and free from intrusion and that includes at minimum an electrical outlet, a chair, a surface on which to place a breast pump and other personal items, and nearby access to running water.[545] If a room an employer designates to serve as a lactation room is also used for another purpose, the sole function of the room must be as a lactation room while an employee is using the room to express breast milk. When an employee is using the room to express milk, the employer must provide notice to other employees that the room is given preference for use as a lactation room.[546]

If providing a lactation room would impose an undue hardship on an employer, the employer must engage in a cooperative dialogue with the employee to determine a reasonable accommodation.[547]

An employer must also develop and implement a written policy regarding the provision of a lactation room and distribute the policy to all employees upon hiring. The policy must include a statement that employees have a right to request a lactation room, and identify a process by which employees may request a lactation room.[548] This process must:

- specify the means by which an employee may submit a request for a lactation room;
- require that the employer respond to a request for a lactation room within a reasonable amount of time not to exceed 5 business days;

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[542] N.Y.C. ADMIN. CODE §§ 8-102(5), 8-107(22).

[543] New York City Commission on Human Rights, *Legal Enforcement Guide on Pregnancy Rights* (April 2016), available at http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2016.pdf.

[544] N.Y.C. ADMIN. CODE § 8-107(22)(b).

[545] N.Y.C. ADMIN. CODE § 8-102.

[546] N.Y.C. ADMIN. CODE § 8-107(22)(b).

[547] N.Y.C. ADMIN. CODE § 8-107(22)(b).

[548] N.Y.C. ADMIN. CODE § 8-107(22)(c).

- provide a procedure to follow when 2 or more individuals need to use the lactation room at the same time, including contact information for any follow up required;
- state that the employer must provide reasonable break time for an employee to express breast milk; and
- state that if the request for a lactation room poses an undue hardship on the employer, the employer must engage in a cooperative dialogue with the requesting employee.[549]

The presence of a lactation room and existence of a lactation room policy do not affect an individual's right to breastfeed in public.[550]

Suffolk County. Employers in Suffolk County are subject to lactation accommodation requirements mirroring those under state law. The Suffolk County Human Rights Law makes it an unlawful employment practice for an employer of four or more employees to:

- discriminate against an employee who chooses to express breast milk in the workplace;
- refuse to provide reasonable unpaid break time or refuse to permit an employee to use paid break time or meal time each day to allow an employee to express breast milk for her nursing child for up to three years following child birth; or
- refuse to make reasonable efforts to provide a room or other location, in close proximity to the work area, where an employee can express breast milk in privacy.[551]

3.5 Working Hours & Compensable Activities

3.5(a) *Federal Guidelines on Working Hours & Compensable Activities*

In contrast to some state laws that provide for mandatory days of rest, the FLSA does not limit the hours or days an employee can work and requires only that an employee be compensated for "all hours" worked in a workweek. Ironically, the FLSA does not define what constitutes hours of work.[552] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call, training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[553]

As a general rule, employee work time is compensable if expended for the employer's benefit, if controlled by the employer, or if allowed by the employer. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as work time. An employee's *principal duties* include an employee's productive tasks. However, the phrase is expansive enough to encompass not only those tasks an employee is employed to perform, but also tasks that are an "integral and indispensable" part of the principal activities. For more information on this topic, including information on whether time spent traveling, changing clothes, undergoing security screenings, training,

[549] N.Y.C. ADMIN. CODE § 8-107(22)(c).

[550] N.Y.C. ADMIN. CODE § 8-107(22)(b), (c)..

[551] SUFFOLK CNTY., N.Y. CODE §§ 528-6, 528-7(8).

[552] The FLSA states only that to employ someone is to "suffer or permit" the individual to work. 29 U.S.C. § 203(g).

[553] *See, e.g.*, *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 519 (2014) (in determining whether certain preliminary and postliminary activities are compensable work hours, the question is not whether an employer requires an activity (or whether the activity benefits the employer), but rather whether the activity "is tied to the productive work that the employee is employed to perform").

waiting or on-call time, and sleep time will constitute hours worked under the FLSA, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.5(b) *State Guidelines on Working Hours & Compensable Activities*

New York does not have any generally applicable laws regarding the typical hours of work that an employer may set. There are some specific requirements for domestic workers, nurses, and truck or bus drivers, as well as for employees who work for brickyards or railroads (street or otherwise).[554]

On the other hand, New York has enacted several laws concerning what type of work-related activities are compensable. Not all time associated with work is necessarily paid, and there are a number of issues considered when determining whether activities constitute work. This publication looks more closely at pay requirements for reporting time, on-call time, split shifts, and travel time.

For information about working hours on holidays or days of rest, see **3.8(b)(ii)**.

3.5(b)(i) *Reporting Time*

Pay for reporting time (also known as "call-in time") in New York includes hours worked but can also cover hours not worked, based on the employee's reporting for duty. Reporting time is compensable under both the miscellaneous and hospitality industry wage orders.

Miscellaneous Industries and Occupations Wage Order. Any employee who reports for work—whether by request or permission of the employer—must be "paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less."[555] Payment must be made at the applicable state minimum hourly wage.

Hospitality Industry Wage Order. Hospitality industry employees are entitled to call-in pay if they report for work, either at the request of, or with the permission of, the employer.[556] The amount of the pay depends on how many short shifts occur and the length of the regularly scheduled shift.

- For one short shift, the employee must receive at least three hours of pay, or the number of hours in the regularly scheduled shift, whichever is less.
- For two short shifts, totaling six hours or less, the employee must receive at least six hours of pay, or the number of hours in the regularly scheduled shift, whichever is less.
- For three shifts totaling eight hours or less, the employee must receive at least eight hours of pay, or the number of hours in the regularly scheduled shift, whichever is less.

Unlike reporting time pay for miscellaneous industries, call-in pay in the hospitality industry is not based solely on the state minimum wage. To the contrary, the wage order expressly states that the "applicable wage rate" for call-in pay means:

1. "payment for time of actual attendance calculated at the employee's regular or overtime rate of pay, whichever is applicable, minus any customary and usual tip credit;" plus

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[554] *See, e.g.*, N.Y. LAB. LAW §§ 2(16), 161(1), 163-65, 167, 170, and 198; N.Y. COMP. CODES R. & REGS. tit.12, §§ 175.5–175.7.

[555] N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.3.

[556] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.5.

2. "payment for the balance of the period calculated at the basic minimum hourly rate with no tip credit subtracted."[557]

In other words, the employee receives wages for hours actually worked at their regular or overtime rate, plus payment at the applicable state minimum wage for the additional reporting time hours during which no work was performed.

Employers should note that payment for the second component of call-in pay (*i.e.*, basic minimum wage due for the hours not worked) is not included in the regular rate of pay when calculating overtime pay for the same workweek.[558] Additionally, call-in pay may "not be offset by any credits for meals or lodging provided to the employee."[559]

3.5(b)(ii) *On-Call Time*

While there is no separate generally applicable on-call pay requirement in New York, the New York Department of Labor (NYDOL) considers fully-compensable on-call time to include "time during which employees are required to remain at the prescribed workroom or workplace, awaiting the need for the immediate performance of their assigned duties."[560] In addition, special provisions are particularly pertinent to the hospitality and building service industries.

For example, residential employees—who live on the employer's premises—are not considered to be working: (1) during normal sleeping hours, even if "on call;" or (2) at any time the employees are free to leave.[561]

And in the hospitality industry, *working time* is defined to include "time an employee is required to be available for work at a place or within a geographical area prescribed by the employer such that the employee is unable to use the time productively for his or her own purposes."[562]

3.5(b)(iii) *Split Shifts & Spread of Hours Premiums*

New York requires some employers to pay a special premium—one hour of additional pay at the state minimum wage rate—to employees who work split shifts, or shifts with a spread exceeding 10 hours, or both.[563]

Premium Pay for Split Shifts

Miscellaneous Industries and Occupations Wage Order. For workers covered by the miscellaneous wage order, *split shift* refers to a schedule where the working hours in a particular day are not

[557] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.5(b).

[558] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.5(b)(2).

[559] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.5(c).

[560] N.Y. State Dep't of Labor, Op. Ltr., File No. RO-08-0127 (Dec. 1, 2008), (differentiating "on call" time from "subject to call" time, which is not compensable because employees may leave the work site and pursue their own activities, beginning work only when contacted to do so).

[561] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 142-2.1(b), 142-3.1(b); *see, e.g.*, N.Y. State Dep't of Labor, Op. Ltr., File No. RO-08-0119 (Feb. 24, 2009), (explaining that residential employee, of a nonprofit employer, need not be paid for seven hours per night of uninterrupted sleep but must be paid when she assists her roommates, as planned for one hour per evening).

[562] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-3.6.

[563] *See* N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.4.

consecutive. For these purposes, a meal break of one hour or less is not considered an interruption of consecutive work hours.[564] Thus, for example, a work schedule requiring the employee to be on duty from 8:00 A.M. to 10:00 A.M., and then again from 2:00 P.M. to 4:00 P.M., would represent a split shift. An employee working a split shift is entitled to "one hour's pay at the basic minimum wage . . . in addition to the minimum wage required" for that workday.[565]

Hospitality Industry Wage Order. No premium is required for split shifts in the restaurant and hotel industries. The premium applies only to other types of employees working split shifts.

Premium Pay for Spread of Hours

Miscellaneous Industries and Occupations Wage Order. Employees may also be entitled to a one-hour premium based on the *spread of hours* of their workday. *Spread of hours* refers simply to the entire "interval between the beginning and end of an employee's workday."[566] If an employee works a shift where the spread exceeds 10 hours, the employee must be paid an additional one hour of pay at the basic applicable minimum wage (which may not be their regular rate of pay).[567]

Importantly, the spread of hours includes time off for meals or other off-duty periods. Thus, for example, if an employee works from 10:00 A.M. until 2:00 P.M., and again from 4:00 P.M. to 9:00 P.M., that employee is entitled to the one-hour premium for two reasons: because the spread of their workday is more than 10 hours and because the employee worked a split shift. Only hour additional hour need be paid in this instance.[568]

The NYDOL has advised, however, that the one-hour premium need not be paid to all employees, depending on whether their earnings at their regular rate of pay (without the premium) satisfy the state minimum wage requirement (including the premium).[569] As one court explained:

> if an employee's total weekly compensation is equal to or greater than the total minimum wages due the employee for that workweek, including compensation for an additional hour for each day in which the 'spread of hours' exceeds 10, no additional payments are due the employee because the employee earns sufficiently more than the statutory minimum wage.[570]

Consistent with these interpretations, it appears that the spread of hours requirement, under the miscellaneous wage order, applies primarily to employees making the state-mandated minimum wage. A higher regular rate of pay that covers the premium, as a practical matter, would render the spread of hours premium moot.

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[564] N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.17.

[565] N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.4.

[566] N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.18.

[567] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 142-2.4, 146-1.6 (applying premium to restaurants and all-year hotels).

[568] *See, e.g.*, N.Y. State Dep't of Labor, Op. Ltr., File No. RO-10-0173 (Feb. 7, 2011).

[569] *See, e.g.*, N.Y. State Dep't of Labor, Op. Ltr., File No. RO-08-0086 (Aug. 26, 2009).

[570] *Jenkins v. HANAC, Inc.*, 493 F. Supp. 2d 556, 558 (E.D.N.Y. 2007); *see also Sosnowy v. A. Perri Farms Inc.*, 765 F. Supp. 2d 457, 473-74 (E.D.N.Y. 2011); *Almeida v. Aguinaga*, 500 F. Supp. 2d 366, 369-70 (S.D.N.Y. 2007); *Franklin v. Breton Int'l, Inc.*, 2006 WL 3591949, at **4-5 (S.D.N.Y. Dec. 11, 2006).

Hospitality Industry Wage Order. While the spread of hours premium applies to hospitality employees, it operates a little differently. The premium extends to workers in "restaurants and all-year hotels, regardless of a given employee's regular rate of pay."[571] The wage order therefore grants the premium to these workers, if the spread of hours exceeds 10, even if the employees' regular rate of pay would exceed the statutory minimum wage plus the hour premium. In short, hospitality workers are entitled to the premium even in situations where nonhospitality workers are not.

The calculation of the spread of hours again includes time off for meals or other off-duty periods. If a restaurant employee works from 10:00 A.M. until 2:00 P.M., and then is also scheduled for a shift from 4:00 P.M. to 9:00 P.M., that employee is entitled to the one-hour premium because the spread of their workday exceeds 10 hours.[572] The premium must be paid no matter how much the employee otherwise earns.[573]

Hospitality employees do not receive a premium for working a split shift, however. As a result, the hypothetical employee in the prior paragraph is not entitled to a premium because of their split shift.

3.5(b)(iv) *Travel Time*

Employees must be paid "for time spent in traveling to the extent that such traveling is part of the duties of the employee."[574] Thus, if an employee's duties require travel, and the employee is not fully relieved and free to engage in their own pursuits during that time, the travel time is compensable.[575]

3.5(c) *Local Predictive Scheduling Ordinances*

New York City has enacted a predictive scheduling ordinance covering retail and fast food employers, as briefly summarized here. Fast food employers, that is, employers at a fast food establishment that is one of 30 or more chain establishments nationally, must provide employees with a good faith estimate of the employee's schedule, as well as written work schedules. Fast food employers must pay employees an additional amount when the schedule changes. Additionally, fast food employers must provide a certain minimum time between shifts and offer additional shifts to current employees before hiring new fast food employees. Retail employers, that is, employers with 20 or more employees engaged primarily in the sale of consumer goods at one or more stores within New York City, must also provide employees with written work schedules and may not schedule retail employees for on-call shifts, with certain exceptions. Employers must grant an employee's request for a temporary change in work schedule related to a personal event two times per calendar year for up to one business day per request.[576]

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[571] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.6.

[572] N.Y. State Dep't of Labor, Op. Ltr., File No. RO-10-0173 (Feb. 7, 2011).

[573] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.6; *see also Martinez v. Hilton Hotels Corp.*, 930F. Supp. 2d508, 530-32 (S.D.N.Y. 2013) ("[N]on-exempt hotel workers are entitled to receive 'spread of hours' compensation regardless of their rate of pay.").

[574] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 142-2.1(b) (miscellaneous wage order), 142-3.1(b) and 143.7 (miscellaneous wage order and nonexempt nonprofits), and 146-3.6 (hospitality industry wage order).

[575] *See* N.Y. State Dep't of Labor, Op. Ltr., File No. RO-09-0023 (Mar. 10, 2009), (finding that a 30-minute window, in which employees concluded one shift and travelled to a second location to begin another shift, was compensable time).

[576] N.Y.C., N.Y., ADMIN. CODE §§ 20-1201 *et seq.*

Temporary Schedule Change Act. New York City requires all employers to grant an employee's request for a temporary change in work schedule related to a personal event two times per calendar year for up to one business day per request. An employer may permit the employee to use two business days for one request, in which case the employer need not grant a second request. Employers must also distribute materials about the law's requirements to employees.[577]

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks *minors*, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[578] Additional latitude is also granted where minors are employed by their parents.

Considerable penalties can be imposed for violation of the child labor requirements, and goods made in violation of the child labor provisions may be seized without compensation to the employer. Employers may protect themselves from unintentional violations of child labor provisions by maintaining an employment or age certificate indicating an acceptable age for the occupation and hours worked.[579] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.6(b) *State Guidelines on Child Labor*

3.6(b)(i) *State Restrictions on Type of Employment for Minors*

General Restrictions. New York has its own restrictions on the types of work that may be performed by minor employees.[580] These limitations vary somewhat by age and are summarized in Table 21.

Table 21. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Under Age 18	*Minors under age 18 may not work in or assist with:* • operation of freight/passenger elevators; • manufacturing, packaging, or storing of explosives; • operating or using abrasives (emery, Tripoli, rouge, corundum, stone, silicon carbide, etc.) where particles of metals or iridium are manufactured; • penal or correctional institutions; • adjusting belts to machinery, or oiling or wiping machinery; • packing paints, dry colors, red/white leads; • preparing any composition using dangerous or poisonous acids; • operating steam boilers;

577 N.Y.C., N.Y., ADMIN CODE §§ 20-1262, -1264.

578 29 C.F.R. §§ 570.36, 570.50.

579 29 C.F.R. § 570.6.

580 N.Y. LAB. LAW § 133 (listing the prohibited employment of minors). Additional information on the employment of minors is available at https://dol.ny.gov/employment-minors.

Table 21. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• construction (including wrecking, demolition, roofing, excavation, painting, or cleaning of exterior surfaces from an elevation); • jobs involving exposure to radioactive substances, ionizing radiation, or silica or other harmful dust; • logging and occupations using a saw, lath mill, shingle mill, or cooperate-stock mill; • mining or quarrying; • operating power-driven machinery (woodworking, bakery, metal-punching, etc.), or circular and band saws, or guillotine shears; • brick, tile, and kindred product manufacturing; • assisting with motor vehicles (including for transport or delivery of goods); • unclothed entertainment; • slaughterhouse, meatpacking facility, or rendering plant; • delivery work associated with warehousing and storage; or • occupations that endanger life or limb.
Under Age 16	*In addition to the above restricted occupations, minors under age 16 may not work in or assist with any of the following types of employment:* • painting or exterior cleaning in connection with maintenance of a building or structure; • factory work (with narrow exceptions, including, for example, for clerical work);[581] • "operation of washing, grinding, cutting, slicing, pressing or mixing machinery;"[582] or • within institutions in the department of mental hygiene (with exceptions for specified volunteer work).[583] Minors under 16 may work in "dry cleaning stores, tailor shops, shoe repair shops and similar service stores which clean, press, alter, repair or dye articles or goods belonging to the ultimate consumer."[584] Additionally, working minors must be supervised by an adult at all times while on the employer's premises.[585]
Under Age 14	Minors under 14 may not be employed in any capacity. Exceptions apply,

[581] *See* N.Y. LAB. LAW § 131. On the whole, minors may not work in a factory setting, except to: (1) pick up newspapers, if the designated pick-up location does not include dangerous machinery and does not permit access to such equipment; or (2) perform clerical work in the office of a factory, if the office is enclosed and apart from any manufacturing.

[582] N.Y. LAB. LAW § 133(1)(c).

[583] N.Y. LAB. LAW § 133(1)(d).

[584] N.Y. LAB. LAW § 131(4)(a)(2).

[585] N.Y. COMP. CODES R. & REGS. tit. 12, § 185.2.

Table 21. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	including, for example, modeling and performing, newspaper delivery, bridge caddying, and family farming.[586]

Restrictions on Selling or Serving Alcohol. In New York, minors under the age of 18 cannot work "as a hostess, waitress, waiter, or in any other capacity where the duties of such person require or permit such person to sell, dispense or handle alcoholic beverages."[587]

Minors can, however, work in other roles in establishments that sell alcohol as follows:

- handling or delivering beer and wine products for any person holding a grocery or drug store beer license;
- recording and receiving payment for beer and wine products for any person holding a grocery or drug store beer license—if under the direct supervision of an adult who is at least 18 years of age;
- handling containers that may have held alcoholic beverages, for any person holding a grocery or drug store beer license, for purposes of redemption under the environmental conservation laws, if necessary; or
- working as a dishwasher, busboy, or similar position, in which handling containers that may have held alcoholic beverages will be necessary, if under direct supervision of an adult who is legally old enough to purchase alcohol (21).

Minors under the age of 18 also cannot work for retailers as entertainers, on premises licensed for retail sales.[588] Entertainers under 18 may appear if:

- express parent consent is given, in writing;
- the appearance is for a special function or occasion;
- the appearance is approved by and sponsored by a primary or secondary school;
- the appearance takes place in the presence and under the direct supervision of a teacher of that school; and
- the appearance does not take place in a tavern.

These restrictions apply to all minor employees, ages 14 through 17.

Employers may hire minor employees (14 through 17 years of age) with physical disabilities, for occupations permitted by their work certificate or permit.[589] Employers may not employ such minor

[586] N.Y. LAB. LAW § 130(2) (listing exceptions and directing to other laws regulating certain employment).

[587] N.Y. LAB. LAW § 100(2)(a).

[588] N.Y. LAB. LAW § 100(2)(b).

[589] N.Y. LAB. LAW § 136.

employees for more than six months, however, starting from the date of issuance of their certificate or permit.[590] Permit requirements, in general, are discussed in **3.6(b)(iii)**.

3.6(b)(ii) *State Limits on Hours of Work for Minors*

Like many states, New York regulates the hours that minor employees may work, both during the school year and during school breaks. The acceptable hours (both length and timing) vary by age and are summarized below.

Minors Aged 16 & 17. While school is in session in New York, minors aged 16 and 17 cannot work:

- more than four hours on a day preceding a school day (other than a Sunday or holiday);
  - *Exception:* This rule does not apply to students in cooperative work experience programs. They may work up to six hours on a day preceding a school day if the employment is solely because of the program. Any hours these students work count towards their weekly allowed total.[591]
- more than eight hours on a Friday, Saturday, or Sunday, or on a holiday;
- more than 28 hours in a week;
- more than six days per week;
- between 10:00 P.M. and 6:00 A.M. on a day preceding a school day;
  - *Exception:* A minor may work until midnight on a day preceding a school day, if the employer receives: (1) written parental consent; and (2) a certificate from the minor's school asserting that the minor is in satisfactory academic standing;
- between 10:00 P.M. and 6:00 A.M. on a day preceding a nonschool day, unless the minor has written parental consent, in which case the minor may work until midnight, preceding a nonschool day.[592]

When school is out of session, minors aged 16 and 17 cannot work:

- more than eight hours a day;
  - *Exception:* A minor may work longer days, to make one or more shorter workdays or a holiday in a week. In that event, the minor may work up to 10 hours in one day, and nine hours on any of the other four days—but cannot work more than 48 hours in any week;
- more than 48 hours in a week;
- more than six days per week; and
- between midnight and 6:00 A.M.[593]

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[590] N.Y. LAB. LAW § 136.

[591] N.Y. LAB. LAW § 143(1)(a)(ii).

[592] N.Y. LAB. LAW § 143(1).

[593] N.Y. LAB. LAW § 143(2).

These out of school restrictions also apply to minors aged 16 and 17 who are not enrolled in daytime school when it is in session.

These rules concerning minors aged 16 and 17 do not apply to certain performance-related (*i.e.*, singers or performers in hotels or restaurants) or seasonal occupations (*i.e.*, employees in seasonal resorts, or mercantile establishment during the holiday period). Additional exceptions exist, including, by way of example, for writers/reporters in a newspaper office, aircraft maintenance trainees, or youth poll/election workers.[594]

Minors Aged 14 & 15. While school is in session, minors aged 14 and 15 cannot work:

- more than three hours on any school day;
- more than eight hours on any day when school is not in session (*i.e.*, weekends);
- more than 18 hours in a week;
- more than six days per week; and
- between 7:00 P.M. and 7:00 A.M.[595]
  - *Exception*: Slightly different rules apply for minors aged 14 and 15 who are enrolled in a supervised work study program. Those employees are subject to the same rules above, except they may work up to 23 hours per work (rather than only 18 hours).[596]

When school is out of session, minors aged 14 and 15 cannot work:

- more than eight hours a day;
- more than six days per week;
- more than 40 hours in a week; and
- between 7:00 P.M. and 7:00 A.M., but with two exceptions:
  - *Exception*: Minors may work until 9:00 P.M. in the evening between June 21 and Labor Day each year; and
  - *Exception*: This restriction does not apply to minors employed as junior counselors or counselors in training at a camp for children, during the months of June, July, and August.[597]

These rules concerning minors aged 14 and 15 do not apply to newspaper carriers, farm laborers, child performers or models, bridge caddies, or babysitters.[598]

[594] N.Y. LAB. LAW § 143(5).

[595] N.Y. LAB. LAW § 142(1).

[596] N.Y. LAB. LAW § 142(3).

[597] N.Y. LAB. LAW § 142(2).

[598] N.Y. LAB. LAW § 142(4).

3.6(b)(iii) *State Work Permit or Waiver Requirements*

In addition to managing the above-noted scheduling limitations, employers have additional duties—concerning permits and postings—if they elect to hire minor employees.

Minors under the 18 of age in New York may work only if they present a validly-issued employment certificate or permit.[599] A minor aged15, who is determined to be "incapable of profiting from further instruction" and who receives a special permit (in accordance with the education law), can be employed with fewer restrictions. In that event, the minor still may not work in, or in connection, with a factory.[600]

Before employment of any minor begins, the employer must file the minor's certificate or permit, so that it is readily accessible upon request.[601] When the minor's employment ends, the employer must also return the certificate to the employee.[602]

Furthermore, as mentioned in **3.1(a)(ii)**, employers must display certain notices if they employ minors. Specifically, employers must post a child labor law poster in the workplace and a schedule for all minors indicating the daily times for each shift as well as the designated meal breaks.[603] The failure to post notice is *prima facie* evidence of a violation.

3.6(b)(iv) *State Enforcement, Remedies & Penalties*

The child labor laws are enforced by the New York Department of Labor (NYDOL). Individuals do not have a private right of action for alleged violations of these laws.

The NYDOL is authorized to assess civil penalties for violations of the labor law, including child labor violations. Penalties are $1,000 for the first offense, $2,000 for a second offense, and $3,000 for a third or subsequent violation.[604]

Criminal penalties may also apply for knowing violations of the child labor laws. Punishment for a first conviction may include a fine up to $500 or imprisonment up to 60 days, or both. Additional offenses may result in a fine up to $5,000 or imprisonment up to one year, or both.[605]

3.7 Wage Payment Issues

3.7(a) *Federal Guidelines on Wage Payment*

There is no federal wage payment law. The FLSA covers minimum wage and overtime requirements, but would not generally be considered a "wage payment" law as the term is used in state law to define when and how wages must be paid.

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[599] N.Y. LAB. LAW §§ 131-32, 135; *see also* N.Y. COMP. CODES R. & REGS. tit. 12, § 185.2(b)(i).

[600] N.Y. LAB. LAW § 131(3)(e).

[601] N.Y. LAB. LAW § 135(1)(a).

[602] N.Y. LAB. LAW § 135(1)(b).

[603] N.Y. LAB. LAW § 144; N.Y. COMP. CODES R. & REGS. tit. 12, § 185.2. Factory employers can petition the Department of Labor for waiver of the schedule posting requirement, if "the nature of the work" makes it "practically impossible to fix the hours of work weekly in advance." N.Y. LAB. LAW § 144(4).

[604] N.Y. LAB. LAW § 141. Additional information is available at https://dol.ny.gov/employment-minorshttps.

[605] N.Y. LAB. LAW § 145.

3.7(a)(i) *Form of Payment Under Federal Law*

Authorized Instruments. Wages may be paid by cash, check, or facilities (*e.g.*, board or lodging).[606]

Direct Deposit. Neither the FLSA, nor its implementing regulations, address direct deposit of employee wages. The U.S. Department of Labor (DOL) has briefly considered the permissibility of direct deposit by stating:

> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's payroll deposit account, if it is at a place convenient to their employment and without charge to them.[607]

According to the Consumer Financial Protection Bureau (CFPB), an employer may require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the direct deposit. Alternatively, an employer may give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash.[608]

Payroll Debit Card. Employers may pay employees using payroll card accounts, so long as employees have the choice of receiving their wages by at least one other means.[609] The "prepaid rule" regulation defines a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[610]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll

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606 U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf; *see also* 29 C.F.R. § 531.32 (description of "other facilities").

607 U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c00.

608 Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.

609 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013) and Consumer Fin. Prot. Bureau, *Ask CFPB: Prepaid Cards, If my employer offers me a payroll card, do I have to accept it?* (Sept. 4, 2020), *available at* https://www.consumerfinance.gov/ask-cfpb/if-my-employer-offers-me-a-payroll-card-do-i-have-to-accept-it-en-407/.

610 12 C.F.R. § 1005.2(b)(3)(i)(A).

card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[611] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[612]

The CFPB provides numerous online resources regarding prepaid cards, including Frequently Asked Questions. Employers that use or plan to use payroll card accounts should consult these resources, in addition to the prepaid card regulation, and seek knowledgeable counsel.[613]

3.7(a)(ii) *Frequency of Payment Under Federal Law*

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[614]

3.7(a)(iii) *Final Payment Under Federal Law*

Federal law does not address when final wages must be paid to discharged employees or to employees who voluntarily quit. However, as noted in **3.7(a)(ii)**, wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned.

3.7(a)(iv) *Notification of Wage Payments & Wage Records Under Federal Law*

Federal law does not generally require employers to provide employees wage statements when wages are paid. However, federal law does require employers to furnish pay stubs to certain unique classifications of employees, including migrant farm workers.

Federal law does not address whether electronic delivery of earnings statements is permissible.

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611 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *Guide to the Short Form Disclosure* (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_guide-to-short-form-disclosure.pdf; *Prepaid Disclosures* (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

612 12 C.F.R. § 1005.18.

613 *See* Consumer Fin. Prot. Bureau, *Prepaid Cards*, *available at* https://www.consumerfinance.gov/ask-cfpb/category-prepaid-cards/ and *Prepaid Rule Small Entity Compliance Guide* (Apr. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

614 29 C.F.R. § 778.106; *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

3.7(a)(v) *Changing Regular Paydays or Pay Rate Under Federal Law*

There are no general notice requirements under federal law should an employer wish to change an employee's payday or wage rate. However, it is recommended that employees receive advance written notice before a change in regular paydays or pay rate occurs.

3.7(a)(vi) *Paying for Expenses Under Federal Law*

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[615] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[616] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[617] tools and equipment,[618] and business transportation and travel.[619] Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employer, the reimbursement cannot be included in the employee's regular rate.[620]

3.7(a)(vii) *Wage Deductions Under Federal Law*

Permissible Deductions. Under the FLSA, an employer can deduct:

- state and federal taxes, levies, and assessments (*e.g.*, income, Social Security, unemployment) from wages;[621]
- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[622]
- amounts as directed by an employee's voluntary assignment or order to pay an employee's creditor, donee, or other third party (the employer or agent cannot directly or indirectly profit or benefit from the transaction);[623]

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[615] *See* 29 U.S.C. §§ 203(m), 206; 29 C.F.R. §§ 531.2, 531.32(a), and 531.36(a); U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA)* (rev. July 2009).

[616] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[617] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[618] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.35; U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[619] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[620] 29 C.F.R. § 778.217.

[621] 29 C.F.R. § 531.38.

[622] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[623] 29 C.F.R. § 531.40.

- with an employee's authorization for:
  - the purchase of U.S. savings stamps or U.S. savings bonds;
  - union dues paid pursuant to a valid and lawful collective bargaining agreement;
  - payments to the employee's store accounts with merchants wholly independent of the employer;
  - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
  - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[624]
- the reasonable cost of providing employees board, lodging, or other facilities by including this cost as wages, if the employer customarily furnishes these facilities to employees;[625] or
- amounts for premiums the employer paid while maintaining benefits coverage for an employee during a leave of absence under the Family and Medical Leave Act if the employee fails to return from leave after leave is exhausted or expires, if the deductions do not otherwise violate applicable federal or state wage payment or other laws.[626]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[627]

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[628] Finally, if an employee is granted vacation pay before it accrues, with the understanding it constitutes an advance of pay, and the employee quits or is

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[624] 29 C.F.R. § 531.40.

[625] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[626] 29 C.F.R. § 825.213.

[627] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[628] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-19NA (Oct. 8, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

fired before the vacation is accrued, an employer can recoup the advanced vacation pay, even if this cuts into the minimum wage or overtime owed an employee.[629]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[630]

During overtime workweeks, deductions can be made on the same basis in overtime weeks as in non-overtime weeks if the amount deducted does not exceed the amount which could be deducted if the employee had not worked overtime during the workweek. Deductions that exceed this amount for articles that are not "facilities" are prohibited. There is no limit on the amount that can be deducted for qualifying deductions for "board, lodging, or other facilities." However, deductions made only in overtime weeks, or increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[631]

Prohibited Deductions. The FLSA prohibits an employer from making deductions for administrative or bookkeeping expenses incurred by an employer to the extent they cut into the minimum wage and overtime owed an employee.[632]

3.7(b) *State Guidelines on Wage Payment*

In New York, *wages* refers to "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis."[633] For some purposes, wages is also defined to include "benefits or wage supplements," such as: (1) reimbursement for expenses; (2) health, welfare, and retirement benefits; and (3) vacation, separation, or holiday pay.[634]

3.7(b)(i) *Form of Payment Under State Law*

New York has enacted laws and regulations governing how employers can pay their employees.

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[629] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-17NA (Oct. 6, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[630] 29 C.F.R. § 531.36.

[631] 29 C.F.R. § 531.37.

[632] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[633] N.Y. LAB. LAW § 190(1).

[634] N.Y. LAB. LAW §§ 190(1), 198-c. These supplements are not considered "wages" for purposes of section 191 (frequency of payments) or section 192 (cash payment of wages). N.Y. LAB. LAW § 190(1).

Authorized Instruments. Under the New York labor code, employers can pay their employees in cash or by check, or—if voluntarily allowed by the employee—by direct deposit or pay cards.[635]

Direct Deposit. Under New York law, employers cannot require nonexempt employees to accept wages by direct deposit. This limitation does not apply to individuals who qualify for the *bona fide* executive, administrative, or professional exemptions if they earn more than $1,300 per week. It also does not cover workers on farms that are not connected with a factory.[636]

For nonexempt employees, direct deposit of net wages in a bank or financial institution is permissible with the employee's prior written consent. Direct deposit must be made to a financial institution the employee selects. *Consent* is defined as "an express, advance, written authorization given voluntarily by the employee and only given following receipt by the employee of written notice of all terms and conditions of the method of payment. Consent may be withdrawn at any time, provided however, that the employer shall be given a reasonable period of time, but no longer than two full pay periods, to finalize such change."[637] An employer must maintain a copy of each employee's consent during the period of the employee's employment and for six years following the last payment of wages by direct deposit. A copy of the employee's written consent must be provided to the employee.[638]

The New York Department of Labor (NYDOL) has issued some guidance on appropriate consent. In particular, the NYDOL has indicated that:

- consent can be effectuated through a collective bargaining agreement that covers all represented employees;[639] and
- consent given before employment begins is invalid.[640]

An employer who offers one or more methods of payment of wages that require consent must obtain such consent in writing and: (1) must obtain the employee's informed consent without intimidation, coercion, or fear of adverse action for refusal to accept payment of wage by direct deposit; and, (2) may not make payment of wage by direct deposit a condition of hire or of continued employment. Moreover, employers must provide written notice to all employees who receive wages using a payment method other than cash or check, as follows. The notice must: describe, in "plain language" all of the employee's options for receiving wages (*i.e.*, by check, direct deposit, and/or debit card); expressly provide that the employer cannot compel the employee to accept wages by direct deposit or debit card; and, expressly inform the employee that he or she may not be charged any fees for services that are necessary for the employee to access the wages in full.[641]

The notice and consent forms must be presented to employees in English and in the employee's primary language (provided the NYDOL had issued a sample notice and consent form in that language). The

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635 N.Y. LAB. LAW § 192(1); N.Y. COMP. CODES R. & REGS. tit. 12, §§ 192-1.1, -2.1, -2.2, -2.3; *see also* N.Y. State Dep't of Labor, Op. Ltr., File No. RO-10-0028 (June 17, 2010), (discussing how checks must operate as a cash equivalent).

636 N.Y. LAB. LAW § 192(2).

637 N.Y. COMP. CODES R. & REGS. tit. 12, §§ 192-1.2, -2.2.

638 N.Y. COMP. CODES R. & REGS. tit. 12, § 192-2.2.

639 N.Y. State Dep't of Labor, Op. Ltr., File No. RO-07-0114 (Feb. 11, 2008).

640 N.Y. State Dep't of Labor, Op. Ltr., File Nos. RO-08-0001, 08-0045, 09-0022, 09-0086 (Oct. 29, 2009).

641 N.Y. COMP. CODES R. & REGS. tit. 12, § 192-1.3.

notices and consents may also be presented to the employee electronically, provided that the employee can view and print the notice and consent forms while the employee is at work and without cost, and the forms must inform the employee of her right to access and print the notice form.[642]

Payroll Debit Card. Employers may pay wages via payroll debit cards if certain requirements are met. In order to pay employees by debit card, an employer must:

1. provide notice of terms and conditions to the employee;
2. obtain written consent from the employee in the manner discussed below;
3. wait at least seven business days, even if the employer receives consent from the employee to issue wage payments by debit card, before allowing the consent to take effect;
4. provide local access to an automated teller machine that is located within a reasonable travel distance from the worksite or the employee's home and allows employees to make withdrawals at no cost;
5. provide at least one method to withdraw up to the total amount of wages for each pay period, or the balance remaining on the payroll debit card, without the employee incurring a fee;
6. ensure that the funds on the debit card never expire, although the card may be suspended for inactivity if the card issuer provides reasonable notice of the suspension and agrees to refund the remaining balance on the card within seven days of the suspension;
7. maintain a copy of the written consent for the duration of the employee's employment and for a period of six years following the cessation of the employment relationship; and
8. provide a copy of the written consent to the employee in the manner discussed below.[643]

When an employee is covered by a valid collective bargaining agreement that expressly provides the method or methods by which wages may be paid to employees, an employer must also have the approval of the union before paying by payroll card.[644]

Consent. The consent requirements for direct deposit (*i.e.*, written advance notice is given consistent with the above-noted three factors demonstrating voluntariness) also apply to payroll debit cards.[645] These requirements are discussed in the direct deposit section above. However, specific to payroll debit cards, consent must be received at least seven business days before issuing payment by payroll debit card.[646]

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[642] N.Y. COMP. CODES R. & REGS. tit. 12, § 192-1.3.

[643] N.Y. COMP. CODES R. & REGS. tit. 12, § 192-2.3.

[644] N.Y. COMP. CODES R. & REGS. tit. 12, § 192-2.3; *see also Reardon v. Global Cash Card and New York State Industrial Board of Appeals,* 2020 N.Y. Slip Op. 00187 (N.Y. App. Div. Jan. 9, 2020).

[645] N.Y. State Dep't of Labor, Op. Ltr., File Nos. RO-08-0001, 08-0045, 09-0022, 09-0086 (Oct. 29, 2009); N.Y. State Dep't of Labor, Op. Ltr., File No. RO-09-0158 (Jan. 15, 2010); *see also* N.Y. State Dep't of Labor, Op. Ltr., File No. RO-10-0018 (Oct. 6, 2010).

[646] N.Y. COMP. CODES R. & REGS. tit. 12, § 192-2.3.

Requirements for Notice and Consent Forms. Employees must be given full notice concerning all the terms and conditions applicable to the debit card option, including any fees.[647] This requirement is discussed in detail in the direct deposit section above as well. A model Notice and Consent for Payroll Debit Card is available online.

Notice of Change or Modification of Terms and Conditions. If there is any change or modification in the terms and conditions of the use of the payroll debit card, including any changes in the itemized list of fees, the employer is obligated to provide a notice of the change at least 30 days before any change takes effect. The notice must be written in plain language, in the employee's primary language or in a language the employee understands, and in at least 12-point font. If the issuer charges the employee any new or increased fee within 30 days of the date the employer has provided the employee with written notice of the change, the employer must reimburse the employee for the amount of that fee.[648]

Fees. An employer may not deliver payment of wages by payroll debit card unless the employee is provided with at least one method to withdraw up to the total amount of wages for each pay period or balance remaining on the payroll debit card without the employee incurring a fee. Moreover, the employee may not be charged any fees for services that are necessary for the employee to access his or her wages in full.[649]

Employers are prohibited from passing along to employees, directly or indirectly: application, initiation, loading, participation, or other action necessary to receive wages fees; a fee for point of sale transactions; an overdraft, shortage or low balance status fee; a fee for account inactivity; a maintenance fee; any charges for using telephonic or online customer service; charges for accessing balance or other account information through any means; fees for providing the employee with statements, transaction histories, or the card issuer's policies; charges for ordering replacement cards; fees for closing the account; costs associated with requests to issue payment of the balance on the debit card by check; declined transaction fees; or, any other fee not explicitly identified by type and dollar amount in the contract between the employer and issuer or in the terms and conditions of the payroll debit card provided to the employee. An employer is also prohibited from passing on any of its own costs associated with a payroll debit card account to an employee, and from receiving any kickback or other financial remuneration from the issuer, card sponsor, or any third party for delivering wages by payroll debit card.[650]

Other Provisions. Any restrictions, or encumbrances that limit or delay employee access to their full wages, violate the law.[651] An employer or its agent may not deliver payment of wages by payroll debit card account that is linked to any form of credit, including a loan against future pay or a cash advance on future pay.[652]

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[647] N.Y. State Dep't of Labor, Op. Ltr., File Nos. RO-08-0001, 08-0045, 09-0022, 09-0086 (Oct. 29, 2009); N.Y. State Dep't of Labor, Op. Ltr., File No. RO-09-0158 (Jan. 15, 2010); *see also* N.Y. State Dep't of Labor, Op. Ltr., File No. RO-10-0018 (Oct. 6, 2010).

[648] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 192-1.3, -2.3.

[649] N.Y. COMP. CODES R. & REGS. tit. 12, § 192-2.3.

[650] N.Y. COMP. CODES R. & REGS. tit. 12, § 192-2.3.

[651] N.Y. LAB. LAW § 191; N.Y. State Dep't of Labor, Op. Ltr., File Nos. RO-08-0001, 08-0045, 09-0022, 09-0086 (Oct. 29, 2009).

[652] N.Y. COMP. CODES R. & REGS. tit. 12, § 192-2.3.

3.7(b)(ii) *Frequency of Payment Under State Law*

New York law sets out the frequency with which an employee must be paid, which turns on whether an employee is classified as a manual worker, railroad worker, commission salesperson or "clerk and other" worker.[653] The law prohibits employers from requiring employees, as a condition of employment, to accept payment of wages at periods longer than those imposed by the law.

Manual workers include mechanics, "workingmen," and laborers.[654] Employers are required to pay these workers weekly, and not later than seven calendar days after the end of the week in which the wages are earned.[655] Excluded from this requirement are nonprofit organizations and certain large employers that have received authorization from the NYDOL. If approved, these employers are instead required to pay manual workers according to the agreed terms of employment, but not less frequently than semi-monthly.[656]

Generally speaking, railroad workers must be paid on or before Thursday of each week, for the wages earned during the seven-day period ending on Tuesday of the preceding week.[657]

Commissioned salespeople must be paid according to the terms of their employment agreements—and, in any event, no less than once a month and not later than the last day of the month following the month in which the wages were earned.[658] If, however, the "monthly or more frequent payment of wages, salary, drawing accounts or commissions are substantial, then additional compensation earned" (*i.e.*, bonuses) may be paid less often than once a month, "but in no event later than the time provided in the employment agreement or compensation plan."[659] Relatedly, the NYDOL takes the position that only commissions must be paid monthly; if an employee receives a salary plus commissions, the salary must be paid semi-monthly.

The rule applicable to clerical and other workers covers all other (and most) employees—except those who are exempt as *bona fide* executive, administrative, or professional personnel making more than $1,300 a week.[660] Clerical and other workers must be paid semi-monthly, on regular paydays designated by the employer.[661]

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[653] N.Y. LAB. LAW § 191.

[654] N.Y. LAB. LAW § 190(4).

[655] N.Y. LAB. LAW § 191(1)(a).

[656] N.Y. LAB. LAW § 191(1)(a).

[657] N.Y. LAB. LAW § 191(1)(b). At the written request of an employee, railroad corporations, with certain exceptions must mail every check for wages by first-class U.S. mail. N.Y. LAB. LAW § 191(1)(b).

[658] N.Y. LAB. LAW § 191(1)(c). For these purposes, the statute defines such *salespeople* as "any employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article or thing and whose earnings are based in whole or in part on commissions." N.Y. LAB. LAW § 190(6). This term does not include any "an employee whose principal activity is of a supervisory, managerial, executive or administrative nature." N.Y. LAB. LAW § 190(6).

[659] N.Y. LAB. LAW § 191(1)(c).

[660] N.Y. LAB. LAW § 190(7).

[661] N.Y. LAB. LAW § 191(1)(d).

3.7(b)(iii) *Final Payment Under State Law*

New York law addresses when employers must pay employees who are leaving their employment. On the whole—whether by termination or voluntary resignation—employees must be paid no later than the regular payday for the pay period in which they separate from employment. If requested by the employee, the payment must be mailed.[662]

Commissioned salespeople, however, must be paid in accordance with their employment agreements. Those agreements must be written and signed by both parties. In the event of a dispute about the terms, and if the employer fails to provide a written agreement upon request of the NYDOL, the NYDOL will defer to the salesperson's description of the agreed-upon terms.[663]

3.7(b)(iv) *Notification of Wage Payments & Wage Records Under State Law*

Every New York employer must provide employees with pay stubs, with every payment of wages.[664]

Pursuant to the state labor laws, including the Wage Theft Prevention Act, all paystubs must include the following information:

- gross wages;
- deductions;
- net wages;
- dates of work covered by the payment;
- employee's name;
- employer's name;
- employer's address and telephone number;
- rate(s) of pay and basis thereof (*i.e.*, hourly, shift, daily, weekly, salary, piece, commission, etc.);
- allowances claimed as part of the minimum wage; and
- upon request of the employee, an explanation of how wages were calculated.

For nonexempt employees, wage statements must also include:

- regular hourly rate(s) of pay;
- overtime rate(s) of pay;
- number of regular hours worked;
- number of overtime hours worked;
- for employees paid on a piece rate, the applicable piece rate or rates of pay and the number of pieces completed at the piece rate; and

662 N.Y. LAB. LAW § 191(3).

663 N.Y. LAB. LAW § 191(1)(c).

664 N.Y. LAB. LAW § 195(3).

- the benefit portion of the minimum rate of home care aide total compensation as defined in the public health law.[665]

For commissioned salespeople, employers must also provide, upon written request, a statement of earnings paid, or due and unpaid.[666]

The law requires an employer to furnish each employee a wage statement each pay period, but it does not specify what form it must take.

Per the NYDOL, an employer must either: (1) give employees the option of paper or electronic wage statements; or (2) require that electronic statements be provided, while providing employees the ability to view and print statements at work, for free.[667]

Public Work Contracts. For public works contracts, certain information must be provided to every laborer, worker, or mechanic. The wage statement to employees must also include the prevailing wage supplements, if any, claimed as part of any prevailing wage or similar requirement. For each type of supplement claimed, the notice must identify the following:

- the hourly rate claimed;
- the type of supplement, including when applicable, but not limited to, pension or healthcare, or, any home care benefits provided;
- the names and addresses of the person or entity providing such supplement; and
- the agreement, if any, requiring or providing for such supplement, together with information on how copies of such agreements or summaries can be obtained.[668]

3.7(b)(v) *Wage Transparency*

New York's equal pay statute, discussed in more detail in **3.11(b)(ii)**, includes a wage transparency provision. In New York, no employer may prohibit employees from "inquiring about, discussing, or disclosing" their wages.[669] Employees are not obligated to disclose their wages, but they cannot be banned from doing so.[670]

Employers may implement written policies that establish reasonable workplace and workday limitations on the time, place, and manner for discussion about wages, however, including prohibiting an employee from disclosing the wages of another employee without their permission.[671] Those policies must be consistent with all state and federal laws, including the National Labor Relations Act. Any "limitations must be justified without reference to the content of the regulated speech, narrowly tailored to serve a significant interest, and leave open ample alternative channels for the communication of

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[665] N.Y. LAB. LAW §§ 191, 195.

[666] N.Y. LAB. LAW §§ 191, 195.

[667] N.Y. State Dep't of Labor, Op. Ltr., File No. RO-10-0018 (Oct. 6, 2010).

[668] N.Y. LAB. LAW §§ 195; 220.

[669] N.Y. LAB. LAW § 194(4)(a); *see also* N.Y. COMP. CODES R. & REGS. tit. 12, §§ 194-1.1 *et seq*.

[670] N.Y. LAB. LAW § 194(4)(c).

[671] N.Y. LAB. LAW § 194(4)(b). Such permission may be granted verbally or in writing, and may be granted directly or indirectly. N.Y. COMP. CODES R. & REGS. tit. 12, § 194-1.3.

information."[672] The regulations explain that employer-imposed restrictions cannot "unreasonably or effectively preclude[] or prevent[] inquiry, discussion, or disclosure of wages at the worksite and/or during work hours, directly or in practice."[673] If an employer establishes a reasonable policy regulating wage disclosures, and disciplines an employee for violating it, the employer is entitled to an affirmative defense to any claim by the employee for violation of the transparency provision, so long as the adverse action is taken for failure to adhere to the policy (and not the wage disclosure itself).[674] The transparency provision, moreover, does not apply with the same force to employees who access wage information as part of their essential job functions.[675]

Employees must be notified of any such written policy, either electronically, through a workplace posting, or by paper copy. Employers cannot avail themselves of the affirmative defense if they do not disclose the policy to employees as required. Employers must retain copies of their policies while applicable and for six years thereafter.[676]

3.7(b)(vi) *Changing Regular Paydays or Pay Rate Under State Law*

General Notice Requirements. New York's Wage Theft Protection Act requires employers to provide advance written notice to employees if there are changes concerning pay as initially reflected in the notices received when their employment began (discussed in **2.1(b)**, Table 3). Notice is triggered, for example, if there is a change in pay rate, payday, basis of pay rate, allowances affecting the minimum wage (*i.e.*, tip credits), or changes to the employer's name or contact information.[677] Notices must be given to both exempt and nonexempt employees.

According to the NYDOL, for many employees, notice is required for a decrease in pay, but notice of an increase in pay rate is not necessary so long as the information appears on the next pay stub.[678] This NYDOL interpretation does not apply in the hospitality industry, as discussed below. Notices of such changes must be delivered at least seven calendar days before the changes take effect.

As with the original notice, the notice of the change must be in English and, where appropriate, the primary language spoken by the employee. Templates in certain languages (English, Spanish, Chinese, Korean, Creole, Polish, and Russian) are available from the NYDOL.[679] Notice can be provided electronically, as long as the employer provides a system for the employees to acknowledge receipt and print a copy of the notice.[680] Employers bear the burden of proving compliance with the notice requirements.

Additional Notice Requirements Specific to Pay Rates. There are a few additional rules concerning changes to pay rates, which are specific to certain types of employees. For nonexempt employees, for

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[672] N.Y. COMP. CODES R. & REGS. tit. 12, § 194-1.3.

[673] N.Y. COMP. CODES R. & REGS. tit. 12, § 194-1.3.

[674] N.Y. LAB. LAW § 194(4)(c).

[675] N.Y. LAB. LAW § 194(4)(d).

[676] N.Y. COMP. CODES R. & REGS. tit. 12, § 194-1.3.

[677] N.Y. LAB. LAW § 195(2). *Wage Theft FAQs*.

[678] New York Dep't of Labor, *Wage Theft FAQs*.

[679] New York Dep't of Labor, *Wage Theft FAQs*. More information is available at https://dol.ny.gov/notice-pay-rate. *See also* N.Y. COMP. CODES R. & REGS. tit. 12, § 146-2.2(d) (providing English template).

[680] New York Dep't of Labor, *Wage Theft FAQs*.

example, the notice must include the employees' regular and overtime rates of pay. Employees with multiple pay rates receive notices that identify each of those rates.

Employees who are compensated with bonus or incentive plans are not necessarily entitled to another notice if: (1) the employee initially received a description of the plan; or (2) the payment is clearly shown on the applicable pay stub.

Workers in the hospitality industry must receive written notice every time a wage rate changes, whether it is increased or decreased. Such changes include any alteration in regular or overtime rates, tip credits, and any extra pay required if tips are insufficient to bring the employee up to the basic minimum hourly rate.[681]

Unionized employees must also receive individualized notices concerning applicable wage rates that confirm with New York law—even if a collective bargaining agreement includes information about rates for multiple titles.[682]

Commissioned salespeople must execute a commission agreement. Changes to the agreement or related changes would also require a notice attached to any updated agreement. Employers must keep copies of both documents.[683]

3.7(b)(vii) *Paying for Expenses Under State Law*

At times, employees incur expenses by virtue of their employment. New York provides that some of these expenses cannot be borne by the employee. This section briefly discusses the main types of expenses that must be reimbursed by employers.

General Indemnification Obligation. Under New York law, expenses that employees incur in carrying out their duties cannot bring their wages under the minimum wage.[684] Relatedly, an employer that agrees to pay or provide "benefits or wage supplements" to employees, and that fails to do so within 30 days after the payment is required, is guilty of a misdemeanor. *Benefits or wage supplements* is expressly defined to include expense reimbursements, along with health benefits and holiday pay.[685]

Tools & Equipment. New York does not have a generally applicable law governing expenses for tools and equipment. In the building service industry, however, an employer cannot take any allowance for tools and supplies that are necessary to maintain buildings. If an employee pays for tools or supplies up front, the employee must be reimbursed no later than the next payday.[686]

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[681] N.Y. COMP. CODES & REGS. tit. 12, § 146-2.2.

[682] New York Dep't of Labor, *Wage Theft FAQs*.

[683] N.Y. LAB. LAW § 191-b (governing contracts with sales representatives to solicit wholesale orders).

[684] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 142-2.10(b) (miscellaneous workers), 146-2.7(c) (hospitality industry employees).

[685] N.Y. LAB. LAW § 198-c. This provision does not apply to employees who are exempt as *bona fide* executive, administrative, or professional personnel.

[686] N.Y. COMP. CODES R. & REGS. tit. 12, § 141-1.9.

Uniforms. The term *wages* in New York typically includes allowances for tips, meals, lodging, and apparel.[687] There are different rules addressing required apparel expenses under different wage orders.

Required uniforms are defined as "clothing worn by an employee, at the request of the employer, while performing job-related duties or to comply with any State, city or local law, rule or regulation."[688] This definition does not cover clothing that may be worn as part of an ordinary wardrobe, including, for example, a short-sleeved polo of a particular color scheme (chosen by an employer) that lacks a company logo.[689]

Uniform Purchase & Maintenance: NonHospitality Workers. Under the regulations applicable to miscellaneous employees, all nonprofits, and building service workers, an employer cannot take any allowance for supplying, maintaining, or laundering required uniforms.[690] If an employee purchases a required uniform, the employee must be reimbursed no later than the next payday.

Moreover, under the wage orders applicable to miscellaneous employees, nonexempt nonprofits (*i.e.*, those subject to minimum wage orders), and building service workers, if "an employer fails to launder or maintain required uniforms for any employee," it must pay the employee a set amount—in addition to regular wages—to cover the employee's costs.[691] That amount depends on several factors, including: (1) where the employee works; and (2) how many hours per week the employee works.[692] Employees working more than 30 hours weekly receive the *High* uniform maintenance rate, while employees working between 20 and 30 hours receive a reduced *Medium* rate, and employees working less than 20 hours per week receive the least amount, a *Low* rate. Tables 22 and 23 summarize the applicable uniform maintenance pay and scheduled increases (if applicable), both inside and outside New York City.

Table 22. Uniform Maintenance Rates: New York City

Effective Date	New York City
1/1/24	High — $19.90 Medium — $15.75 Low — $9.50

Table 23. Uniform Maintenance Rates: Outside New York City

Effective Date	Nassau, Suffolk, and Westchester Counties	Remainder of State
1/1/24	High — $19.90	High — $18.65

[687] N.Y. LAB. LAW § 651. See **3.3(b)(ii)** for a discussion of tip, meal, and lodging credits.

[688] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 142-2.22, 142-3.19, and 141-3.11.

[689] N.Y. State Dep't of Labor, Op. Ltr., File No. RO-07-0100 (Oct. 1, 2007); *see also* N.Y. State Dep't of Labor, Op. Ltr., File No. RO-07-0132 (Feb. 6, 2008).

[690] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 141-1.8, 142-2.5(c), 142-3.5(c), 143.2, and 143.8.

[691] The regulations governing exempt nonprofits (*i.e.*, those that have certified that they will pay the minimum wage and thus are exempt from a wage order) do not provide for uniform maintenance pay.

[692] N.Y. COMP. CODES R. & REGS. tit. 12, §§ 141-1.8, 142-2.5(c), and 142-3.5(c).

Table 23. Uniform Maintenance Rates: Outside New York City		
	Medium — $15.75 Low — $9.50	Medium — $14.80 Low — $8.95
1/1/25	High — $20.50 Medium — $16.25 Low — $9.80	High — $19.25 Medium — $15.30 Low — $9.25
1/1/26	High — $21.10 Medium — $16.75 Low — $10.10	High — $19.85 Medium — $15.80 Low — $9.55

Uniform Purchase & Maintenance: Hospitality Workers. The same principles apply in the hospitality industry, with some additional guidance. Hospitality workers, too, must be reimbursed, on or by the next regular payday, if they purchase required uniforms out of pocket. Employers cannot skirt this obligation by asking incoming employees to purchase uniforms before they start working.[693] If a uniform is provided free of charge, or if an employer pays for the employee to buy enough uniforms to cover an average workweek, the employer does not have to reimburse an employee who elects to buy additional uniforms, beyond the number needed.[694] These rules apply to all workers, no matter their regular rate of pay.[695]

Special rules also apply to hospitality workers for maintenance (washing, ironing, dry cleaning, altering, repairing) of their uniforms. As with other employers, if a hospitality employer does not maintain the uniforms, it must pay the employee a set amount—in addition to regular wages—to cover the employee's costs. The uniform maintenance pay for hospitality workers is the same as for other employees and is reflected in Tables 23 and 24.[696]

Nonetheless, a hospitality employer is not required to pay for maintaining uniforms if the uniforms: (1) "are made of 'wash and wear materials;'" (2) can be routinely laundered with other personal clothing; (3) "do not require ironing, dry cleaning, daily washing, commercial laundering, or other special treatment;" and (4) are provided to the employee (either directly or through reimbursement) in sufficient number to cover the employee's average workweek.[697]

There is another exception in the hospitality industry, applicable to employers that provide a laundry service. Such employers need not pay for uniform maintenance if they: (1) launder uniforms regularly and free of charge; (2) ensure the "availability of an adequate supply of clean, properly-fitting uniforms;" and (3) "inform employees individually in writing" about the free laundry service.[698]

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693 N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.8(a).

694 N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.8(b).

695 N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.8(c).

696 N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.7. This maintenance pay cannot be offset by other credits, *i.e.*, for meals or lodging. N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.7(d).

697 N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.7(b).

698 N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.7(c).

3.7(b)(viii) *Wage Deductions Under State Law*

New York law[699] prohibits employers from making any deductions from employee wages, except those that are:

1. authorized by law or governmental regulation;
2. voluntary, expressly authorized in writing by the employee and made for the employee's benefit, which the legislature has limited to: (a) insurance premiums and prepaid legal plans; (b) pension or health and welfare benefits; (c) contributions to charitable organizations; (d) purchases at certain charitable events; (e) payments for U.S. bonds; (f) payments for dues or assessments to a labor organization; (g) discounted parking or mass transit passes, fare cards, or vouchers; (h) fitness, health club, or gym membership dues; (i) cafeteria, vending machine, and pharmacy purchases at the employer's premises, as well as purchases at gift shops operated by the employer if the employer is a hospital, college, or university; (j) tuition, room, board, and fees for pre-school, nursery, primary, secondary, and/or post-secondary educational institutions; (k) day care, before-school, and after-school care expenses; (l) payments for housing provided at market rates by nonprofit hospitals or their affiliates; and/or (m) similar payments for the employee's benefit;[700]
3. related to recovery of an overpayment of wages that was due to the employer's mathematical or clerical error; or
4. for repayment of advances of salary or wages.[701]

New York also regulates specific issues related to such deductions, including, for example, requirements for valid employee authorization, monetary limitations, and treatment of loans and overpayments. These points are briefly summarized below.

Employers should also bear in mind that some of these provisions, included within New York Labor Law section 193, were scheduled to expire on November 6, 2018, a again in November 2020, and once again on November 6, 2024, but have since been renewed until November 6, 2026. Employers with questions about how these deductions operate, and what provisions remain effective, are advised to consult counsel.

Requirements for Deductions. Deductions may be authorized either through a collective bargaining agreement (with the employee's representative) or by a written agreement between the employer and employee. The authorization must be "express, written, voluntary, and informed."[702] An authorization is considered *informed* if the employee receives written notice—prior to authorization and prior to any deduction—of "all terms and conditions of the deduction, its benefit and the details of the manner in which deductions shall be made."[703] Notice must also be given prior to any change in the amount of the deduction or a "substantial change in the manner in which" deductions occur.[704] The employer must

[699] New York Labor Law section 193 is set to expire on November 6, 2026, unless renewed.

[700] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-4.4.

[701] N.Y. LAB. LAW § 193(1)(a)-(d).

[702] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-4.2(a).

[703] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-4.2(a).

[704] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-4.2(a). *Substantial change* means any increase in the amount of the deduction or a reduction in the benefit for which the deduction is made.

grant the employee an unpaid opportunity to review these materials. One authorization may cover multiple deductions, as long as all the necessary information is conveyed.

For deductions that may vary in amount (*i.e.*, cafeteria or gift shop purchases), the notice may account for deductions in a range by including the highest and lowest amount of potential deductions. Thereafter, any deduction made within that range does not require additional notice and authorization.[705]

Authorizations must be retained by employers during employment and for six years after employment ends.[706] Employees may revoke authorizations, in writing at any time, except for authorizations included in collective bargaining agreements. Upon receipt of a revocation, an employer must cease the deduction as soon as practicable, and no later than four pay periods or eight weeks after the authorization was withdrawn, whichever is sooner.[707]

Monetary Limitations on Deductions. When deductions are permitted, New York law regulates how large a deduction may be per pay period.[708] Limitations apply for deductions stemming from:

1. purchases made at events sponsored by a bona fide charitable organization affiliated with the employer where at least 20% of the profits from such event are being donated;
2. cafeteria and vending machine purchases made at the employer's place of business, and purchases made at gift shops operated by the employer, where the employer is a hospital, college, or university;
3. pharmacy purchases made at the employer's place of business; and
4. deductions that qualify as "similar payments for the benefit of the employee."[709]

The total aggregate amount of these deductions for each pay period is subject to limitations set both by the employer and the employee. The rules governing these restrictions are:

- The aggregate amount of the deductions cannot exceed a maximum set by the employer for each pay period.
- The aggregate amount cannot exceed a maximum set by the employee, which can be for any amount (in $10 increments) but cannot exceed the maximum set by the employer.
- The employer cannot permit the employee to make any purchases, for these categories of deductions, that would exceed the employee' maximum or, if the employee did not set an outer limit, that would exceed the employer's maximum.
- The employee must have free access, at the workplace, to current account information showing their expenditures and the running total of deductions applicable to the next pay period.[710]

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[705] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-4.2(b).

[706] N.Y. LAB. LAW § 193(1)(b).

[707] N.Y. LAB. LAW § 193.

[708] N.Y. LAB. LAW § 193.

[709] N.Y. LAB. LAW § 193.

[710] N.Y. LAB. LAW § 193.

Advances. Employers that have advanced wages to their employees may recoup the payments through future wage deductions.[711] New York has set forth a process specific to those deductions, however, which must be followed.

First and foremost, before any advance is given, employers and employees must enter into a written authorization. This authorization must address: (1) the amount to be advanced; (2) the amount of the deductions needed for repayment, both in total and per wage payment; and (3) the dates when each deduction will occur.[712] The agreement thus sets out the timing and duration of repayment. The employer may recover the advance by deductions on each payday, but not more frequently.[713] The authorization may allow complete recovery of any unpaid balance in the final payment of a separating employee.[714]

The authorization must also explain to the employee that the employee may contest any deduction that does not conform to the authorization. Indeed, the employer must establish a procedure by which the employee can challenge the amount and frequency of deductions that do not comply with the parties' written authorization. An employer issuing an advance must give the employee written notice of this procedure. The procedure must allow an employee's written objection, require a written explanation from the employer, and halt deductions until any necessary adjustments are made.[715]

An employee may revoke the authorization, but only prior to the advance. Once the advance takes place, "no further advance may be given or deducted until any existing advance has been repaid in full."[716]

All authorizations, notices, replies, etc. may be provided electronically but they must use ordinary language and must be written in at least 12-point font. Authorizations must be retained by the employer for at least six years after an employee's termination.[717]

Negative Vacation Balance. A negative vacation balance arises when an employee takes paid vacation before the employee has accrued the time off. New York has not enacted any express provision concerning payroll deductions to recoup an employee's unpaid vacation balance.

Because New York wage law generally considers vacation pay as *wages*, it is arguable that the provisions governing the recovery of advances (discussed above) also apply to recovery for negative vacation balances. (Even so, note that this interpretation of the term *wages* does not apply to *bona fide* exempt

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[711] An *advance* is defined as "provision of money by the employer to the employee based on the anticipation of the earning of future wages." N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.2. It does not include, however, payments accompanied by interest or fees.

[712] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.2.

[713] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.2(b). The parties can also agree to repayment of the advance through a separate transaction. N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.2(c).

[714] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.2(d).

[715] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.2(f)–(h) (setting out requirements for this process).

[716] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.2(a).

[717] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.3.

employees.)[718] Because this is an open question, an employer considering deducting wages to eliminate a negative vacation balance should consult with counsel before doing so.

Overpayments. New York authorizes employers to recoup certain overpayments made to employees, subject to temporal and procedural restrictions.[719] Wage deductions are permitted for overpayments "due to a mathematical or other clerical error by the employer."[720]

As for timing, employers can recover overpayments only if they were erroneously made in the eight weeks prior to the employer issuing notice to the employee of the overpayment and need for repayment. In other words, the employer has eight weeks to catch its mistake and notify affected employees. The employer then may take up to six years to recoup the full amount of the overpayment.[721]

If it intends to deduct wages to satisfy overpayments, an employer must provide written notice to an employee informing the employee of the plan to commence deductions. The notice must indicate: (1) the amount overpaid in total and per pay period; (2) the total amount to be deducted; and (3) the date for each deduction along with the amount for that date. The timing of the notice depends on how quickly the overpayment can be recouped. If the entire overpayment can be recovered in the next wage payment, notice must be given at least three days prior to payday. If not, notice shall be given three weeks in advance of any deductions.[722]

The authorization must also explain to the employee that the employee may dispute the overpayment and terms of recovery. The employee may also request a delay in the deductions. Under the applicable regulations, the employee has one week from the receipt of notice to contest the deductions. The employer must then respond within one week, offer in writing to meet with the employee thereafter, and provide the employee with a final written determination following any such meeting.[723] If employees submit any dispute, the employer may not begin taking any deductions until at least three weeks after it has issued a final determination. Additional details are found in the regulations.[724]

Overpayments can be recovered through deductions or in separate transactions, as long as the same rules governing repayments are followed.[725] If an employer elects to recoup overpayments by wage deductions, the deductions can occur no more frequently than once per pay period.[726]

Deductions must comply with any final determination. Additionally, if the entire overpayment can be recovered in the next single pay period (*i.e.*, the amount is equal to or less than the net wages earned),

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[718] *See* N.Y. LAB. LAW § 198-c (defining *wage supplements* to include "vacation, separation or holiday pay" but excluding *bona fide* exempt employees earning more than $1,300 a week from the section).

[719] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.1.

[720] N.Y. LAB. LAW § 193; N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.1.

[721] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.1(a).

[722] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.1(e).

[723] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.1(f) (setting out details and timing for the entire dispute resolution process).

[724] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.1(g).

[725] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.1(c).

[726] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.1(b).

the employer can recover that full amount from the next paycheck. If, however, the overpayment exceeds net wages earned in the next pay period, the deductions may not: (1) exceed 12.5% of the gross wages earned per paycheck; or (2) reduce the effectively hourly wage below the New York minimum hourly wage.[727]

All authorizations, notices, replies, etc. may be provided electronically but they must use ordinary language and must be written in at least 12-point font. Authorizations must be retained by the employer for at least six years after an employee's termination.[728]

Prohibited Deductions. The NYDOL has identified specific types of deductions that are not permissible, because they are not similar to those authorized by law. These prohibited deductions include:

- repayments of loans, advances, and overpayments that do not comply with wage deduction regulations;
- employee purchases of tools, equipment, and attire required for work;
- recoupment of unauthorized expenses;
- repayment of employer losses, including those for spoilage and breakage, cash shortages, and fines and penalties the employer incurred via the employee's conduct;
- fines or penalties for tardiness, excessive leave, misconduct, quitting without notice;
- contributions to political action committees, campaigns, and similar payments; and
- fees, interest, or the employer's administrative costs.[729]

New York also bans deductions that are merely for convenience of the employee, because "[c]onvenience is not a benefit."[730] The NYDOL provides this example: "an employer who offers to cash an employee's paycheck may not deduct a fee for providing that service because the convenience of having the paycheck cashed by the employer does not provide any benefit to the employee, but only ease in cashing his or her paycheck."[731]

The miscellaneous wage order explicitly provides identical restrictions. Under that order, an employer cannot deduct the following from employee wages:

- spoilage or breakage;
- cash shortages or losses; or
- fines or penalties for lateness, misconduct, or quitting without notice.[732]

The Hospitality Industry Wage Order includes similar prohibitions, precluding deductions for:

- spoilage or breakage;

[727] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.1(d).

[728] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-5.3.

[729] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-4.5.

[730] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-4.3(b).

[731] N.Y. COMP. CODES R. & REGS. tit. 12, § 195-4.3(b).

[732] N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.10(a).

- cash shortages or losses;
- fines or penalties for lateness, misconduct, or quitting without notice; or
- nonpayment by a customer.[733]

3.7(b)(ix) *Local Retirement Savings Programs*

Savings Access New York – Board and Program for Private Sector Employee Retirement Savings. New York City established a state-facilitated IRA retirement savings program (Program) to be created by a retirement savings board (Board) for private-sector workers by a date to be determined by the Board. The Program must include the following elements:

- contributions to an IRA established under the Program through payroll deduction or other method established by the Board;
- application to all participating employers;
- requirement of all participating employers to offer covered employees the opportunity to contribute to accounts established by the Program through payroll deduction or any other method of contribution established Board;
- automatic enrollment of covered employees and allowance of employee to opt out;
- a five percent default contribution rate;
- that contribution rates may be changed and the Program must allow lump-sum contributions;
- a process for withdrawals;
- confidentiality measures; and
- that employers may not contribute to the accounts and not cause it to be considered a benefit plan under ERISA.

The mandatory auto-enrollment payroll deduction IRA program applies to employers that employ no fewer than five employees whose regular duties occur in the city, has employed no fewer than five such employees without interruption for the previous calendar year, has been in continuous operation for at least two years, and has not offered or maintained the preceding two years a retirement plan.[734]

3.7(b)(x) *Wage Assignments & Wage Garnishments*

Wage assignment is the procedure of taking money directly from an employee's compensation under the authority of a court order in order to pay a debt obligation. Wage garnishment occurs when an employer is required to withhold the earnings of an individual for the payment of a debt in accordance with a court order or other legal or equitable procedure.

New York's wage garnishment laws require an employer to notify the garnishment issuer promptly when the debtor-employee's employment ends, and provide the individual's last address and new employer's name and address, if known.[735] The employer also must notify the garnishment issuer when

[733] N.Y. COMP. CODES R. & REGS. tit. 12, § 146-2.7(a).

[734] N.Y.C. ADMIN. CODE § 20-1401.

[735] N.Y. C.P.L.R. § 5241(c)(1)(ix).

the individual no longer receives income, and provide the individual's last address and new employer's name and address, if known.[736] Employers or income payors also must make and remit payment to: (1) the state disbursement unit, if deductions are for child or combined child and spousal support; or (2) the creditor, if deductions are only for spousal support.[737] Additionally, payment must be remitted within seven business days of the date the debtor-employee is paid.[738]

An employer may be liable to the employee's creditor for failing to comply with a wage garnishment order. Wage garnishment orders generally cease when the employee resigns or is dismissed unless the employee was reinstated or reemployed within 90 days.

In addition, employers may not discharge, lay off, discipline, or refuse to hire an employee because of one or more wage assignments or income executions served upon that employer or any former employer.[739]

3.7(b)(xi) *State Enforcement, Remedies & Penalties*

An employee who believes they were not properly paid may file a claim with the NYDOL or may initiate a civil action.[740] Employees may also register complaints, or file lawsuits, based on alleged discrimination or retaliation due to wage claim activity. Under New York law, an employer may not discharge, threaten, penalize, or otherwise discriminate or retaliate against employees for complaining to the NYDOL, assisting in an investigation, or the like.[741]

Upon finding violations of certain state wage and hour laws, the Commissioner of Labor may order employers to pay wages, liquidated damages up to an amount equal to those wages, and penalties, depending on the nature of the violation.[742]

If an employee brings a civil suit, the employee may recover their unpaid wages, plus liquidated damages in an amount equal to those wages, plus costs, attorneys' fees, and interest.[743] An employer may avoid liquidated damages by proving it had "a good faith basis" for believing that its underpayment was lawful.[744]

Criminal liability can also attach to corporations, partnerships, limited liability companies—and officers or agents thereof—for various offenses as well. For example, failure to pay wages as mandated is deemed a misdemeanor, and conviction results in a fine (between $500 and $20,000) or imprisonment of up to one year and one day.[745] Failure to comply with the Wage Theft Prevention Act is also a

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[736] N.Y. C.P.L.R. § 5241(g).

[737] N.Y. C.P.L.R. § 5242(c)(2).

[738] N.Y. C.P.L.R. § 5241(g).

[739] N.Y. C.P.L.R. § 5252(1).

[740] N.Y. LAB. LAW §§ 196-A, 198.

[741] N.Y. LAB. LAW § 215.

[742] N.Y. LAB. LAW § 218 (establishing means of administrative enforcement of the state Minimum Wage Act and state laws governing payment of wages, labor practices for farm workers, days of rest and meal breaks).

[743] N.Y. LAB. LAW §§ 198(1-a), 663. The amount of liquidated damages recoverable under this law increased from 25% to 100% in 2011.

[744] N.Y. LAB. LAW §§ 198(1-a), 663.

[745] N.Y. LAB. LAW § 198-a.

misdemeanor, with conviction leading to fines ranging from $500 to $5,000 or to one year of imprisonment.[746]

Repeated violations of record-keeping requirements (within a six-year period) can rise to the level of a felony. Upon convictions, a violator can be fined between $500 and $20,000, imprisoned for up to one year and one day, or both.[747]

3.8 Other Benefits

3.8(a) *Vacation Pay & Similar Paid Time Off*

3.8(a)(i) *Federal Guidelines on Vacation Pay & Similar Paid Time Off*

To the extent an "employee welfare benefit plan" is established or maintained for the purpose of providing vacation benefits for participants or their beneficiaries, it may be governed under the federal Employee Retirement Income Security Act (ERISA).[748] However, an employer program of compensating employees for vacation benefits out of the employer's general assets is not considered a covered welfare benefit plan.[749] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[750]

3.8(a)(ii) *State Guidelines on Vacation Pay & Similar Paid Time Off*

For many purposes under New York law, the definition of *wages* includes vacation pay.[751] Employers are not obligated by law to offer paid vacation or similar time off for their employees. But if they commit to doing so, they cannot renege on that promise. In fact, if an employer agrees to pay or provide fringe benefits (including vacation pay) to nonexempt employees, it is a misdemeanor for that employer to fail, neglect, or refuse to pay those benefits.[752]

Employers are obligated to notify their employees in writing, or to publicly post, all policies concerning "sick leave, vacation, personal leave, holidays and hours."[753] Furthermore, the New York Department of Labor (NYDOL) takes the position that failure to provide written notification of an existing policy does

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[746] N.Y. LAB. LAW § 198-a.

[747] N.Y. LAB. LAW § 198-a.

[748] 29 U.S.C. § 1002.

[749] 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a; U.S. Dep't of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dep't of Labor, *Advisory Opinion 2004-03A* (Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

[750] 490 U.S. 107, 119 (1989).

[751] N.Y. LAB. LAW §§ 190 to 191, 198-c.

[752] N.Y. LAB. LAW § 198-c. This provision of the code does not apply to *bona fide* exempt professionals earning more than $1,300 per week. N.Y. LAB. LAW § 198-c(3).

[753] N.Y. LAB. LAW § 195(5).

not relieve an employer from obligation under that policy. If, for example, there is credible evidence that such a policy existed, the employer will be bound by its practice, even if unwritten.[754]

New York differentiates between vacation or personal time and vacation pay. Vacation pay—once earned per the employer's policy—is considered additional compensation for labor and must be treated as wages.[755] But rights related to vacation time, "such as the option to receive payment in lieu thereof or the carrying over" of days year to year, are equally "dependent on the employment contract."[756]

In sum, because vacation time is optional in New York, an employer's obligations are based entirely on its policy or an applicable contract. As discussed briefly below, employers generally can impose restrictions on the accrual, use, and forfeiture of vacation time. To enforce such limitations, employers should craft and distribute clear policies on vacation benefits.

Caps on Accrual. Some employers elect to cap the amount of vacation time that can be accrued by an employee. For example, employees who can roll over their vacation days year-to-year might not be permitted to earn more than 30 days of vacation time.

Based on case law, such a cap on accrual appears lawful in New York. On a related question, for example, a court upheld the employer's limitation, included in its personnel manual, on payouts for accrued vacation. Under that policy, the employer would not pay out more than 40 days of unused, accrued vacation time to departing employees.[757]

Use-It-or-Lose-It Policies. Employers also may dictate whether, or to what extent, earned vacation time can be rolled over into the following year or beyond. Thus, employers can instruct employees that if they do not take their earned vacation by a certain deadline, that time will be lost.[758]

Forfeiture of Accrued Vacation When Employment Ends. Similarly, in New York, an employer's policy can require forfeiture of accrued vacation upon termination, rather than payout of the monetary value of that time. If a policy does not contain a forfeiture provision, however, it is unclear whether payout is required when employment ends. Thus far, courts have held that payout is not required,[759] but the NYDOL contends that payout is required.[760]

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[754] N.Y. State Dep't of Labor, Op. Ltr., File No. RO-09-0185 (Mar. 11, 2010); *see also Spencer v. Christ Church Day Care Ctr., Inc.*, 720N.Y.S.2d 633, 634-35 (N.Y. App. Div. 2001) (explaining that, because there was no written contract, plaintiff had to show that "upon termination, defendant had a regular practice of paying its employees accumulated and unused vacation").

[755] *Grisetti v. Super Value, Inc.*, 736 N.Y.S.2d 835, 836 (N.Y. App. Div. 2001).

[756] 736 N.Y.S.2d at 836. For example, an employer could dictate that no payout for vacation would be made to employees not working on a particular date. *Gennes v. Yellow Book of N.Y., Inc.*, 806 N.Y.S.2d 646, 647-48 (N.Y. App. Div. 2005).

[757] *Spencer*, 720N.Y.S.2d at 634-35.

[758] *Grisetti*, 736N.Y.S.2d at 836.

[759] *See, e.g.*, *Shapiro v. John T. Mather Hosp. of Port Jefferson, N.Y., Inc.*, 208 A.D.3d 913(N.Y. App. Div. 2022) (sick pay): *Steinmetz v. Attentive Care, Inc.*, 972 N.Y.S.2d 147 (N.Y. App. Div. 2013); *In re Chatelle v. N. Country Cmty. Coll.*, 955 N.Y.S.2d 266 (N.Y. App. Div. 2012); *In re Bolin v. Nassau Cnty. Bd. of Coop. Educ. Servs.*, 861 N.Y.S.2d 701, 706-07 (N.Y. App. Div. 2008); *Spencer*, 720 N.Y.S.2d at 634-35; *Grisetti*, 736 N.Y.S.2d at 836; *see also Bradley v. Pride Technologies of N.Y., L.L.C.*, 2017 WL 1423681, at *18 (N.Y. Sup. Ct. Apr. 20, 2017) (New York Labor Law section 198-c "codifies the general understanding that vacation and sick pay are purely matters of contract

As a result, employers with vacation policies should be explicit about what happens to accrued vacation time when an employee leaves: forfeiture, or payout, or some combination thereof. (For example, employers could cap the amount of payout to a certain number of days, regardless of how many have been accrued). In the absence of clear notice, employees may seek, and the NYDOL may require, full payout.

3.8(b) *Holidays & Days of Rest*

3.8(b)(i) *Federal Guidelines on Holidays & Days of Rest*

There is no federal law requiring that employees be provided a day of rest each week, or be compensated at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(b)(ii) *State Guidelines on Holidays & Days of Rest*

Employees in New York are not entitled to any particular days off, for either holidays or religious worship. Nonetheless, under the New York Human Rights Law, an employer must reasonably accommodate an employee's sincerely held religious practices if it can do so without undue hardship.[761] Unless such hardship exists, it is an unlawful discriminatory practice for an employer to impose any condition on employment that would force an employee or applicant to violate or forego a sincerely held practice, including observation of a Sabbath or other holy day.[762]

New York law grants certain types of employees one full day of rest each week. This law applies to employers that operate "a factory, mercantile establishment, hotel, restaurant, or freight or passenger elevator in any building."[763] It also covers the maintenance staff—watchmen, engineers, fire crew, janitors, superintendents, supervisors, or managers—working in any dwelling, apartment or office building, garage, storage facility, warehouse, or any other structure.[764] Employees working in these types of businesses are entitled to 24 consecutive hours off of work in each and every calendar week.

Moreover, employers may not operate on a Sunday unless they have already designated a day of rest for each employee, each week. Employees must be given advance notice of the day of rest and may not be permitted to work it.[765]

There are numerous exceptions, however. Special rest requirements apply to employers operating movie theatres or other theatres where productions are shown.[766] This law, for example, does not cover

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between an employer and employee;" because the agreement did not state that plaintiff will be paid for unused vacation, the court held the employee "has not demonstrated the existence of an agreement entitling him to such payment upon termination of his employment") (citations omitted).

[760] *See* New York Dep't of Labor, *Wages and Hours: Frequently Asked Questions*, *available at* https://dol.ny.gov/wages-and-hours-frequently-asked-questions.

[761] N.Y. EXEC. LAW § 296(10).

[762] *See also* N.Y. EXEC. LAW § 296(10)(b) (further explaining that, barring the undue hardship of the employer, no employee can be required to remain at work during any day, or portion of a day, reserved for religious practices, including appropriate travel time). Employees can be required to use unpaid leave time (but not sick leave) to cover time off if the work hours cannot be made up on another day. N.Y. EXEC. LAW § 296(10)(b)–(c).

[763] N.Y. LAB. LAW § 161(1).

[764] N.Y. LAB. LAW § 161(1).

[765] N.Y. LAB. LAW § 161(3).

employees working as foremen in charge or working no more than three hours in certain jobs on Sundays. The day of rest requirement also does not extend to workers in dairies, ice cream plants, or seasonal hotels and restaurants in rural communities.[767] In addition, special rules apply to domestic workers, whose day of rest per week should coincide, if possible, with the worker's traditional day reserved for religious worship.[768]

The state labor department may grant exemptions from these day of rest requirements if an employer demonstrates "practical difficulties or unnecessary hardship."[769]

3.8(c) *Recognition of Domestic Partnerships & Civil Unions*

3.8(c)(i) *Federal Guidelines on Domestic Partnerships & Civil Unions*

Federal law does not regulate or define domestic partnerships and civil unions. States and municipalities are free to provide for domestic partnership and civil unions within their jurisdictions. Thus, whether a couple may register as domestic partners or enter into a civil union depends on their place of residence. States may also pass laws to regulate whether employee benefit plans must provide coverage for an employee's domestic partner or civil union partner.

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[770] ERISA does not preempt state laws that regulate insurance, so employer health benefit plans that provide benefits pursuant to an insurance contract are subject to state laws requiring coverage for domestic partners or civil union partners.

The federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide continuation coverage under the plan for a specified period of time to each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event (*e.g.*, the employee's death or termination from employment).[771] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[772] Here again, states may choose to extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

3.8(c)(ii) *State and Local Guidelines on Domestic Partnerships & Civil Unions*

Couples may register as domestic partners in several local jurisdictions in New York, including, but not limited to New York City, Albany, Rochester, Westchester County, and Suffolk County. Under state law,

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766 N.Y. LAB. LAW § 161(1).

767 N.Y. LAB. LAW § 161(2).

768 N.Y. LAB. LAW § 161(1). Domestic workers may choose voluntarily to work on the day of rest but must be paid overtime if they do so. Additionally, after one year of service with the same employer, domestic workers must be given three paid days off each year.

769 N.Y. LAB. LAW § 161(5).

770 29 U.S.C. § 1144.

771 29 U.S.C. § 1161.

772 29 U.S.C. § 1167(3).

health insurers may cover domestic partners under a group health insurance policy or contract issued to an employer. However, such coverage is not mandated, and it is within the discretion of the employer whether to offer it.[773]

3.9 Leaves of Absence

3.9(a) *Family & Medical Leave*

3.9(a)(i) *Federal Guidelines on Family & Medical Leave*

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees up to 12 weeks of unpaid leave in any 12-month period:

- for the birth or placement of a child for adoption or foster care;[774]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[775]
- to take medical leave when the employee is unable to work because of a serious health condition;[776]
- for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or called to covered active duty status as a member of the National Guard, armed forces, or armed forces reserves (see **3.9(k)(i)** for information on "qualifying exigency leave" under the FMLA); and
- to care for a next of kin service member with a serious injury or illness (see **3.9(k)(i)** for information on the 26 weeks available for "military caregiver leave" under the FMLA).

A *covered employer* is engaged in commerce or in any industry or activity affecting commerce and has at least 50 employees in 20 or more workweeks in the current or preceding calendar year.[777] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the last 12 months at a location where 50 or more employees work within 75 miles of each other.[778] For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(a)(ii) *State Guidelines on Family & Medical Leave*

New York enacted a statewide Paid Family Leave Benefit Program (PFLBP), which is a series of amendments to the workers' compensation law, effective on January 1, 2018. The law's features are summarized below.

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[773] N.Y. Office of Gen'l Counsel, Op. Ltr. 05-03-26 (Mar. 22, 2005), *available at* http://www.dfs.ny.gov/insurance/ogco2005/rg050326.htm.

[774] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[775] 29 C.F.R. §§ 825.102, 825.112, and 825.113; *see also* U.S. Dep't of Labor, Wage & Hour Div., *Administrator's Interpretation No. 2010-3* (June 22, 2010), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf (guidance on who may take time off to care for a sick, newly-born, or adopted child when the employee has no legal or biological attachment to the child).

[776] 29 C.F.R. §§ 825.112, 825.113.

[777] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[778] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

Coverage & Eligibility. The paid family leave law broadly applies to all employers with one or more employee, on each of at least 30 days, in any calendar year.[779] Thus, any employer covered by the New York workers' compensation law will have to permit eligible employees to take paid leave.

Employees who work more than 20 hours per week for a covered employer are eligible for benefits if they have been employed by a covered employer for 26 or more consecutive weeks. Employees who work a schedule that is fewer than 20 hours per week become eligible for benefits under the PFLBP on the 175th day of employment.[780] An employee who previously worked 26 consecutive weeks for an employer, before taking a specified, unpaid leave or unpaid vacation, is immediately eligible for benefits upon their return.[781] Coverage under the PFLBP, therefore, is more expansive than under the FMLA.

Employees on administrative leave are not entitled to paid family leave benefits.[782]

Purpose & Length of Leave. Eligible employees may receive paid family leave:

1. to provide care for a family member because of the family member's serious health condition;
2. to bond with their child during the first 12 months after the child's birth, or during the first 12 months after placement of the child for adoption or foster care; or
3. to attend to obligations arising because the spouse, child, or parent of the employee is on active duty or has been notified of an impending call to active duty in the U.S. armed forces.[783]

For purposes of the PFLBP, *family member* refers to "a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner."[784] These family relationships are further defined to include biological, foster, or adoptive parents or children, stepparents and stepchildren, adopted, half-, and step-siblings, legal guardians, or similar individuals.[785] *Serious health condition* refers to "an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential health care facility, continuing treatment or continuing supervision by a health care provider."[786]

Eligible employees will be paid by a state fund financed by deductions taken directly from employees' wages.[787] Notably, the paid family leave is not available for an employee's *own* serious health condition, although an employee may be eligible for income protection benefits under New York's short-term disability insurance program.

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[779] N.Y. WORKERS' COMP. LAW § 202. Special rules apply for domestic workers and for businesses that cease to employ a sufficient number of workers.

[780] N.Y. WORKERS' COMP. LAW § 203; N.Y. COMP. CODES R. & REGS. tit. 12, § 380-2.5.

[781] N.Y. WORKERS' COMP. LAW § 203.

[782] N.Y. WORKERS' COMP. LAW § 206(3)(b).

[783] N.Y. WORKERS' COMP. LAW § 201(15).

[784] N.Y. WORKERS' COMP. LAW § 201(20).

[785] N.Y. WORKERS' COMP. LAW § 201(16), (19).

[786] N.Y. WORKERS' COMP. LAW § 201(18).

[787] The Superintendent of Financial Services will set the employee contribution rate(s). The statute, however, specifically states that "[n]o employer shall be required to fun any portion of the family leave benefit." N.Y. WORKERS' COMP. LAW § 209(2)(b).

The requirement to provide paid leave, the amount of leave required, and the amount of pay that employees may receive was phased in as set forth in Table 24.[788] Note, however, that the state Superintendent of Financial Services had the discretion to delay this schedule of increases.[789]

Table 24. Paid Leave Under PFLBP

Effective Date	Weeks of Benefits (per 52-week period)	Income Benefit Level
1/1/2018	Up to 8 weeks	50% of average weekly wage, but not to exceed 50% of the *New York State average weekly wage* (NYSAWW)[790]
1/1/2019	Up to 10 weeks	55% of the employee's average weekly wage, but not to exceed 55% of the NYSAWW
1/1/2020	Up to 10 weeks	60% of the employee's average weekly wage, but not to exceed 60% of the NYSAWW
1/1/2021	Up to 12 weeks	67% of the employee's average weekly wage, but not to exceed 67% of the NYSAWW

Paid leave may be taken intermittently, or for less than a full workweek, in increments of one full day or one-fifth of the weekly benefit. It is unclear whether leave can be taken in smaller increments (*i.e.*, by hour or half-day).[791]

An employer is not obligated to allow more than one employee to take the same leave period as another employee, to care for the same family member.[792]

Employer Obligations. Although employers are not responsible for providing the PFLBP benefit to employees while on leave, they do bear some burdens.

The employer must maintain any existing health benefits in effect, for the duration of the leave, as if the employee had not taken leave.[793]

Employees are also entitled to full reinstatement upon their return from leave. Accordingly, the employer must restore an employee returning from leave "to the position of employment held by the employee when the leave commenced, or to be restored to a comparable position with comparable

[788] N.Y. WORKERS' COMP. LAW § 204.

[789] N.Y. WORKERS' COMP. LAW § 204(2). The statute provides specific factors to be considered in determining whether delay of an increase is appropriate.

[790] By way of example, in 2015, the NYSAWW was $1,296.48.

[791] N.Y. WORKERS' COMP. LAW § 204(2)(a).

[792] N.Y. WORKERS' COMP. LAW § 206(5).

[793] N.Y. WORKERS' COMP. LAW § 203-c.

employment benefits, pay and other terms and conditions of employment."[794] While on leave, however, employees do not accrue seniority or other benefits.

Further, employers must satisfy two notice obligations. First, covered employers must post a notice in a conspicuous location, informing employees that the employer has provided for both workers' compensation disability and family leave benefits.[795] Second, employers must provide written, individual notice to covered employees who are absent for more than seven consecutive days, explaining the right to family leave. This notice must be provided either within five business days after the seventh consecutive day that the employee has missed work, or within five business days after the employer learns that the absence is due to family leave, whichever is later.[796]

Finally, discrimination or retaliation against an employee for taking family leave is prohibited.[797]

Employee Rights & Obligations. For their part, employees must provide advance notice of the need for leave, when foreseeable. Specifically, employees must give employers no less than 30 days' notice before the leave will begin, where due to the expected birth or placement of a child, or where due to planned medical treatment. If the birth, placement, or medical treatment requires leave within less than 30 days, the employee must provide notice as soon as practicable.[798]

In addition, employees seeking benefits must submit proof of their need for family leave within 30 days of the commencement of the leave. Additional proof may be required by the employer from time to time, but no more often than once per week. Such proof includes a statement of disability from the health care provider.[799]

Failure to furnish notice or proof in the manner and timing subscribed does not invalidate—but may limit—an employee's claim for benefits under the PFLBP. If notice or proof are delayed, no benefits need be paid for any period lasting more than two weeks prior to the date on which the proof is furnished, unless the employee demonstrates that prompt notice or proof was not reasonably possible and that it was given as soon as possible.[800]

Interaction with Other Leaves or Paid Time Off. Leave taken under the PFLBP runs concurrently with federal FMLA leave.[801] Additionally, an employee cannot concurrently receive paid disability benefits under New York law and PFLBP benefits.[802]

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[794] N.Y. WORKERS' COMP. LAW § 203-b.

[795] N.Y. WORKERS' COMP. LAW § 229(1).

[796] N.Y. WORKERS' COMP. LAW § 229(2).

[797] N.Y. WORKERS' COMP. LAW §§ 120, 203-a.

[798] N.Y. WORKERS' COMP. LAW § 205(5).

[799] N.Y. WORKERS' COMP. LAW §§ 205(2)(b), 217(1). Employees who adhere to certain religious teachings, and who depend on prayer for healing in accordance with those tenets, may submit as proof a certification from an accredited practitioner containing facts and opinions about the disability and need for leave.

[800] N.Y. WORKERS' COMP. LAW § 217(1).

[801] N.Y. WORKERS' COMP. LAW §§ 205(2), 206(4).

[802] N.Y. WORKERS' COMP. LAW § 205(4).

Beyond these statutory leaves, some employers offer paid time off that employees can use for family leave purposes. An employer may offer an employee—who has accrued but unused vacation time or personal leave available at the time of need—to choose between two options. In that event, the employee can choose: (1) to charge all or part of the family leave time to accrued but unused vacation or personal leave, and receive full salary; or (2) not to charge time to accrued but unused vacation or personal leave, and receive paid family leave benefits under the PFLBP. An employer that pays full salary for family leave may request reimbursement of the balance covered by the PFLBP.[803] No PFLBP benefits will be paid to an employee who is already collecting sick pay or paid time off from an employer.[804]

Under either option, the employee remains protected by the reinstatement and antidiscrimination provisions of New York law. In any event, paid leave cannot exceed 12 weeks.[805]

3.9(b) *Paid Sick Leave*

3.9(b)(i) *Federal Guidelines on Paid Sick Leave*

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[806] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

3.9(b)(ii) *State and Local Guidelines on Paid Sick Leave*

As of September 30, 2020, New York State has a statewide paid sick and/or safe time law.[807] Additionally, there are local requirements in New York City and Westchester County,[808] which has one law concerning paid sick leave and a separate law concerning paid safe leave, as discussed in **3.9(j)(ii)**.[809] Note, however, that the Westchester County Human Rights Commission says online[810] that the new statewide law triggers the "reverse preemption" provision in the county's paid sick – but not paid safe – ordinance. However, the county has not provided any guidance about what happens to local paid sick leave employees accrued under the ordinance before September 30, 2020 – during 2020, or in previous years that was carried over into 2020.

Since February 19, 2023, employers cannot discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee because an employee uses any legally protected absence pursuant to federal, local, or state law. This includes assessing any demerit, occurrence, any other point,

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[803] N.Y. WORKERS' COMP. LAW § 205(2)(c).

[804] N.Y. WORKERS' COMP. LAW § 206(3)(c).

[805] N.Y. WORKERS' COMP. LAW § 205(2).

[806] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[807] N.Y. LAB. LAW § 196-B; *see also* New York State Department of Labor, *New York State Paid Sick Leave FAQ*, and *Paid Sick Leave Details*, *available at* https://www.ny.gov/programs/new-york-paid-sick-leave.

[808] N.Y.C., N.Y. CODE §§ 20-911 *et seq.* & N.Y.C., N.Y. RULES §§ 7-201 *et seq.*; WESTCHESTER CNTY., N.Y. CODE §§ 585.01 *et seq.*

[809] WESTCHESTER CNTY., N.Y. CODE §§ 586.01 *et seq.*

[810] *See* https://humanrights.westchestergov.com/resources/earned-sick-leave-law.

or deductions from an allotted bank of time that subjects or could subject an employee to disciplinary action, which may include but not be limited to failure to receive a promotion or loss of pay.[811]

Covered Employers & Employees.[812] The New York State law applies to all private employers. Employers with four or fewer employees must provide unpaid sick leave. However, employers with four or fewer employees and net income of more than $1 million in the previous tax year, and employers with five or more employees, must provide paid sick leave. As of September 30, 2020, New York City's amended law contains similar standards. Additionally, effective January 1, 2025, the state law requires all employers to provide paid prenatal personal leave in addition to paid or unpaid sick and safe leave.

Although state law does not include an employee definition, the state labor department contends the law applies to all private employees. In Westchester County, to be considered a covered employee, an individual must work in the jurisdiction for more than 80 hours in a calendar year. Its law, and the law in New York City, exclude from coverage work experience program participants, federal work study participants, and employees on scholarship. Additionally, New York City's law specifically excludes independent contractors, and certain hourly professional education employees, and a federal judge held the federal Airline Deregulation Act preempts the city law as to flight attendants.[813]

Under the New York State law, a collective bargaining agreement entered into on or after September 30, 2020 that specifically acknowledges the law's provisions can, in lieu of required leave, provide a comparable benefit for covered employees in the form of paid days off, which must be in the form of leave, compensation, other employee benefits, or some combination thereof. Additionally, a certified collective bargaining agent can negotiate terms and conditions of sick leave that are different from what the law requires if the agreement specifically acknowledges the law's provisions.

Under the New York City law, for unionized workers covered by a collective bargaining agreement (CBA) at the time the law took effect, the law applies when the CBA expires. The law allows its requirements to be wholly or partly waived by employees covered by a CBA that expressly waives the requirement(s) and provide a comparable paid leave benefit. Additionally, the law's requirements can be waived via a CBA by employees in the construction and grocery industries.

Covered Relations. Under state law and New York City law, employees can use sick and safe leave for personal reasons, or to care for or assist a family member, which includes a child, grandchild, grandparent, parent, sibling, or spouse. In New York City, leave can also be used by another individual related to the employee by blood and any other individual whose close association with the employee is the equivalent of a family relationship.

Accrual & Carry-Over. Under state law, and New York City law, an employer is not required to provide any additional sick and safe leave if it has adopted a sick leave or time off policy that provides employees an amount of leave that meets or exceeds the law's requirements and satisfies the law's accrual, carryover, and use requirements. Note, however, that this provision does not include paid

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811 N.Y. LAB. LAW § 215(a).

812 Both laws also cover domestic workers, and additional requirements may exist for firms placing such employees. These provisions are outside the scope of this summary.

813 *Delta Air Lines, Inc. v. New York City Department of Consumer Affairs*, 1:17-cv-01343, ECF 76 (E.D.N.Y. Sept. 30, 2021).

prenatal personal leave that employers must provide in addition to sick and safe leave under state law effective January 1, 2025.

Otherwise, under state law, when employment begins employees accrue sick and safe leave at a rate of one leave hour for every 30 hours worked. New York City's law uses a similar standard. As paid prenatal personal leave that employers must provide under state law effective January 1, 2025 is a standalone leave entitlement in addition to sick and safe leave, employees do not accrue this benefit.

Under state law, employers can set an annual accrual cap of 40 or 56 hours, depending on whether they have 100 or more, or 99 or fewer, employees, respectively. New York City's amended law contains similar standards. Under state law, effective January 1, 2025, employers must provide employees 20 hours of paid prenatal personal leave in any 52-week calendar period, in addition to sick and safe leave.

State law requires that unused sick and safe leave must carry over to the following year. New York City's law provides that, up to 40 or 56 hours of unused leave must be carried over to the following year, depending on whether an employer has 99 or fewer, or 100 or more, employees, respectively.

State law does not permit traditional frontloading: an employer can provide the total amount of sick leave the law requires at the beginning of the year, but cannot reduce or revoke any leave based on the number of hours actually worked during the year. However, in New York City, employers can provide an amount of leave hours equal to the applicable cap to an employee on the first day of each year and avoid carry-over requirements.

Covered Purposes & Using Leave. The state law and New York City law allow leave to be used for the following sick time purposes: mental or physical illness, injury or health condition, and medical diagnosis, care, or treatment thereof, and preventive medical care. Additionally, under state law, effective January 1, 2025, employees can use paid prenatal personal leave for health care services received by an employee during their pregnancy or related to such pregnancy, including physical examinations, medical procedures, monitoring and testing, and discussions with a health care provider related to the pregnancy.

Under state law, and in New York City, leave can also be used for the following safe time purposes when an employee or covered relation has been a victim of a family offense or sexual offense, stalking, or human trafficking:

- obtain services from a domestic violence shelter, rape crisis center, or other shelter or services program;
- safety planning, temporary or permanent relocation, or other actions to increase an employee or covered relation's safety from future offenses;
- meeting an attorney or social service provider to obtain information and advice on, and preparing for or participating in a legal proceeding;
- filing a complaint or domestic incident report with law enforcement; meeting with a district attorney's office; enrolling children in a new school; and
- taking other actions necessary to maintain, improve, or restore the physical, psychological, or economic health or safety of an employee or covered relation or to protect those who associate or work with the employee.

Additionally, in New York City, employees can use leave when their place of business or a child's school or place of care has been closed due to a public health emergency.

Under state law, employees hired on or before December 31, 2020, can use accrued sick and safe leave on January 1, 2021, whereas employees hired on or after January 1, 2021 can use leave as it accrues. As of September 30, 2020, New York City's amended law provides that employees can use leave as it is accrued. However, the amended law contains provisions specific to how this works during the period of September 30 through December 31, 2020. Specifically, employees of employers with 100 or more employees may use an accrued amount of leave that exceeds 40 hours per year on or after January 1, 2021, and employees of employers with four or fewer employees with a net income of $1 or more during the previous tax year may use leave as it is accrued on or after January 1, 2021.

Under state law, and New York City's amended law as of September 30, 2020, employers can limit to 40 or 56 hours the amount of sick and safe leave an employee can use each year, depending on whether they have 100 or more, or 99 or fewer, employees, respectively. Under state law, effective January 1, 2025, employees will be able to use 20 hours of paid prenatal personal leave in any 52-week calendar period, in addition to sick and safe leave.

When sick and safe leave is used, employers can require that, during an initial period of use, employee use up to 4 hours; but, in New York City this is subject to the minimum increment being reasonable under the circumstances. However, as amended, New York City's law provides that, if the state adopts a minimum increment of use standard that exceeds the standard under its law, it will adopt the state law standard. If an employee's absence will be longer than 4 hours, the local jurisdictions differ on how much leave an employee must use. In New York City, employers can require that leave in subsequent periods be used in 30-minute blocks. Additionally, under state law, effective January 1, 2025, employees can use paid prenatal personal leave in hourly increments.

The state law does not address whether and how employees must provide notice of the need to use sick and safe leave; however, per the state labor department, there is no specified notice requirement if an employee submits a request before using leave. In New York City, employers can require employees to provide up to seven days' notice for foreseeable absences, and notice as soon as possible for unforeseeable absences. Moreover, revised New York City rules effective October 15, 2023, provide that a need is foreseeable when the employee knows they need to use leave seven days or more before use; otherwise, it is unforeseeable. Employers subject to both state and city laws, however, must comply with the more employee-friendly standard.

Under state law, for a sick or safe leave absence of three or more consecutive and previously scheduled workdays or shifts, employers can request verification or documentation confirming an employee's eligibility to take leave. Conversely, under New York City's law, employers can require employees to confirm, in writing, that leave was used for a covered purpose. Also, under the New York City law, if an employee is absent for more than three consecutive workdays, employers can require employees to provide reasonable documentation that leave was used for a covered purpose. Additionally, in New York City, as of September 30, 2020, employers are responsible for paying for reasonable costs and expenses employees incur when they procure documentation their employer requests to substantiate a sick or safe leave absence. Similarly, under state law, employers cannot require employees to pay any costs or fees associated with obtaining medical or other verification of eligibility for use of leave.

Payment When Leave Is Used. Under state law, employees must receive compensation at their regular rate of pay or the applicable state minimum wage, whichever is greater; for the "regular" rate, concerning sick and safe leave, the state labor department has said employers use the same calculation they would to calculate the overtime regular rate. In New York City, as of September 30, 2020, employers must pay employees for leave at their regular rate of pay at the time leave is taken, which cannot be less than the highest applicable rate of pay to which the employee is entitled under the state minimum wage or any other applicable federal, state, or local law, rule, contract, or agreement. Moreover, revised New York City rules as of October 15, 2023, provide that, unlike state law, the city does not use the overtime regular rate for "regular" rate purposes. Employers subject to both state and city laws, however, must comply with the more employee-friendly standard.

The state labor department has issued guidance concerning how to calculate the rate of pay for various employees. Overtime-exempt employees paid hourly basis are assumed to work 40 hours per workweek for regular rate calculation purposes unless their terms and conditions of employment specify or require otherwise. For employees paid multiple rates, employers must use employees' weighted average, which employers calculate by dividing total regular pay by total hours worked in the week. Employers must pay tipped employees their full rate of pay and cannot factor in tip credits or allowances. However, employers need not factor in lost tips when calculating tipped employees' regular rate.

New York City drills further down on calculating pay for various types of employees. If employees wholly or partly earn commissions, leave must be paid at their base rate or the state minimum wage, whichever is greater. For employees with multiple jobs or pay rates, leave is paid at the rate applicable when the employee was absent. If an employee is paid a flat rate, regardless of hours worked, leave is paid based on the employee's most recent hourly rate for the applicable pay period, which is calculated by dividing total earnings (including tips, commissions, and supplements) for the most recent work week in which no leave was taken by the number of hours spent performing work during such work week or 40 hours, whichever amount of hours is less. Tipped employees must be paid their full rate of pay, and employers cannot factor in tip credits or allowances when calculating the pay rate. Keep in mind, however, that for all these local calculations revised rules as of October 15, 2023, provide contain a caveat: unless a higher applicable rate applies pursuant to any other law, rule, regulation, contract, or agreement. Finally, when calculating an employee's rate of pay, employers can exclude discretionary bonuses, and, due to revised rules as of October 15, 2023, supplements.

Notice & Posting Requirements.[814] Under state law, within three business days of an employee's oral or written request, an employer must provide a summary of the amounts of sick leave accrued and used in the current and/or any previous year. Additionally, a pre-existing statute requires employers to notify employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays and hours.[815] Moreover, the state labor department says that, before employers provide leave to employees, they must put into writing, and either post or give individual notice to employees, of any limitations or restrictions on leave use, *e.g.*, if an employer adopts a minimum increment of use.

In New York City, when employment begins, employers must personally provide employees written notice of their leave rights, including accrual and use of leave, the employer's designated year, and the

[814] For record-keeping requirements, *see* **3.1(b)(i)**.

[815] N.Y. LAB. LAW § 195(5).

right to be free from retaliation.[816] For employees who were already employed before September 30, 2020, employers must give employees such notice within 30 days of the amendments' effective date. Notwithstanding the 30-day requirement under the statute, the enforcement agency says "Under the New Amendments effective September 30, 2020, the following employers must provide an updated notice of rights to employees by January 1, 2021: Employers with 100 or more employees; Employers of domestic workers."[817] New York City employers must conspicuously display the time-of-hiring notice in addition to personally providing it to employees.

Additionally, in New York City, the amount of leave accrued and used during a pay period and an employee's total balance of accrued leave must be noted on a pay statement or other form of written documentation provided to the employee each pay period. Pursuant to revised rules as of October 15, 2023, if the employee's total balance exceeds the amount of leave available to use, the pay statement or other writing must include the latter information. Additionally, per revised rules as of October 15, 2023, if an employer uses an electronic system, it may comply by: (1) electronically alerting employees each pay period that the information is available; (2) making the information in the system readily accessible outside of the workplace; and (3) keeping accrual, use, and balance information for any past pay period in the system readily accessible outside of the workplace.

Finally, New York City's law contains numerous, detailed requirements concerning what must be included in an employer's leave policy.

End of Employment. None of the laws requires employers to pay employees the monetary value of their accrued but unused leave. However, if an employee is rehired within six months of separation in New York City, previously accrued but unused leave must be reinstated.

Enforcement. The New York State Labor Commissioner will enforce the state law. The New York City law is enforced by the city's Department of Consumer and Worker Protection, with whom employees can file a complaint within two years of the date the individual knew or should have known about an alleged violation. As of March 20, 2024, under the New York City ordinance employees can also file a lawsuit within two years of the date the individual knew or should have known about an alleged violation.

3.9(c) *Pregnancy Leave*

3.9(c)(i) *Federal Guidelines on Pregnancy Leave*

Three federal statutes are generally implicated when handling leave related to pregnancy: the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964 ("Title VII") in 1978; the Family and Medical Leave Act; and the Americans with Disabilities Act. For additional information, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions

[816] Additional notice requirements exist as it relates to individuals who were employed before amendments to New York City's law took effect on May 5, 2018, *i.e.*, an updated notice concerning safe time rights had to be provided within 30 days of May 5, 2018.

[817] N.Y.C. Dep't of Consumer & Worker Protection, *Paid Safe and Sick Leave: Notice of Employee Rights*, *available at* https://www1.nyc.gov/site/dca/about/Paid-Safe-Sick-Leave-Notice-of-Employee-Rights.page.

under an employer's health or disability insurance or sick leave plan.[818] Policies and practices involving such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

An employer must allow individuals with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. However, an employer may not compel an employee to take leave because the employee is pregnant, as long as the employee is able to perform their job. Moreover, an employer may not prohibit employees from returning to work for a set length of time after childbirth. Thus, employers must hold open a job for a pregnancy-related absence for the same length of time as jobs are held open for employees on sick or disability leave.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for their own serious health condition, such as severe morning sickness.[819] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[820] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

Several states provide greater protections for employees with respect to pregnancy. For example, states may have specific laws prohibiting discrimination based on pregnancy or providing separate protections for pregnant women, including the requirement that employers provide reasonable accommodations to pregnant employees to enable them to continue working during their pregnancies, provided that no undue hardship on the employer's business operations would result. These protections are discussed in **3.11(c)**. To the extent that a state law focuses primarily on providing job-protected leave for employees with disabling pregnancy-related health conditions, that state law is discussed below.

3.9(c)(ii) *State Guidelines on Pregnancy Leave*

Both the New York State and New York City pregnancy accommodation requirements are discussed further in **3.11(c)(ii)** and **3.11(c)(iii)**, respectively.

In addition, under state law, employers may not discriminate against pregnant employees or applicants, with respect to employment decisions, reasonable accommodations, or the taking of leave time. Employers may not, for example, force a pregnant employee to take leave, unless she is prevented from

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[818] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

[819] 29 C.F.R. § 825.202.

[820] EEOC, Notice 915.003, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; *see also* EEOC, *Facts About Pregnancy Discrimination* (Sept. 8, 2008), *available at* https://www.eeoc.gov//facts/fs-preg.html.

performing her duties in a reasonable manner.[821] An employer with four or more employees must grant maternity leave, however, to the same extent that it would grant leave for disabilities.[822]

3.9(c)(iii) *Local Guidelines on Pregnancy Leave*

New York City. The New York City Human Rights Law also bans discrimination on the basis of pregnancy or perceived pregnancy. For example, it is unlawful for an employer of four or more employees to refuse a reasonable accommodation to an employee for her pregnancy, childbirth, or related condition. The law addresses pregnancy-related leave and related requests for medical documentation in support thereof. As noted in **2.1(b)** (Table 3) and **3.1(a)(ii)** (Table 6), the law also requires employers to notify employees of their right to be free from pregnancy-related discrimination.[823]

In addition, an employer is required to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or whom the employer has noticed may require such an accommodation related to pregnancy, childbirth, or a related medical condition. Upon reaching a final determination at the conclusion of the cooperative dialogue, the employer must provide the employee requesting an accommodation with a written final determination identifying any accommodation granted or denied. The employer may make a determination that no reasonable accommodation would enable the employee to satisfy the essential requisites of a job or enjoy the right or rights in question only after the parties have engaged, or the employer has attempted to engage, in a cooperative dialogue.[824]

3.9(d) *Adoptive Parents Leave*

3.9(d)(i) *Federal Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of the employee's leave entitlement under the FMLA. For information on the FMLA, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.9(d)(ii) *State Guidelines on Adoptive Parents Leave*

Under New York law, an employer that allows leave for biological parents must also permit leave, to the same extent, for adoptive parents. This protection applies: (1) when the child is adopted at an early age (preschool age or younger); or (2) when the adopted child is under 18 and is also deemed "hard to place" or has a disability.[825]

3.9(e) *School Activities Leave*

3.9(e)(i) *Federal Guidelines on School Activities Leave*

Federal law does not address school activities leave for private-sector employees.

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[821] N.Y. EXEC. LAW § 296(1)(g), (3).

[822] *In re Hamilton v. New York City Comm'n on Human Rights*, 606 N.Y.S.2d 166 (N.Y. App. Div. 1993).

[823] N.Y.C., N.Y., ADMIN. CODE § 8-107(22). More detailed information from the New York City Commission on Human Rights about the law is available at http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2016.pdf.

[824] N.Y.C., N.Y., ADMIN. CODE § 8-107(28).

[825] N.Y. LAB. LAW § 201-c.

3.9(e)(ii) *State Guidelines on School Activities Leave*

New York law does not address school activities leave for private-sector employees.

3.9(f) *Blood, Organ, or Bone Marrow Donation Leave*

3.9(f)(i) *Federal Guidelines on Blood, Organ, or Bone Marrow Donation*

Federal law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(f)(ii) *State Guidelines on Blood, Organ, or Bone Marrow Donation*

New York has enacted leave laws covering both bone marrow and blood donation.

Bone Marrow Donation. Private employers with 20 or more employees, working at least one location, must grant leave to an employee who seeks to donate bone marrow. This protection applies to employees who work an average of 20 hours or more per week. The combined length of the leave should be determined by the pertinent doctor, but the leave should not exceed 24 hours in total without the employer's agreement. The employer may require a doctor's verification to establish the purpose and length of the leave. The law also prohibits retaliation against any employee who requests or takes leave for bone marrow donation.[826]

Blood Donation. Employers in New York are also required to provide employees with up to three hours of unpaid leave time to donate blood within any 12-month period.[827] This law applies to both public and private entities that employ 20 or more employees at one or more sites.[828] Eligible employees includes individuals who perform services for hire for an employer, for an average of 20 or more hours per week; the definition includes all individuals employed at any site owned or operated by an employer but does not include independent contractors.[829]

Employers may, as an alternative to providing the unpaid leave time, provide employees an opportunity to donate blood (such as through a blood drive) at the workplace or within a reasonable distance from it. For this option, employers must offer donation opportunities during work hours, at least twice a year, at least 60 days apart, and without requiring employees to use accrued leave time. Employers must also notify employees in writing of their right to take blood donation leave, and the written notification must be made in a manner that ensures employees will see it.[830] Employers may offer additional leave protections for this purpose, if they choose.[831]

Employers must not retaliate against any employee who requests or takes blood donation leave.[832]

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[826] N.Y. LAB. LAW § 202-a. A separate provision governs this type of leave for public employees. N.Y. LAB. LAW § 202-b.

[827] N.Y. LAB. LAW § 202-j.

[828] N.Y. LAB. LAW § 202-j(1)(b).

[829] N.Y. LAB. LAW § 202-j(1)(a).

[830] *See* N.Y. LAB. LAW § 202-j(2)(b); N.Y. State Dep't of Labor, Div. of Labor Standards, *Guidelines for Implementation of Employee Blood Donation Leave*, *available at* https://dol.ny.gov/system/files/documents/2023/11/ls703.pdf.

[831] N.Y. LAB. LAW § 202-j(4).

[832] N.Y. LAB. LAW § 202-j(3).

3.9(g) *Voting Time*

3.9(g)(i) *Federal Voting Time Guidelines*

There is no federal law concerning time off to vote.

3.9(g)(ii) *State Voting Time Guidelines*

Employees who are registered voters may take off so much working time as will enable the employee to vote at any election. This leave must be paid, for up to two hours. The employee shall be allowed time off for voting only at the beginning or end of the employee's shift, as the employer designates, unless otherwise mutually agreed. Before taking leave, however, the employee must notify the employer, not more than 10 nor less than two working days before the day of the election, that time off to vote will be required.[833]

Employers may be guilty of a misdemeanor if they refuse to permit this privilege to their employees who properly request it, or if they subject employees taking leave to a penalty or reduction of wages.[834]

Employers are also guilty of a misdemeanor if they threaten, intimidate, or impede employees to compel them to vote, or refrain from voting, for specific candidates or propositions. It is further unlawful for employers to enclose in or mark an employee's pay envelope with any political material containing threats intended to influence the political opinions or actions of the employees.[835]

3.9(h) *Leave to Participate in Political Activities*

3.9(h)(i) *Federal Guidelines on Leave to Participate in Political Activities*

Federal law does not address leave for private-sector employees to participate in political activities.

3.9(h)(ii) *State Guidelines on Leave to Participate in Political Activities*

New York law does not address leave for private-sector employees to participate in political activities.

3.9(i) *Leave to Participate in Judicial Proceedings*

3.9(i)(i) *Federal Guidelines on Leave to Participate in Judicial Proceedings*

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[836] Employers are under no federal statutory obligation to pay employees while serving on a jury.

Employers may verify that an employee's request for civic duty is legally obligated by requiring the employee to produce a copy of the summons, subpoena, or other documentation. Also, an employer can set reasonable advance notice requirements for jury duty leave. Upon completion of jury duty, an employee is entitled to reinstatement.

An employer also may be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal administrative agencies, as required by a variety of

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833 N.Y. ELEC. LAW § 3-110(1), (3).

834 N.Y. ELEC. LAW § 17-118.

835 N.Y. ELEC. LAW § 17-150.

836 28 U.S.C. § 1875.

additional federal statutes.[837] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

3.9(i)(ii) *State Guidelines on Leave to Participate in Judicial Proceedings*

Leave to Serve on a Jury. An employer may not discharge or otherwise penalize an employee who is absent due to jury service, provided that the employee notifies the employer prior to their service. This leave may be unpaid, unless the employer has more than 10 employees. If the employer has more than 10 employees, the employer cannot withhold the first $40 of a juror's daily wage during the first three days of jury service.[838]

Leave to Comply with a Subpoena. New York law provides that employees have the right to take time off of work to comply with a witness subpoena, with advance notice to the employer. The employer need not pay the employee for leave time and may require the employee to submit verification of their service as a witness. It is a misdemeanor for an employer to terminate or otherwise penalize an employee who misses work because the employee was required to appear as a witness or consult with a district attorney.[839]

3.9(j) *Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

3.9(j)(i) *Federal Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Federal law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(j)(ii) *State Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Statewide Leave for Witnesses & Victims. In addition to authorizing leave for witnesses, New York law protects employees who have been victims of crime and must participate in legal proceedings. Under the law, an employee is eligible for leave if the employee is: (1) a subpoenaed witness; (2) the victim, the victim's next of kin, or the victim's representative (*i.e.*, a guardian, partner, executor, or parent); (3) a "Good Samaritan;"[840] or (4) pursuing an order of protection.[841]

Eligible employees may take time off work to comply with a subpoena to testify in a criminal proceeding, to consult with the district attorney about such testimony, to give a statement at a sentencing hearing, to give a victim impact statement, or to provide a statement at a parole board hearing.[842]

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[837] *See, e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e 3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act).

[838] N.Y. JUD. LAW § 519.

[839] N.Y. PENAL LAW § 215.14.

[840] *Good Samaritan* is defined as "person who, other than a law enforcement officer, acts in good faith (a) to apprehend a person who has committed a crime in his presence or who has in fact committed a felony, (b) to prevent a crime or an attempted crime from occurring, or (c) to aid a law enforcement officer in effecting an arrest." N.Y. EXEC. LAW § 621(7).

[841] N.Y. PENAL LAW § 215.14; *see also* N.Y. EXEC. LAW § 621.

[842] N.Y. PENAL LAW § 215.14.

Employees requiring such leave must notify their employers at least one day in advance. Upon the employer's request, the party that demanded the employee's attendance must verify their service. Employers are not obligated to pay for this leave time.[843]

Statewide Leave for Victims of Domestic Violence. It is an unlawful employment practice for an employer to discriminate against an employee due to his or her status as a victim of domestic violence, or refuse to provide reasonable accommodations to such employees.[844]

An employer is required to provide a reasonable accommodation to an employee whom the employer knows to be a victim of domestic violence if the employee must be absent from work for a reasonable time. The law does not define "reasonable time." Reasonable accommodation is limited to absences taken for the following purposes:

- seeking medical attention for injuries caused by domestic violence, including for a child who is a victim of domestic violence, provided that the employee is not the perpetrator of the domestic violence against the child;
- obtaining services from a domestic violence shelter, program, or rape crisis center as a result of domestic violence;
- obtaining psychological counseling related to an incident or incidents of domestic violence, including for a child who is a victim of domestic violence, provided that the employee is not the perpetrator of the domestic violence against the child;
- participating in safety planning and taking other actions to increase safety from future incidents of domestic violence, including temporary or permanent relocation; or
- obtaining legal services, assisting in the prosecution of the offense, or appearing in court in relation to the incident or incidents of domestic violence.[845]

An employer is required to provide a reasonable accommodation for an employee's absence unless the employer can demonstrate that the employee's absence would constitute an undue hardship to the employer. If an employee has a physical or mental disability resulting from an incident or series of incidents of domestic violence, the employer must treat the employee in the same manner as an employee with any other disability as required under the New York State Human Rights Law, which provides that discrimination and refusal to provide reasonable accommodation of disability are unlawful discriminatory practices.[846]

An employee who must be absent from work must provide the employer with reasonable advance notice of the employee's absence, unless advance notice is not feasible. An employee who cannot feasibly give reasonable advance notice of the absence must, within a reasonable time after the absence, provide certification supporting the absence to the employer when requested by the employer. Acceptable forms of certification include:

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[843] N.Y. PENAL LAW § 215.14.

[844] N.Y. EXEC. LAW § 296(22).

[845] N.Y. EXEC. LAW § 296(22).

[846] N.Y. EXEC. LAW § 296(22).

- a police report indicating that the employee or his or her child was a victim of domestic violence;
- a court order protecting or separating the employee or his or her child from the perpetrator of an act of domestic violence;
- other evidence from the court or prosecuting attorney that the employee appeared in court; or
- documentation from a medical professional, domestic violence advocate, health care provider, or counselor that the employee or his or her child was undergoing counseling or treatment for physical or mental injuries or abuse resulting in victimization from an act of domestic violence.[847]

To the extent allowed by law, an employer must maintain the confidentiality of any information regarding an employee's status as a victim of domestic violence.

The employer may require an employee to charge any time off against any leave with pay ordinarily granted, where available, unless otherwise provided for in a collective bargaining agreement or existing employee handbook or policy, and any such absence that cannot be charged may be treated as leave without pay. An employee who must be absent from work is entitled to the continuation of any health insurance coverage provided by the employer to which the employee is otherwise entitled during any such absence.[848]

3.9(j)(iii) *Local Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Leave in New York City for Certain Victims. The New York City Human Rights Law protects victims of domestic violence, sexual assault, sex offenses, or stalking. A victim of domestic violence includes a person who has been subjected to acts or threats of economic abuse.[849] New York City employers of four or more employees may not refuse to hire such victims, discharge them, or otherwise discriminate against them. Moreover, employers must reasonably accommodate the needs of such individuals. Employers may request certification of the need for leave, including documentation from a victim services organization, attorney, clergy member, or medical professional.[850] In addition, an employer is required to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or whom the covered entity has noticed may require such an accommodation for the person's needs as a victim of domestic violence, sex offenses or stalking. Upon reaching a final determination at the conclusion of the cooperative dialogue, the employer must provide the employee requesting an accommodation with a written final determination identifying any accommodation granted or denied. The employer may make a determination that no reasonable accommodation would enable the employee to satisfy the essential requisites of a job or enjoy the right or rights in question only after the parties have engaged, or the employer has attempted to engage, in a cooperative dialogue.[851]

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[847] N.Y. EXEC. LAW § 296(22).

[848] N.Y. EXEC. LAW § 296(22).

[849] N.Y.C., N.Y., ADMIN. CODE § 8 – 102, as amended by N.Y.C. Int. No. 0148 – 2022.

[850] N.Y.C., N.Y., ADMIN. CODE § 8-107(27).

[851] N.Y.C., N.Y., ADMIN. CODE § 8-107(28).

Further, the New York City Earned Sick and Safe Time Act permits an eligible employee to use paid time off to seek assistance from law enforcement and other legal and social services in response to a family offense matter, a sexual offense, stalking, or human trafficking.[852] The Earned Sick and Safe Time Act is discussed in full detail in **3.9(b)(ii)**.

Paid Leave in Westchester County for Certain Victims. In addition to providing reasonable accommodations for employees who are victims of domestic violence, sexual abuse, or stalking,[853] Westchester County employers are required to provide employees who are victims of domestic violence or human trafficking up to 40 hours of paid leave per year. Such employees may use this leave in order to attend or testify at criminal or civil court proceedings relating to domestic violence or human trafficking, and/or move to a safe location, and may use full days of leave or take leave in increments. An eligible employee is someone employed for hire by an employer in any employment within Westchester County for more than 90 days in a calendar year who performs work on a full- or part-time basis, including work performed in subsidized private sector and not-for-profit employment programs. Eligible employees do not include those employed through a work study program or work experience program.

An employer must provide safe leave upon an employee's request. A request may be made orally, in writing, by electronic means, or by any other means acceptable to the employer. When possible, a request must include the expected duration of the leave. The employee must make a good faith effort to provide notice in advance of taking leave. When possible, an employee must make a reasonable effort to schedule leave use in a manner that does not unduly disrupt an employer's operations. An employer cannot require an employee to find another employee to work during the employee's absence as a condition of using leave.

The employer may require an employee to provide reasonable supporting documentation that leave has been used for a covered purpose. Information about an employee or family member obtained solely for the purpose of using safe leave must be treated as confidential and cannot be disclosed except with the affected employee's written permission, unless disclosure is otherwise required by law. Any health or safety information possessed by an employer regarding an employee or family member must be maintained on a separate form and in a separate file from other personnel information.

Per guidance from an agency other than enforcement agency, leave must be paid at the hourly rate an employee normally earns during hours worked.[854]

An employer cannot utilize an absence control policy that includes safe leave as an absence that may lead to or result in discipline, discharge, demotion, or suspension, and is also prohibited from retaliating against an employee for exercising rights protected under the paid leave law.

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[852] N.Y.C., N.Y., CODE § 20-914(b).

[853] WESTCHESTER CNTY., N.Y. CODE §§ 586.01 *et seq*.

[854] Westchester County Human Rights Commission, *Westchester's Safe Time Leave Law: What Employers Need to Know* (Oct. 23, 2019).*available at* https://humanrights.westchestergov.com/images/stories/pdfs/safetimeleavelawemployers.pdf.

3.9(k) *Military-Related Leave*

3.9(k)(i) *Federal Guidelines on Military-Related Leave*

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to "serve" in the "uniformed services." USERRA also requires employers to reinstate employees returning from military leave who meet certain defined qualifications. An employer also may have an obligation to train or otherwise qualify those employees returning from military leave. USERRA guarantees employees a continuation of health benefits for the 24 months of military leave (at the employee's expense) and protects an employee's pension benefits upon return from leave. Finally, USERRA requires that employers not discriminate against an employee because of past, present, or future military obligations, among other things.

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[855]

FMLA. Under the FMLA, eligible employees may take leave for: (1) any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the armed forces; or (2) to care for a next of kin servicemember with a serious injury or illness (referred to as "military caregiver leave").

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or member of the National Guard who faces recall to active duty if a qualifying exigency exists.[856] An eligible employee may also take leave for a qualifying exigency if a covered family member is a member of the regular armed forces and is on duty, or called to active duty, in a foreign country.857 Notably, leave is only available for covered relatives of military members called to active federal service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.

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[855] USERRA provides that: (1) nothing within USERRA is intended to supersede, nullify, or diminish a right or benefit provided to an employee that is greater than the rights USERRA provides (38 U.S.C. § 4302(a)); and (2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

[856] 29 C.F.R. § 825.126(a).

[857] Deployment of the member with the armed forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. 29 C.F.R. § 825.126(a)(3).

2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

3.9(k)(ii) *State Guidelines on Military-Related Leave*

Military Leave for Private-Sector Employees. New York state law provides that its citizens "should not be discriminated against because they are subject to military duty" and should not be denied employment "because they are so subject to military duty."[858] Accordingly, no employer may solicit, require, or request a person to waive their rights under this antidiscrimination law. Such conduct constitutes a misdemeanor and can result in a civil penalty of up to $5,000 for each occurrence.[859]

New York further provides that certain private-sector employees who leave a position, other than a temporary position, in order to perform military service, are entitled to reinstatement following completion of military service. Such employees are afforded the right to reemployment in their previous position or in a position of similar status and pay after a period of military service.[860] This law applies only to those employees who receive a certificate of completion of military service, who remain qualified to perform the duties of the position, and who apply for reemployment within 90 days after being relieved of military service.[861] Where the employer's circumstances have so changed during the period of the employee's leave as to make reemployment impossible or unreasonable, employers are not obligated to reemploy these individuals.[862]

Private-sector employees who take a leave of absence for certain types of military training are required to apply for reemployment within 60 days, or in some situations, 10 days, following this training.[863] These rights extended to private-sector employees under state law do not apply to persons participating in routine reserve-officer training corps training, except when performing advanced training duty as a member of a reserve component of the armed forces.[864]

Notably, New York's labor law in general prohibits employers from retaliating against employees who complain to the employer or the state about an alleged leave law violation, cooperate with an investigation, or exercise their rights under leave provisions.[865] Violating employers may be subjected to penalties ranging from $1,000 to $10,000, with greater penalties possible for multiple violations within a six-year period.[866]

Family Military Leave. In New York, employers with 20 or more employees at any worksite are obligated to provide up to 10 days of unpaid leave to certain military spouses.[867] This protection extends specifically to employees who: (1) work more than 20 hours per week on average; and (2) are married to

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858 N.Y. MIL. LAW § 318(1).

859 N.Y. MIL. LAW § 318(2).

860 N.Y. MIL. LAW § 317.

861 N.Y. MIL. LAW § 317(1).

862 N.Y. MIL. LAW § 317(1)(c).

863 N.Y. MIL. LAW § 317(2), (2-a).

864 N.Y. MIL. LAW § 317(3).

865 N.Y. LAB. LAW § 215(1)(a).

866 N.Y. LAB. LAW § 215(1)(b).

867 N.Y. LAB. LAW § 202-i.

a member of the U.S. armed forces, National Guard, or reserves "who has been deployed during a period of military conflict, to a combat theater or combat zone of operations."[868] The unpaid leave must be used only when the employee's spouse is also on leave.

Employers may not retaliate against employees who request or take spousal military leave. Employers also are not limited to these leave requirements but may offer more generous leave options for military spouses if they choose.[869]

Other Military-Related Protections: Spousal Unemployment Benefits. Although unemployment benefits can be denied when an employee resigns voluntarily, New York has enacted an exception to that rule that may apply to military spouses. The law generally provides that a claimant for unemployment benefits will not be disqualified if they resigned their employment due to "compelling family reasons."[870] The term *compelling family reasons* includes a resignation based on the need for the former employee to accompany their spouse "(A) to a place from which it is impractical for [the employee] to commute and (B) due to a change in location of the spouse's employment."[871] Although the law does not directly address military deployment, the definition of *compelling family reasons* would arguably apply, entitling military spouses to unemployment benefits.

3.9(l) *Other Leaves*

3.9(l)(i) *Federal Guidelines on Other Leaves*

There are no federal statutory requirements for other categories of leave for private-sector employees.

3.9(l)(ii) *State Guidelines on Other Leaves*

New York law offers additional protections to employees seeking leaves of absence for specific purposes.

Funeral or Bereavement Leave. New York does not require employees to offer funeral or bereavement leave upon the death of a spouse, or the child, parent, or other relative of the spouse. But if an employer offers such leave, it must grant the same leave to employees in committed same-sex relationships. In other words, an employer that offers this type of leave must extend it to an employee upon the death of "the same-sex committed partner or the child, parent or other relative of the committed partner."[872]

Volunteer Emergency Responder Leave. Employees who are volunteer firefighters or members of a volunteer ambulance service may request leaves of absence to perform their volunteer duties during a state of emergency, as declared by the state or federal government.[873] Employers must allow such leaves unless doing so would impose an undue hardship on the business. For this purpose, *undue*

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[868] N.Y. LAB. LAW § 202-i(1)-(2).

[869] N.Y. LAB. LAW § 202-i(3)-(4).

[870] N.Y. LAB. LAW § 593.

[871] N.Y. LAB. LAW § 593(1)(b)(iii).

[872] N.Y. CIV. RIGHTS § 79-n*2. The statute defines *same-sex committed partners* to include "those who are financially and emotionally interdependent in a manner commonly presumed of spouses."

[873] N.Y. LAB. LAW § 202-l.

hardship means "an accommodation requiring significant expense or difficulty" and includes "a significant interference with the safe or efficient operation of the workplace."[874]

Employees are eligible for responder leave only if: (1) the employee previously provided written documentation, notifying the employer of the employee's role; and (2) the employee's volunteer duties "are related to the declared emergency."[875] Leave is excused but unpaid, although the employee may elect to use any other applicable paid leave to which the employee is entitled.

Additionally, the employer may request a notarized statement from the head of the applicable volunteer unit, certifying the employee's need for leave.[876]

3.10 Workplace Safety

3.10(a) *Occupational Safety and Health*

3.10(a)(i) *Fed-OSH Act Guidelines*

The federal Occupational Safety and Health Act ("Fed-OSH Act") requires every employer to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to employees.[877] Employers are also required to comply with all applicable occupational safety and health standards.[878] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see LITTLER ON WORKPLACE SAFETY.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[879] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

3.10(a)(ii) *State-OSH Act Guidelines*

New York, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[880] Thus, New York is a so-called "state plan" jurisdiction, with its own detailed rules for occupational safety and health that parallel, but are separate from, Fed-OSHA standards. However, New York's plan covers only state and local government

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874 N.Y. EXEC. LAW § 296(10).

875 N.Y. LAB. LAW § 202-l(2).

876 N.Y. LAB. LAW § 202-l(4).

877 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

878 29 U.S.C. § 654(a)(2).

879 29 U.S.C. § 667(c)(2).

880 29 U.S.C. § 667.

workplaces, as well as other governmental entities (*i.e.*, schools, fire departments). New York does not have a similar statewide plan applicable to private-sector employers.[881]

That being said, there are safety-related laws contained within the labor code. For example, employers are generally required to construct, equip, arrange, operate, and conduct the workplace in a manner that provides reasonable and adequate protection to the lives, health, and safety of all employees and persons lawfully frequenting the workplace. All machinery, equipment, and devices in the workplace are to be placed, operated, guarded, and lighted so as to provide reasonable and adequate protection to these persons.[882]

Beyond these basic protections, the labor code also includes regulations concerning exposure to asbestos, exterior window-cleaning, demolition work, and factories.[883]

3.10(a)(iii) *Local Workplace Safety Guidelines*

With respect to providing safe workplaces, New York City specifically prohibits employers from preventing exit from any workplace, such as by performing "lock-ins," when by doing so, the health or safety of any employee, independent contractor, or other individual working in such workplace may become endangered by fire or other hazardous condition.[884] Moreover, New York City law prohibits retaliation against employees who lawfully participate in civil or criminal enforcement proceedings related to the enforcement of this law.[885]

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

General Restrictions. New York has enacted laws banning the use of cell phones and portable electronic devices in motor vehicles—both personal and commercial—while in motion.[886] These laws apply to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, the restrictions.

The regulations, including the definitions, are broad. For example, *using* a cell phone includes not only actual conversation but also holding the phone in immediate proximity to an ear.[887] *Using* an electronic device (which includes, among other things, handheld devices as well as laptops, pagers, and electronic

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881 N.Y. LAB. LAW § 27-a; *see, e.g.*, U.S. Dep't of Labor, Occupational Safety & Health Admin., *New York State Plan*, *available at* https://www.osha.gov/dcsp/osp/stateprogs/new_york.html.

882 N.Y. LAB. LAW § 200.

883 *See, e.g.*, N.Y. LAB. LAW §§ 202 (windows and building exteriors), 202-h (high voltage), 205 (eating meals near noxious materials), 240–42 (construction, demolition, etc.), 255 *et seq*. (factories and foundries), 203 & 203-a (elevator operators), 376 *et seq*. (rules applicable to mercantile and restaurant establishments), 870-a *et seq*. (carnivals, fairs and amusement parks), and 900 *et seq*. (asbestos).

884 N.Y.C., N.Y., ADMIN. CODE § 28-307.1.

885 N.Y.C., N.Y., ADMIN. CODE § 28-307.3.

886 N.Y. VEH. & TRAF. LAW §§ 1225-c, 1225-d.

887 N.Y. VEH. & TRAF. LAW § 1225-c(1)(c).

games) means holding it "while viewing, taking or transmitting images, playing games," searching the internet, texting, and checking email.[888]

There are exceptions to the ban, including for emergency situations and first-responders (police officers, firefighters, etc.).[889] In addition, drivers may use a hands-free mobile telephone.[890] There is no exception for texting at any time; it is simply illegal. The laws create a presumption against any driver who is holding a mobile phone or electronic device conspicuously while the vehicle is in motion.[891]

Restrictions for Commercial Drivers. New York imposes stricter rules for commercial drivers, who may not use their phones or other devices "while temporarily stationary because of traffic, a traffic control device, or other momentary delays."[892] The law thus implies that noncommercial drivers could use a device while stopped at a light, but commercial drivers may not.

Of particular relevance to employers, the law expressly states that no motor carrier may allow or require its drivers to use either a hand-held phone or a portable electronic device while driving.[893]

3.10(c) *Firearms in the Workplace*

3.10(c)(i) *Federal Guidelines on Firearms on Employer Property*

Federal law does not address firearms in the workplace.

3.10(c)(ii) *State Guidelines on Firearms on Employer Property*

In 2022, New York overhauled its gun laws to restrict where a person may legally carry a concealed weapon. Of interest to employers, the law makes it a crime to carry a firearm onto private property where the owner has posted signage prohibiting firearms on the property. The law creates the new crime of criminal possession of a weapon in a restricted location and classifies it as a class E felony. Property owners or lessees can display a sign on their property to allow the concealed carry of weapons on the premises. If there is no sign, concealed carry permit owners should assume firearms are not permitted on the property and that it is a crime to enter onto or remain on the property with a firearm.[894]

3.10(d) *Smoking in the Workplace*

3.10(d)(i) *Federal Guidelines on Smoking in the Workplace*

Federal law does not address smoking in the workplace.

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[888] N.Y. VEH. & TRAF. LAW § 1225-d(2)(a)-(b).

[889] N.Y. VEH. & TRAF. LAW §§ 1225-c(3), 1225-d(3).

[890] N.Y. VEH. & TRAF. LAW §§ 1225-c(3), 1225-d(3). *Hands-free mobile telephone* is defined to include phones with features or functions that permit a user to engage in a call without the use of either hand. This exception does not apply to commercial drivers if the device requires that they dial or answer a call "by pressing more than a single button." N.Y. VEH. & TRAF. LAW § 1225-c(1)(e).

[891] N.Y. VEH. & TRAF. LAW §§ 1225-c(2)(b), 1225-d(4).

[892] N.Y. VEH. & TRAF. LAW §§ 1225-c(2)(a), 1225-d(4). The restrictions do not apply to commercial motor vehicle drivers if the vehicle is pulled over to the side or off of a public highway.

[893] N.Y. VEH. & TRAF. LAW §§ 1225-c(2)(d), 1225-d(1-a).

[894] N.Y. PEN. LAW § 265.01-d.

3.10(d)(ii) *State and Local Guidelines on Smoking in the Workplace*

In New York, smoking is prohibited in indoor places of employment, including offices, warehouses, cafeterias, and company-owned vehicles.[895] The workplace smoking prohibition includes *vaping*, defined as use of an electronic cigarette.[896] "No Smoking" signs must be posted and properly maintained by employers.[897] There are some exceptions to the statewide smoking ban, including, for example, restaurants with outdoor seating.[898]

That being said, the state law does not preclude municipalities from enacting their own smoking regulations.[899] New York City has done so and prohibits smoking (including electronic cigarettes) in all enclosed areas, including theaters, mass transit, convention halls, zoos, bars, and restaurants with outdoor seating.[900]

3.10(e) *Suitable Seating for Employees*

3.10(e)(i) *Federal Guidelines on Suitable Seating for Employees*

Federal law does not address suitable seating requirements for employees.

3.10(e)(ii) *State Guidelines on Suitable Seating for Employees*

New York establishes certain seating requirements for female employees. By law, "[a] sufficient number of suitable seats, with backs where practicable, shall be provided and maintained in every factory, mercantile establishment, freight or passenger elevator, hotel and restaurant for female employees."[901] Employers must allow female workers to use these seats as reasonably necessary for their health.

In factories, employers must permit female employees to sit whenever they are engaged in work that can be properly accomplished while seated.

In mercantile establishments, at least one seat must be available for every three women employed. If the female employees handle duties that are performed principally in front of (or in back of) a counter, table, desk or other fixture, the seats should be placed in front of (or in back of) such fixture.[902]

The civil penalties for violating these provisions are steep. The Commissioner of Labor may assess a civil penalty between $1,000 and $10,000, with greater penalties possible for multiple violations within a six-year period. The commissioner may also order injunctive relief and liquidated damages, which are capped at $10,000. Employees may bring individual actions as well.[903]

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[895] N.Y. PUB. HEALTH LAW §§ 1399-n *et seq*.

[896] N.Y. PUB. HEALTH LAW § 1399-o.

[897] N.Y. PUB. HEALTH LAW § 1399-p.

[898] N.Y. PUB. HEALTH LAW § 1399-q.

[899] N.Y. PUB. HEALTH LAW § 1399-r.

[900] N.Y.C., N.Y., ADMIN. CODE § 17-503. Exceptions apply for retail tobacco stores or tobacco bars.

[901] N.Y. LAB. LAW § 203-b.

[902] N.Y. LAB. LAW § 203-b.

[903] N.Y. LAB. LAW § 215.

3.10(f) *Workplace Violence Protection Orders*

3.10(f)(i) *Federal Guidelines on Workplace Violence Protection Orders*

Federal law does not address employer workplace violence protection orders. That is, there is no federal statute addressing whether or how employers might obtain a legal order (such as a temporary restraining order) on their own behalf, or on behalf of their employees or visitors, to protect against workplace violence, threats, or harassment.

3.10(f)(ii) *State Guidelines on Workplace Violence Protection Orders*

New York law does not address employer workplace violence protection orders.

3.11 Discrimination, Retaliation & Harassment

3.11(a) *Protected Classes & Other Fair Employment Practices Protections*

3.11(a)(i) *Federal FEP Protections*

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[904] (2) the Americans with Disabilities Act (ADA);[905] (3) the Age Discrimination in Employment Act (ADEA);[906] (4) the Equal Pay Act;[907] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[908] (6) the Civil Rights Acts of 1866 and 1871;[909] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;
- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[910]
- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40 +); or

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[904] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[905] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[906] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[907] 29 U.S.C. § 206(d). Since the Equal Pay Act is part of the FLSA, the Equal Pay Act applies to employers covered by the FLSA. *See* 29 U.S.C. § 203.

[908] 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42 U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

[909] 42 U.S.C. §§ 1981, 1983.

[910] 140 S. Ct. 1731 (2020). For a discussion of this case, see LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION.

- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[911] Employees must first exhaust their administrative remedies by filing a complaint within 180 days—unless a charge is covered by state or local antidiscrimination law, in which case the time is extended to 300 days.[912]

3.11(a)(ii) *State FEP Protections*

The New York Human Rights Law (NYHRL) offers broader protections than federal law. It prohibits discrimination in employment on the basis of:

- age (protecting individuals 18 years old and over);
- race (includes traits historically associated with race including but not limited to hair texture and protective hairstyles. *Protective hairstyles* includes but is not limited to braids, locks, and twists);[913]
- creed;
- color;
- national origin (including ancestry);
- sexual orientation (actual or perceived);
- military status;
- sex (gender identity, or transgender status. Gender identity and expression is a standalone category as well as a category that is included in sex as a protected class);
- pregnancy;
- disability (includes being a certified medical marijuana patient and gender dysphoria);
- predisposing genetic characteristics;
- marital status;
- arrest or conviction;
- genetic information/testing;
- domestic violence victim status;
- familial status (including being a parent);
- pregnancy-related conditions;
- gender identity or expression (actual or perceived);
- reproductive health decision-making by an employee or dependent of an employee*; or[914]

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911 The EEOC's website is available at http://www.eeoc.gov/.

912 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29 C.F.R. § 1626.7.

913 N.Y. EXEC. LAW § 292.

914 N. Y. LAB. LAW § 203-e.

- citizenship and immigration status.[915]

* Note: The statute provides that an employer that provides a handbook must also provide notice of the right to reproductive decision making in the handbook. However, a district court[916] held that while the government had shown a compelling governmental interest for requiring the notice, the requirement was not narrowly tailored because the government could have achieved its purposes in other ways. Accordingly, the court permanently enjoined the government from enforcing the notice requirement against any employer. The district court's decision does not change the prohibition on discriminating based on reproductive health decisions, and employers may still choose to publish the notice in their handbook if they wish. The case has been appealed and is currently pending before the Second Circuit.

Effective November 16, 2024, under the Clean Slate Act, employers are prohibited from making any inquiry regarding or discriminating against individuals based upon automatically sealed conviction records.[917]

Moreover, it is illegal for an employer to discriminate against an individual because of their known relationship or association with a member of any of the above protected categories.[918] Covered employers also are prohibited from retaliating against any person for opposing an unlawful discriminatory practice, or for filing a complaint, testifying, or assisting in any proceeding under the law. Prohibited retaliation may include disclosing an employee's personnel file under certain circumstances.[919]

Employees may not be required to violate or forego a sincerely held practice of his or her religion, including but not limited to the observance of any particular day or days or any portion thereof as a Sabbath or other holy day in accordance with the requirements of their religion, or the wearing of any attire, clothing, facial hair in accordance with the requirements of their religion, unless, the employer can demonstrate that accommodating such practice or observance is an undue hardship on the conduct of the employer's business.[920]

Covered Employers. With a few exceptions noted below, the NYHRL applies to employers with 1 or more employees. In an action based on alleged sexual harassment, however, the definition of *employer* is expanded to include *all* employees within the state.[921]

The definition of "to threaten, penalize, or in any other manner discriminate or retaliate against an employee includes threatening to contact United States Immigration authorities, or otherwise reporting or threatening to report an employee's suspected citizenship or immigration status or the suspected citizenship or immigration status of an employee's family or household member to a federal, state or local agency.[922]

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[915] N.Y. EXEC. LAW §§ 63, 292, 296, 296-A, 296-C.

[916] *ComoassCare v. Cuomo*, 594F. Supp. 3d 515 (N.D.N.Y., March 29, 2022).

[917] N.Y. EXEC. LAW § 296 (16).

[918] N.Y. EXEC. LAW §§ 291-92, 296; N.Y. COMP. CODES R. & REGS. tit. 9, §§ 466.13, 466.14.

[919] N.Y. EXEC. LAW §§ 296(1)(e), 296(7).

[920] N.Y. EXEC. LAW § 296.

[921] N.Y. EXEC. LAW § 292(5).

[922] N.Y. LAB. LAW § 215.

Additionally, there are exceptions for religious or denominational organizations, as well as charitable or educational groups organized or supervised by religious entities. Such religious organizations may give preference in employment to individuals of the same religion or take other such action to promote their religious principles.[923]

Covered Employees & Interns. Employees working for covered employers are, by extension, protected by the NYHRL. The nondiscrimination provisions also apply to unpaid interns, however.[924] The law prohibits employers from discriminating against interns based on any protected characteristics in recruiting, hiring, or any terms and conditions of their work for the employer. It also expressly prohibits the sexual harassment of interns.[925]

The statute does not create an employment relationship between an employer and intern.[926] As a result, interns are not counted as *employees* for purposes of calculating the number of employees, which is then used when determining whether an employer has the requisite personnel to be covered by the NYHRL.

Third Parties. Notably, the NYHRL also protects third parties against sexual harassment. It is an unlawful discriminatory practice for an employer to permit sexual harassment of nonemployees in its workplace. An employer may be held liable to a nonemployee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace or who is an employee of the nonemployee, with respect to sexual harassment, if the employer or the employer's agents or supervisors knew or should have known that the nonemployee was subjected to sexual harassment in the employer's workplace, and the employer failed to take immediate and appropriate corrective action. In reviewing cases involving nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of the harasser will be considered.[927]

3.11(a)(iii) *State Enforcement Agency & Civil Enforcement Procedures*

The NYHRL is enforced by the New York Division of Human Rights (NYDHR). A person who claims to have been the subject of unfair or discriminatory practices may sign and file a written complaint under oath or declaration with the NYDHR, within one year of the alleged discriminatory practices.[928] **Effective February 15, 2024**, the time to file a claim is three years for all discrimination claims. Employees have three years to file a claim of sexual harassment under state law, whether filing in an administrative agency or in court for claims filed after August 12, 2020. Discrimination claims *other than* sexual harassment will still be subject to a one-year statute of limitation when filed in administrative agencies.

Following the filing of a complaint, the NYDHR will promptly serve a copy on the employer, as well as any individuals it deems necessary parties. The NYDHR will initiate an investigation. Within 180 days of the filing of a complaint, the NYDHR will determine if it has jurisdiction and whether there is probable

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923 N.Y. EXEC. LAW § 297; *see also* N.Y. EXEC. LAW § 296-c.

924 N.Y. EXEC. LAW § 296-c.

925 N.Y. EXEC. LAW § 296-c(2).

926 N.Y. EXEC. LAW § 296-c(5). The provision excludes interns as employees for purposes of Articles 6, 7, 18, and 19 of the labor code, covering topics such as wage payments, minimum wage, and unemployment compensation.

927 N.Y. EXEC. LAW § 296-d.

928 N.Y. EXEC. LAW § 297(1), (5).

cause to believe that a violation has occurred. If either jurisdiction or probable cause is lacking, the NYDHR will dismiss the complaint.[929]

At any time while a complaint is pending, the NYDHR may attempt to resolve the matter through conference, conciliation, and persuasion.[930] In addition, if the NYDHR finds that proceeding to a "hearing would be undesirable, [it] may, in its unreviewable discretion, at any time prior to a hearing . . . dismiss the complaint on the grounds of administrative convenience."[931]

If the NYDHR finds jurisdiction and probable case, and the case is not either administratively dismissed or settled, a public hearing before an examiner will be scheduled within 270 days from the filing of the complaint. At that point, the respondent-employer must answer the charges, no later than two days prior to the scheduled hearing. If an employer answers the complaint, it may participate in the hearing and present a defense.[932] If the employer fails to answer the complaint, the hearing officer may enter a default and proceed on the evidence submitted by the complainant-employee only. Any such default can be set aside only upon a showing of good cause and upon equitable terms and conditions.[933]

Within 180 days after the hearing, the NYDHR must issue its determination and serve its order. No matter the outcome, the NYDHR must state all findings of fact. If the employer is found to have engaged in unlawful discriminatory conduct, the NYDHR may order specific remedies, including: injunctive relief; affirmative relief (including hiring, reinstatement, or upgrading of an employee); back pay; compensatory damages for pain, suffering, humiliation, medical expenses, etc.; and front pay for expected salary loss until reemployment.[934] Civil fines and penalties payable to the state may also be assessed, up to $50,000 generally or up to $100,000 for acts deemed willful, wanton, or malicious.[935]

In contrast to Title VII, punitive damages are not available under the NYHRL for employment discrimination.[936] However, in contrast to its federal counterparts, an award of damages for pain and suffering is not limited by any statutory caps.

Confidentiality. No employee or agent of the NYDHR may disclose, without prior consent, any individual's information obtained by the NYDHR during this administrative process, except as necessary to conduct these proceedings.[937]

Election of Remedy. The NYHRL permits a person aggrieved by an unlawful discriminatory practice to bring a private civil action for damages *unless* the person has previously filed a complaint with the NYDHR or with a local human rights commission, such as the NYCCHR.[938] The law also provides that no person who has initiated a private civil action for an unlawful discriminatory practice may file a

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929 N.Y. EXEC. LAW § 297(2)(a).

930 N.Y. EXEC. LAW § 297(3)(a)-(b).

931 N.Y. EXEC. LAW § 297(3)(c).

932 N.Y. EXEC. LAW § 297(4)(a).

933 N.Y. EXEC. LAW § 297(4)(b).

934 N.Y. EXEC. LAW § 297(4)(c); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1189 (2d Cir. 1992).

935 N.Y. EXEC. LAW § 297(4)(c).

936 *Thoreson v. Penthouse Int'l*, 606 N.E.2d 490, 499 (N.Y. 1992).

937 N.Y. EXEC. LAW § 297(8).

938 *See* N.Y. EXEC. LAW § 297(9).

complaint with respect to the same grievance with the NYDHR.[939] Hence, an aggrieved person generally may seek relief either in an appropriate court or by complaint to the NYDHR, but not both.[940]

The NYDHR provides broad exceptions to its election of remedies provision where the agency dismisses a complaint on grounds of: (1) administrative convenience; (2) untimeliness; or (3) a complainant's request that it do so to permit the complainant to pursue the claim in court.[941] Administrative claims dismissed as untimely because they were not filed within a year of the alleged misconduct may still be actionable in court, however, because the statute of limitations on a civil action is longer than for the administrative action.

An additional exception to the election of remedies provision addresses the situation where the NYDHR takes administrative action after a complaint is referred to it by the EEOC. In order to bring a court action under Title VII or the ADEA, an employee must first file administrative charges with both the EEOC and the state or local agency having subject matter jurisdiction over the charge.[942] If the claimant wishes to bring a civil action under federal and state/local statutes, satisfaction of the state filing requirement would appear to divest the court of jurisdiction over the state and local claims by application of the election of remedies rule discussed above. Rejecting this anomaly, the legislature amended the NYHRL to clarify that a claimant does not make an election of remedies when the claimant files a charge only with the EEOC and the EEOC then refers the charge to the NDYRH under a worksharing agreement between the agencies.[943] However, if the claimant individually files a charge with the NYDHR, the claimant has elected the remedy and generally loses the right to bring a private civil action.[944]

3.11(a)(iv) *Additional Discrimination Protections*

New York employees are covered by additional statewide discrimination protections, some of which are briefly highlighted below.

American Flags. New York employers may not discharge or otherwise discriminate against any employee who displays an American flag on their person or workstation, as long as the display does not substantially or materially interfere with the employee's job duties.[945]

Legal Activities. New York has enacted a legal activities law, which prohibits employers from discriminating against employees because of the employer's dislike of or opposition to the activities in which an employee engages after work.[946]

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[939] N.Y. EXEC. LAW § 297(9).

[940] *Watson v. Arts & Entm't TV Network*, 2008 WL 793596, at *7 (S.D.N.Y. Mar. 26, 2008); *Lennon v. New York City Health & Hosp. Corp.*, 393 F. Supp. 2d 630, 640-41 (S.D.N.Y. 2005).

[941] N.Y. EXEC. LAW § 297(9).

[942] 42 U.S.C. § 2000e-5(c), (f); 29 U.S.C. §§ 626(d), 633(b).

[943] *See* N.Y. EXEC. LAW § 297(9).

[944] *See Lennon*, 392 F. Supp. 2d at 640-41.

[945] N.Y. LAB. LAW § 215-c.

[946] N.Y. LAB. LAW § 201-d; *see State of New York v. Wal-Mart Stores, Inc.*, 621 N.Y.S.2d 158 (N.Y. App. Div. 1995).

This statute makes it generally unlawful for an employer to refuse to hire, employ, license, or to discharge, or to otherwise discriminate against an employee in terms or conditions of employment because of the employee's:

1. lawful political activities "outside of working hours, off of the employer's premises and without use of the employer's equipment or other property;"
2. lawful "use of consumable products prior to the beginning or after the conclusion of the employee's work hours, . . . off of the employer's premises and without use of the employer's equipment or other property;"
3. lawful "recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or property;" or
4. "membership in a union or any exercise of rights" granted by the federal labor laws or by the state Public Employees' Fair Employment Act.[947]

The protections for an individual's legal use of consumable products afforded by the statute would, for example, prohibit an employer from discriminating against an employee or applicant due to that individual's lawful use of cigarettes or alcohol off the clock. *Recreational activities* include any lawful, leisure-time, unpaid activities, which are typically "engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material."[948]

There are numerous exceptions to the legal activities law. For example, an employer can take action if it believes that the employee's conduct is illegal or if it constitutes "habitually poor performance, incompetency or misconduct."[949] By way of further example, the law does not protect activity that "creates a material conflict of interest" connected to the employer's trade secrets or other proprietary information.[950] Employers are also not subject to liability for actions that are required by law or are permissible pursuant to an established policy (*i.e.*, a substance abuse policy) or collective bargaining agreement.[951]

Wage Assignments. Employers are prohibited from discriminating against an employee or applicant who has been subject to a wage assignment or income execution served upon that employer or any former employer.[952] Aggrieved employees or applicants may initiate a civil suit seeking lost wages. Additionally, an employer that discharges, lays off, refuses to promote, or disciplines an employee in violation of this regulation may be subject to a civil penalty of up to $500 for a first offense and up to $1000 for subsequent offenses.[953]

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[947] N.Y. LAB. LAW § 201-d.

[948] N.Y. LAB. LAW § 201-d(1)(b). According to one court, *recreational activity* excludes picketing a public employer for allegedly wasting taxpayer money. *See Kolb v. Camilleri*, 2008 WL 3049855, at *13 (W.D.N.Y. Aug. 1, 2008).

[949] N.Y. LAB. LAW § 201-d(4).

[950] N.Y. LAB. LAW § 201-d(3).

[951] N.Y. LAB. LAW § 201-d(4).

[952] N.Y. C.P.L.R. § 5252(1).

[953] N.Y. C.P.L.R. § 5252(1)-(2).

Workers' Compensation. Employers in New York may not discriminate against employees or applicants who have claimed, or received, workers' compensation benefits. This protection also extends to individuals who have testified or will testify in a workers' compensation proceeding.[954]

Captive Audience. An employer may not refuse to hire, terminate from employment, or otherwise discriminate against an individual in terms of compensation, promotion, or terms, conditions, or privileges of employment because the individual refuses to:

- attend an employer-sponsored meeting; or
- listen to speech or view communications,

the primary purpose of which is to communicate the employer's opinion on religious or political matters.[955]

3.11(a)(v) *New York City FEP Protections*

In addition to the federal and state laws, employers with operations in New York City are subject to the requirements of the New York City Human Rights Law (NYCHRL). The NYCHRL includes additional protected categories and prohibits discrimination in employment on the basis of:

- alienage (including citizenship and immigration status of noncitizens);
- gender (including actual or perceived sex, gender identity and gender expression, including a person's actual or perceived gender-related self-image, appearance, behavior, expression, or other gender-related characteristic, regardless of the sex assigned to that person at birth);
- marital or partnership status (including domestic partners registered by the New York City clerk);
- arrest or conviction record;
- caregiver status;
- credit history;
- unemployment status;
- status as a victim of domestic violence, stalking, and sex offenses. Practices "based on," "because of," "on account of," "as to," "on the basis of," or "motivated by" an individual's "status as a victim of domestic violence," or "status as a victim of sex offenses or stalking" include, but are not limited to, those based solely upon the actions of a person who has perpetrated acts or threats of violence against the individual; and
- sexual and reproductive health decisions. *Sexual and reproductive health decisions* means any decision by an individual to receive services, which are arranged for or offered or provided to individuals relating to sexual and reproductive health, including the reproductive system and its functions. Such services include, but are not limited to, fertility-related medical procedures, sexually transmitted disease prevention, testing, and

[954] N.Y. WORKERS' COMP. §§ 120, 125(1). The provision protecting applicants also expressly covers injured veterans. N.Y. WORKERS' COMP. § 125(1).

[955] N.Y. LAB. LAW § 201-D(2)(e).

treatment, and family planning services and counseling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing, and abortion.[956]

Covered employers also are prohibited from retaliating against any person for opposing an unlawful discriminatory practice, or for filing a complaint, testifying, or assisting in any proceeding under the ordinance.[957] Employees are protected from retaliation as long as they reasonably believe the employer was acting illegally.[958]

The New York City Commission on Human Rights rules establish protections and definitions for gender identity and expression under the New York City Human Rights Law. The rules also expand and clarify the scope of gender-related protections available under the New York City Human Rights Law in the following areas:

- **Pronoun Usage.** The deliberate refusal to use an individual's self-identified name, pronoun, or title is an unlawful discriminatory practice where the refusal is motivated by gender. It is not a deliberate refusal or unlawful to ask someone in good faith either their name or what pronoun they refer to use, nor it is a violation where federal, state, or local law requires otherwise, such as for verifying employment eligibility with the federal government. Thus, examples of unlawful discrimination provided in the new rule include refusing to use an employee's self-identified name in their email account, or asking for or deliberately referring to a transgender woman as "Mr." after she has made it clear that she uses the female title.
- **Single Gender Facilities & Programs.** All persons must be allowed to use single-gender facilities or participate in single-gendered programs consistent with their gender identity and regardless of their sex assigned at birth, anatomy, medical history, appearance, or the sex indicated on their identification. This includes all single-gendered bathrooms, locker rooms, or hospital rooms. For example, it is prohibited to require that a nonbinary person use a single-occupancy restroom instead of a shared bathroom. Moreover, it is not a defense to a violation of the Human Rights Law that some employees object to sharing single-gender facilities or participating in a program with a transgender, nonbinary, or gender nonconforming person.
- **Dress Codes & Uniforms.** Employers may not require dress codes or uniforms or apply grooming or appearance standards that impose different requirements for individuals based on gender. It is not a defense to a dress code violation that the employer is catering to clients or customers. The rules provide the example that it is unlawful to require different uniforms for men and women. Thus, an employer may provide different uniform options that are typically associated with men and women, but may not require that an employee wear one style over the other.
- **Equal Benefits.** Employers must provide equal employee benefits regardless of gender. Benefits plans must be offered equally to all employees, regardless of gender, and employers may not provide health benefits that deny, limit, or exclude services based on

[956] N.Y.C., N.Y., ADMIN. CODE §§ 3-240, 8-102, 8-107, and 8-107(27). Protections for sexual and reproductive choices added by Int. No. 863-A.

[957] N.Y.C., N.Y., ADMIN. CODE § 8-107(7).

[958] Additional information about protections and coverage under the NYCHRL is available at https://www1.nyc.gov/site/cchr/law/in-the-workplace.page.

gender. Health benefits plans may not exclude coverage for transgender care. In addition, it is unlawful to give twelve weeks of paid parental leave to mothers, but only two weeks to fathers, unless the differential in parental leave is based on physical recovery from childbirth, rather than on the parent's gender.

- **Disability Accommodations.** Employers may not use gender as a basis for refusing, withholding, or denying a request for accommodation for a disability, or other request for changes to the terms and conditions of an individual's employment or participation in a program. This includes leave requests and schedule changes. Therefore, employers must treat leave requests to address medical or health care needs related to an individual's gender identity in the same manner as requests for all other medical conditions. Employers must provide reasonable accommodations to individuals undergoing gender transition.[959]

Additionally, the rule contains several definitions related to gender identity and expression.[960]

Covered Employers. The NYCHRL generally covers employers with four or more employees, and it counts independent contractors as employees for purposes of that calculation.[961] However, in an action for unlawful discrimination based on a claim of gender-based harassment, the term *employer* includes all employers in New York City, including those that employ less than four persons.[962] Paid and unpaid interns are also treated as, and are protected as, employees.[963] The law explicitly covers apprentice training programs as well.[964] Like the state law, the NYCHRL includes an exception for religious or denominational institutions, which may limit employment or grant preferences to individuals with the same religion or otherwise act as necessary to promote their religious principles.[965]

Unlike the state and federal law, however, the NYCHRL imposes strict liability on employers for any unlawful discrimination or harassment committed by supervisors. Although an affirmative defense is available to employers for supervisory misconduct under state and federal law,[966] that defense does not apply to claims brought under the NYCHRL.[967]

NYCHRL Enforcement. The New York City Commission on Human Rights (NYCCHR) investigates and enforces the NYCHRL by use of the Law Enforcement Bureau (LEB). Its procedures are similar to those for claims brought under the NYHRL.[968] Written, verified complaints may be submitted within one year

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[959] The New York: NYC Human Rights Commission Final Rule re Gender Identity is available at https://www.nyc.gov/assets/cchr/downloads/pdf/CCHR-Final-Gender-Rule-2019-1-4.pdf. This amendment will be codified at Title 47, sections 2-01 and 2-06 of the Rules of the City of New York.

[960] The rule provides definitions for the following terms: cisgender; gender; gender expression; gender identity; gender nonconforming; intersex; nonbinary; sex; and transgender. The New York: NYC Human Rights Commission Final Rule re Gender Identity is available at https://www1.nyc.gov/assets/cchr/downloads/pdf/CCHR-Final-Gender-Rule-2019-1-4.pdf. This amendment will be codified at Title 47, sections 2-01 and 2-06 of the Rules of the City of New York.

[961] N.Y.C., N.Y., ADMIN. CODE § 8-102(5).

[962] N.Y.C., N.Y .ADMIN. CODE § 8-102(5).

[963] N.Y.C., N.Y., ADMIN. CODE § 8-107(23); *see also* N.Y.C., N.Y., ADMIN. CODE § 8-102(28).

[964] N.Y.C., N.Y., ADMIN. CODE § 8-107(2).

[965] N.Y.C., N.Y., ADMIN. CODE § 8-107(12).

[966] *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

[967] *Zakrzewska v. New School*, 928 N.E.2d 1035, 1039-41 (N.Y. 2010).

[968] *See* N.Y.C., N.Y., ADMIN. CODE §§ 8-109 to 8-120.

of the alleged discriminatory practice.[969] However, the Commission has jurisdiction over a claim of gender-based harassment if such claim is filed within three years after the alleged harassing conduct occurred.[970] The LEB will serve the complaint on the respondent-employer and any other necessary parties, and all written, verified answers are due within 30 days of service.[971]

The LEB may dismiss a complaint for administrative convenience at any time prior to a hearing, for various reasons, including lack of jurisdiction, absence of probable cause, or by request of the complainant.[972] Mediation and conciliation are available, and hearings are conducted by an administrative law judge.[973] The judge's order must include all findings of fact and, where liability is found, may issue injunctive and affirmative relief.[974]

Remedies available for unlawful discrimination under the NYCHRL include: injunctive relief; affirmative relief (including hiring, reinstatement or upgrading of an employee); back pay; compensatory damages; and front pay.[975] Civil penalties may also be assessed, up to $125,000 generally or up to $250,000 for acts deemed willful, wanton, or malicious.[976]

Unlike the state law, the NYCHRL authorizes recovery of punitive damages in a private action, and there are no statutory caps imposed on a punitive damages award.[977] For this reason, employers in New York City typically are sued under the NYCHRL, in addition to state and federal antidiscrimination statutes.

NYCHRL Election of Remedies. Like the NYHRL, the NYCHRL also requires the complainant to elect a remedy.[978] Accordingly, a private civil suit may not be maintained by a person who has filed a complaint with the LEB or the NYDHR with respect to the same discriminatory practices.[979] Courts have dismissed claims under the NYCHRL when the plaintiff previously chose to pursue a claim administratively with the NYDHR.[980] In short, once a complainant elects to proceed in the administrative forum by filing a complaint with the LEB, that becomes the sole avenue of relief for addressing any claim under the NYCHRL, and subsequent judicial action is generally barred. As mentioned in **3.11(a)(iii)** with respect to claims brought to the NYDHR, administrative claims dismissed as untimely because they were not filed within a year of the alleged misconduct may still be actionable in court, however, because the statute of limitations on a civil action is longer (three years) than for the administrative action.[981]

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969 N.Y.C., N.Y., ADMIN. CODE § 8-109(a), (e).

970 N.Y.C., N.Y. ADMIN. CODE § 8-109.

971 N.Y.C., N.Y., ADMIN. CODE §§ 8-109 (governing complaints and service), 8-111 (governing answers).

972 N.Y.C., N.Y., ADMIN. CODE § 8-113(a)-(d).

973 N.Y.C., N.Y., ADMIN. CODE §§ 8-115, 8-119.

974 N.Y.C., N.Y., ADMIN. CODE § 8-120.

975 N.Y.C., N.Y., ADMIN. CODE §§ 8-120(a), 8-502(a).

976 N.Y.C., N.Y., ADMIN. CODE § 8-126.

977 N.Y.C., N.Y., ADMIN. CODE § 8-502(a).

978 N.Y.C., N.Y., ADMIN. CODE § 8-502.

979 N.Y.C., N.Y., ADMIN. CODE § 8-502.

980 *See*, *e.g.*, *Chudnovsky v. Prudential Sec., Inc.*, 2000 WL 1576876, at **4-5 (S.D.N.Y. Oct. 19, 2000), *aff'd*, 51 F. App'x 901 (2d Cir. 2002); *Kamtaprassad v. Chase Manhattan Corp.*, 2001 WL 1662071, at **3-4 (S.D.N.Y. Dec. 28, 2001); *Agugliaro v. Brooks Bros.*, 802 F. Supp. 956, 962 (S.D.N.Y. 1992).

981 N.Y.C., N.Y., ADMIN. CODE § 8-502(d).

3.11(a)(vi) *Other Local FEP Protections*

Employers with operations in the jurisdictions listed in Table 25 are also subject to local fair employment practices ordinances.

Table 25. Local Fair Employment Practices Ordinances

Locality	Notes
Albany County	Employers that employ four or more employees must extend antidiscrimination protections on the basis of: age; color; creed; disability; gender identity or expression; genetic predisposition or carrier status; hair texture or protective hairstyle, or use of turban wrap; marital status; national origin; race; religion; sex; and sexual orientation.[982] An aggrieved person may file a verified written complaint with the Albany County Human Rights Commission through the Albany County Affirmative Action Officer within one year after the alleged discriminatory practice.[983]
Albany	The following classifications are protected: race; sex; creed; color; religion; national origin; sexual orientation; gender; gender identity and expression; age; disability; and marital or domestic partner status.[984] The law does not provide a definition of employer. Any person claiming to be aggrieved by an unlawful discriminatory practice may sign and file with the City of Albany Office of Equal Employment Opportunity and Fair Housing ("Office") a verified complaint in writing within one year after the alleged unlawful discriminatory practice took place.[985] Any person claiming to be aggrieved by an unlawful discriminatory practice will have a cause of action in any court of appropriate jurisdiction unless such person filed a complaint with the Office. If the Office dismissed the complaint on grounds of administrative convenience, then the person can maintain all rights to bring suit as if no complaint had been filed.[986]
Binghamton	Protected classifications include: age; race; color; creed; religion; national origin; ancestry; disability; marital status; sex; sexual orientation; gender identity or expression; weight; and height. The antidiscrimination protections apply to employers that employ five or more individuals for compensation, not including the employer's parents, spouse, or children, as well as any person acting on behalf of an employer, directly or indirectly.[987] There is no city-level enforcement agency that handles

[982] ALBANY CNTY., N.Y., LOCAL LAW NO. 1 for 2000 (Omnibus Human Rights Law for Albany County), as amended by LOCAL LAW NO. P for 2016 (exceptions, including *bona fide* occupational qualifications).

[983] ALBANY CNTY., N.Y., LOCAL LAW NO. 1 for 2000 (Omnibus Human Rights Law for Albany County), as amended by LOCAL LAW NO. P for 2016.

[984] ALBANY, N.Y., CODE § 48-23.

[985] ALBANY, N.Y., CODE § 48-27.

[986] ALBANY, N.Y., CODE § 48-27.

[987] BINGHAMTON, N.Y., CODE OF ORDINANCES §§ 45-2, 45-3, 45-4, and 45-8 (exceptions).

Table 25. Local Fair Employment Practices Ordinances	
Locality	**Notes**
	antidiscrimination claims; an aggrieved party may file a civil action or seek an injunction for violations of the provisions.[988] No statute of limitations is given in the ordinance.
Buffalo	The following classifications are protected: race; creed; color; national origin; sex; gender identity and expression; disability; age (60 years or older); and sexual orientation.[989] The law does not provide a definition of employer. There is no city-level enforcement agency that handles antidiscrimination claims; an aggrieved party may file a civil action or seek an injunction for violations of the provisions.[990] No statute of limitations is given in the ordinance.
Nassau County	Protected classifications include: gender; race; color; creed; national origin; disability; age; religion; source of income; and sexual orientation.[991] The law does not provide a definition of employer. An individual alleging a violation of the ordinance may file a complaint with the Nassau County Commission on Human Rights. No statute of limitations is given in the ordinance.[992]
New York City	Employers that employ four or more employees must extend antidiscrimination protections on the basis of: age (actual or perceived); race; creed; color; national origin; gender (includes actual or perceived sex, gender identity and gender expression, including a person's actual or perceived gender-related self-image, appearance, behavior, expression or other gender-related characteristic, regardless of the sex assigned to that person at birth); disability; marital status or partnership status; caregiver status; sexual orientation (meaning an individual's actual or perceived romantic, physical or sexual orientation exists and includes, but is not limited to, heterosexuality, homosexuality, or bisexuality, asexuality, and pansexuality); uniformed service status; immigration or citizenship status; religion or creed; pregnancy, childbirth and related conditions; status as a victim of domestic violence, stalking, or sex offenses. This includes actions "based on," "because of," or "motivated by" an individual's "status as a victim of domestic violence," or "status as a victim of sex offenses or stalking," including, but not limited to, those based solely upon the actions of a person who has perpetrated acts or threats of violence against the individual; arrest or conviction status; credit history; unemployment status; sexual and reproductive health decisions. *Sexual and reproductive health decisions* means any decision by an individual to receive services, which are

[988] BINGHAMTON, N.Y., CODE OF ORDINANCES § 45-9.

[989] BUFFALO, N.Y., CODE §§ 154-9 through 154-11.

[990] BUFFALO, N.Y., CODE § 154.11.

[991] NASSAU CNTY., N.Y., REGS. tit. C-2, § 21-9.8.

[992] NASSAU CNTY., N.Y., REGS. tit. C-2, § 21-9.9.

Table 25. Local Fair Employment Practices Ordinances	
Locality	**Notes**
	arranged for or offered or provided to individuals relating to sexual and reproductive health, including the reproductive system and its functions. Such services include, but are not limited to fertility-related medical procedures, sexually transmitted disease prevention, testing, and treatment, and family planning services and counseling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing, and abortion; and actual or perceived height or weight.[993] An aggrieved person may file a verified complaint with the New York City Commission on Human Rights within one year after the alleged violation.[994]
Rochester	Employers with four or more employees are subject to the following antidiscrimination protections: age (18 years or older); race; creed; color; national origin; gender; gender identity or expression; sexual orientation; disability; marital status; and source of income.[995] There is no city-level enforcement agency that handles antidiscrimination claims; an aggrieved party may file a civil action in any court of appropriate jurisdiction for injunctive relief, compensatory and punitive damages, and such other remedies as may be appropriate within one year after the alleged discriminatory practice. Moreover, any person claiming to be aggrieved by an alleged discriminatory practice is encouraged to seek mediation of the grievance at the Center for Dispute Settlement. However, mediation is not a prerequisite to the commencement of legal action.[996]
Suffolk County	The Suffolk County Human Rights Law applies to employers of one or more employees, and expressly incorporates the definition of "employer" from the New York State Human Rights Law. Protected classifications include: race; color; creed; age; national origin; alienage or citizenship status; gender; sexual orientation; disability; marital status; familial status; active military status; pregnancy and related conditions; status as a mother who chooses to express breastmilk in the workplace; religion; criminal offense; and group identity, including visible traits of an individual such as natural hair texture, protective hairstyles, and the donning of religious garments and items.[997] An individual alleging a violation of the law may file an administrative complaint with the Suffolk County Human Rights Commission within one year of the alleged violation. Alternatively, the

[993] N.Y.C., N.Y. ADMIN. CODE §§ 8-102, 8-107, 8-107(27).

[994] N.Y.C., N.Y. ADMIN. CODE § 8-109.

[995] ROCHESTER, N.Y., MUN. CODE §§ 63-2, 63-4 (exceptions, including *bona fide* occupational qualifications), 63-9 (exemptions, including religious organizations and institutions).

[996] ROCHESTER, N.Y., MUN. CODE § 63-10.

[997] SUFFOLK CNTY., N.Y., CODE §§ 528-6, 528-7, 528-10, and 528-12 (religious or denominational organization and institution exceptions).

Table 25. Local Fair Employment Practices Ordinances	
Locality	**Notes**
	individual may choose to file a civil action within two years of the alleged violation.[998]
Syracuse	Employers that employ four or more persons must extend antidiscrimination protections on the basis of: sexual or affectional preference or orientation; actual or perceived sex; and gender identity or expression.[999] There is no city-level enforcement agency that handles antidiscrimination claims; an aggrieved party may file a civil action in any court within jurisdiction.[1000]
Westchester County	The Westchester County Human Rights Law applies to employers within Westchester County except for the County itself. 'Covered employers are subject to the following antidiscrimination protections: race; color; religion; age; national origin; alienage or citizenship status; ethnicity; familial status; creed; gender; sexual orientation; marital status; disability; and status as a victim of domestic violence, sexual abuse, or stalking, if the employee provides documentation of their status a victim.[1001] The term "race" includes traits historically associated with race, including but not limited to hair texture and protective hairstyles including but not be limited to, braids, locks, and twists.[1002] An individual alleging a violation of the law may file an administrative complaint with the Westchester County Human Rights Commission within one year of the alleged violation.[1003] Complaints alleging sexual harassment in a workplace may be filed with the Commission within three years of the alleged unlawful discriminatory act.[1004]

3.11(b) *Equal Pay Protections*

3.11(b)(i) *Federal Guidelines on Equal Pay Protections*

The Equal Pay Act requires employers to pay male and female employees equal wages for substantially equal jobs. Specifically, the law prohibits employers covered under the federal Fair Labor Standards Act (FLSA) from discriminating between employees within the same establishment on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs—"the performance of which requires equal skill, effort, and

998 SUFFOLK CNTY., N.Y., CODE § 528-13.

999 SYRACUSE, N.Y., CODE OF ORDINANCES §§ 8-3, 8-4 (exceptions, including for religious or denominational institutions or organizations).

1000 SYRACUSE, N.Y., CODE OF ORDINANCES § 8-7.

1001 WESTCHESTER CNTY., N.Y., CODE §§ 700.02(7), 700.03, and 700.07 (exemptions, including for certain religious organizations).

1002 WESTCHESTER CNTY., N.Y., CODE §§ 700.02(16-b).

1003 WESTCHESTER CNTY., N.Y., CODE §§ 700.11, 700.12.

1004 WESTCHESTER CNTY., N.Y., CODE §§ 700.11, 700.12.

responsibility, and which are performed under similar working conditions."[1005] The prohibition does not apply to payments made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[1006]

3.11(b)(ii) *State Guidelines on Equal Pay Protections*

The New York Labor Law prohibits an employer from paying an employee less than an employee of the opposite sex, working in the same establishment, "for equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions."[1007] Employees are considered to work in the same establishment if the employees work for the same employer at workplaces located in the same geographical region, no larger than a county, taking into account population distribution, economic activity, and/or the presence of municipalities.

Pay discrepancies are permitted in limited circumstances. Pay differentials may be based on:

1. a seniority system;
2. a merit system;
3. a pay system that "measures earnings by quantity or quality of production;" or
4. a "*bona fide* factor other than sex, such as education, training and experience."[1008]

For this fourth exception, the *bona fide* factor must be job-related, consistent with business necessity, and cannot derive from a sex-based differential in pay. The exception, moreover, will not apply if the employee demonstrates that the employer uses a practice that: (1) causes a disparate impact on the basis of sex; (2) that an alternative employment practice exists that would serve the same business purpose and not produce the disparity; and (3) the employer has refused to adopt such alternative practice.[1009] Differentials in pay are prohibited even if two employees whose pay rates are being compared work in different physical locations, provided the locations are in the same geographic region no larger than a county.[1010]

The equal pay statute also prohibits pay discrimination on the basis of a protected class, that is, on the basis of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military

[1005] 29 U.S.C. § 206(d)(1).

[1006] 42 U.S.C. § 2000e-5.

[1007] N.Y. LAB. LAW § 194(1).

[1008] N.Y. LAB. LAW § 194(1).

[1009] N.Y. LAB. LAW § 194(1)(d).

[1010] N.Y. LAB. LAW § 194(3).

status, sex, disability, predisposing genetic characteristics, familial status, marital status, and domestic violence victim status. Further, in addition to prohibiting an employer from paying less to an employee for equal pay for equal work, the law also prohibits paying less for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and which is performed under similar working conditions.[1011]

As discussed in more detail in **3.7(b)(v)**, under the equal pay law, employers cannot prohibit employees from sharing wage information with other employees. Employers may have written policies that establish reasonable workplace and workday limitations on the time, place, and manner for discussion about wages, including prohibiting an employee from disclosing the wages of *another employee* without permission.[1012] Further, beginning in September 2023, an employer that advertises a job, promotion, or transfer opportunity that can or will be performed, at least in part, in New York, will be required to disclose:

- the compensation or a range of compensation for the advertised job, promotion, or transfer opportunity; and
- the job description for the advertised job, promotion, or transfer opportunity, if a description exists.[1013]

Range of compensation means the minimum and maximum annual salary or hourly range of compensation that the employer in good faith believes to be accurate at the time the employer posts the advertisement for the opportunity. Advertisements for jobs, promotions, or transfer opportunities that will be paid solely on commission must also comply with the law by disclosing in writing a general statement that the compensation will be based on commission.[1014]

An employee alleging a violation may file an administrative complaint with the New York Department of Labor or may elect to file a civil action within six years of the alleged violation.[1015] In addition to other remedies under the wage payment law, prevailing employees may recover liquidated damages for willful violations of the equal pay statute. Indeed, employees may be awarded 300% of their unpaid wages.[1016] An employer found to be in violation may also be subject to civil penalties.

3.11(b)(iii) *Local Guidelines on Equal Pay Protections*

The New York City Human Rights Law requires an employer to provide the minimum and maximum annual salary or hourly wage in an advertisement for a job, promotion, or transfer opportunity. In stating the minimum and maximum annual salary or hourly wage for a position, the range may extend from the lowest to the highest salary the employer in good faith believes at the time of the posting that it would pay for the advertised position. Employers must comply with the requirement when advertising positions that can or will be performed, in whole or in part, in New York City, whether from an office, in the field, or remotely from an employee's home. The law does not apply to positions that cannot or will

[1011] N.Y. LAB. LAW § 194.

[1012] N.Y. LAB. LAW § 194(4).

[1013] N.Y. LAB. LAW § 194-B.

[1014] N.Y. LAB. LAW § 194-B.

[1015] N.Y. LAB. LAW §§ 196-A, 198.

[1016] N.Y. LAB. LAW § 198(1-a).

not be performed, at least in part, in New York City.[1017] Albany County, Westchester County, and the city of Ithaca also prohibit employers from advertising a job, promotion, or transfer opportunity without stating the minimum and maximum salary or hourly wage for the position in the advertisement.[1018] Importantly, the statewide requirements that will take effect in September 2023 will not supersede or preempt these local requirements.[1019]

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in **3.9(c)(i)**, the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[1020]

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

[1017] N.Y.C., N.Y. ADMIN. CODE § 8-107(32) (effective Nov. 1, 2022).

[1018] ALBANY CNTY., N.Y. LOCAL LAW NO. 1 for 2000 (Omnibus Human Rights Law for Albany County), as amended by LOCAL LAW NO. E for 2022 § 7(1)(i)(4); WESTCHESTER CNTY., N.Y. CODE OF ORDINANCES § 700.3(a); ITHACA, N.Y. CODE OF ORDINANCES § 215-3(F).

[1019] N.Y. LAB. LAW § 194-B.

[1020] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;
- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or
- temporary suspension of an employee's essential job function(s).[1021]

The PWFA also provides for reasonable accommodations related to lactation, as described in **3.4(a)(iii)**.

An employee seeking a reasonable accommodation must request an accommodation.[1022] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[1023] An employee is not required to accept an accommodation. However, if the employee rejects a reasonable accommodation, and, as a result of that rejection, cannot perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[1024]

An employer is not required to seek documentation from an employee to support the employee's request for accommodation but may do so when it is reasonable under the circumstances for the employer to determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When determining whether an accommodation would impose an undue hardship, the following factors are considered:

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and
- the employer's operations, including:
  - the composition, structure, and functions of the workforce; and

[1021] 29 C.F.R. § 1636.3.

[1022] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[1023] 29 C.F.R. § 1636.3.

[1024] 29 C.F.R. § 1636.4.

- the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[1025]

The following modifications do not impose an undue hardship under the PWFA when they are requested as workplace accommodations by a pregnant employee:

- allowing an employee to carry or keep water near and drink, as needed;
- allowing an employee to take additional restroom breaks, as needed;
- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- allowing an employee to take breaks to eat and drink, as needed.[1026]

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

Where a state law focuses primarily on providing job-protected leave for pregnancy or childbirth—as opposed to a pregnancy accommodation—it is discussed in **3.9(c)(ii)**. For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.11(c)(ii) *State Guidelines on Pregnancy Accommodation*

The New York State Human Rights Law, which applies to employers of all sizes, requires employers to provide reasonable accommodation to an employee or applicant with a pregnancy-related condition.[1027] *Pregnancy-related condition* means a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, including lactation. The definition is limited to conditions which, with reasonable accommodations, do not prevent the employee from performing her job functions in a reasonable manner. Pregnancy-related conditions must be treated as temporary disabilities.[1028]

Reasonable accommodations means actions taken which permit an applicant or employee with a pregnancy-related condition to perform her job functions in a reasonable manner and include, but are not limited to:

- provision of an accessible worksite; acquisition or modification of equipment;
- job restructuring; and
- modified work schedules.[1029]

An employer is not required to provide an accommodation that would impose an undue hardship on the employer's business.[1030]

[1025] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[1026] 29 C.F.R. § 1636.3.

[1027] N.Y. EXEC. LAW §§ 292(5), 296(3)(a).

[1028] N.Y. EXEC. LAW § 292(21-f).

[1029] N.Y. EXEC. LAW § 292(21-e).

The employee must make the disability and need for accommodation known the employer and must cooperate in providing medical or other information necessary to verify the existence of the pregnancy-related condition or that is necessary for consideration of the accommodation.[1031]

The employer has a duty to move forward to consider accommodation once the need for accommodation is known or requested. The employer has the duty to clearly request from the applicant or employee any documentation that is needed. The employer has the right to select which reasonable accommodation will be provided, so long as it is effective in meeting the need.[1032]

An employer must maintain the confidentiality of any medical information an employee provides as part of a reasonable accommodation discussion.[1033] Further, it is an unlawful employment practice for an employer to compel an employee who is pregnant to take a leave of absence, unless the employee's pregnancy prevents her from performing the activities involved in the job or occupation in a reasonable manner.[1034]

3.11(c)(iii) *Local Guidelines on Pregnancy Accommodation*

The New York City Human Rights Law, which applies to employers of four or more employees, requires employers to provide reasonable accommodations for the needs of an employee for her pregnancy, childbirth, or related medical condition that will allow the employee to perform the essential requisites of the job, provided that the employer knows or should have known of the employee's pregnancy, childbirth, or related medical condition.[1035] Potential accommodations include, without limitation:

- minor changes in work schedules;
- adjustments to uniform requirements or dress codes;
- additional water or snack breaks;
- allowing an individual to eat at her workstation;
- extra bathroom breaks or additional breaks to rest;
- physical modifications to a workstation, including the addition of a fan or a seat;
- adjustment of start or end time;
- reduced or modified work schedule;
- desk duty or light duty;
- transfer to an alternative position; or

[1030] N.Y. EXEC. LAW §§ 292(21-e), 296(3)(b).

[1031] N.Y. EXEC. LAW § 296(3)(c); N.Y. COMP. CODES R. & REGS. tit. 9, § 466.11(j), (k).

[1032] N.Y. COMP. CODES R. & REGS. tit. 9, § 466.11(j).

[1033] N.Y. EXEC. LAW § 296(3)(c).

[1034] N.Y. EXEC. LAW § 296(1)(g).

[1035] N.Y.C., N.Y., ADMIN. CODE §§ 8-102(5), 8-107(22)(a); *see also* N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy* (Apr. 2016), *available at* http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2016.pdf.

- leave.[1036]

An employer is not required to provide an accommodation that would impose an undue hardship or that would prevent the employee from performing the essential requisites of the job.[1037]

An employer may not require an employee to provide medical confirmation of pregnancy, childbirth, or a related medical condition. An employer may only request medical documentation from an employee when: (1) the employee is requesting time away from work, including for medical appointments, other than the presumptive six to eight week period following childbirth, and may do so only if the employer requests verification from other employees requesting leave for reasons other than pregnancy, childbirth, or related medical condition; or (2) the employee is requesting to work from home, either on an intermittent basis or a longer-term basis.[1038]

Employers must engage in a cooperative dialogue with a pregnant employee to determine reasonable accommodations.[1039] Where an employee has not requested an accommodation, the employer has an affirmative obligation to initiate a cooperative dialogue when the employer: (1) has knowledge that an employee's performance at work has been affected or that their behavior at work could lead to an adverse employment action; and (2) has a reasonable basis to believe that the issue is related to pregnancy, childbirth, or related medical condition. A cooperative dialogue is ongoing until one of the following occurs:

- a reasonable accommodation is reached; or
- the employer reasonably arrives at the conclusion that there is no accommodation available that will not cause an undue hardship or that no accommodation exists that will allow the employee to perform the essential requisites of the job.[1040]

Once a conclusion is reached, either to offer an accommodation, or that no accommodation can be made, an employer should promptly notify the employee in writing of the determination.

The act of requesting a reasonable accommodation based on pregnancy, childbirth, or a related medical condition, or engaging in a cooperative dialogue with an employer based on such a request, is protected activity under the Human Rights Law. An adverse employment action based on such activity is therefore considered retaliation.[1041]

[1036] N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy* (Apr. 2016).

[1037] N.Y.C., N.Y., ADMIN. CODE § 8-102(18); *see also* N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy* (Apr. 2016).

[1038] N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy* (Apr. 2016).

[1039] N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy* (Apr. 2016).

[1040] N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy* (Apr. 2016).

[1041] N.Y.C., N.Y., ADMIN. CODE § 8-107(7); *see also* N.Y.C. Comm'n on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy* (Apr. 2016), *available at* http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2016.pdf.

Suffolk County and Westchester County have enacted human rights ordinances that are similar to the New York State and New York City Human Rights Laws. Both counties prohibit employers of four or more employees from compelling a pregnant employee to take a leave of absence unless the employee's pregnancy prevents her from performing the activities involved in the job or occupation in a reasonable manner and no reasonable accommodation can be made, without causing an undue hardship on the employer, which will permit the employee to perform the essential functions of the job or occupation in a reasonable manner.[1042]

Further, Suffolk County makes it an unlawful employment practice for a covered employer to fail to provide reasonable accommodation for an applicant's or employee's known pregnancy-related conditions in order to permit the applicant or employee to perform the essential functions of the job or occupation in a reasonable manner, unless doing so would impose an undue hardship on the employer. *Pregnancy-related condition* means a physical or mental condition intrinsic to pregnancy or childbirth, and includes the expression of breast milk by nursing mothers.[1043]

3.11(d) *Harassment Prevention Training & Education Requirements*

3.11(d)(i) *Federal Guidelines on Antiharassment Training*

While not expressly mandated by federal statute or regulation, training on equal employment opportunity topics—*i.e.*, discrimination, harassment, and retaliation—has become *de facto* mandatory for employers.[1044] Multiple decisions of the U.S. Supreme Court[1045] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important role that training plays in establishing a legal defense to harassment and discrimination claims.[1046] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see LITTLER ON HARASSMENT IN THE WORKPLACE and LITTLER ON EMPLOYEE TRAINING.

3.11(d)(ii) *State Guidelines on Antiharassment Training*

New York law aims to curb workplace sexual harassment, and includes a requirement that employers adopt a sexual harassment prevention policy and provide harassment prevention training.

[1042] SUFFOLK CNTY., N.Y. CODE §§ 528-6, 528-7(7); WESTCHESTER CNTY., N.Y. CODE §§ 700.02(7), 700.03(a)(7).

[1043] SUFFOLK CNTY., N.Y. CODE § 528-7(9).

[1044] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[1045] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *see also Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

[1046] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html; *see also* EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), *available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

Pursuant to the law, the New York State Department of Labor, in conjunction with the Division of Human Rights, has published a model sexual harassment prevention guidance document[1047] and sexual harassment prevention policy.[1048] The guidance document and model policy:

- include a statement prohibiting sexual harassment and provide examples of prohibited conduct that would constitute unlawful sexual harassment;
- include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment and a statement that there may be applicable local laws;
- include a standard complaint form;
- include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties;
- inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and
- clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful.[1049]

Every employer must adopt the Department's model sexual harassment prevention policy or establish a sexual harassment prevention policy that equals or exceeds the minimum standards provided in the model policy. Each employer must provide the sexual harassment prevention policy to all employees in writing or electronically. If a copy is made available on a work computer, workers must be able to print a copy for their own records. Employers do not have to provide the written policy to independent contractors, vendors, or consultants, as such individuals are not employees of the employer.[1050]

The Department of Labor and the Division of Human Rights have also published a model sexual harassment prevention training program[1051] to prevent sexual harassment in the workplace. The model sexual harassment prevention training program must be interactive and include:

- an explanation of sexual harassment consistent with the guidance issued by the Department;
- examples of conduct that would constitute unlawful sexual harassment;

[1047] N.Y. Dept. of Lab., *Sexual Harassment Prevention Toolkit*, available at http://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionModelTraining.pdf.

[1048] N.Y. Dept. of Lab., *Model Sexual Harassment Policy*, available at http://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionModelPolicy.pdf.

[1049] N.Y. LAB. LAW § 201-g(1)(a).

[1050] N.Y. LAB. LAW § 201-g(1)(b); N.Y. Dept. of Lab., *Combating Sexual Harassment: Frequently Asked Questions*, available at http://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers.

[1051] N.Y. Dept. of Lab., *Model Sexual Harassment Training Program*, http://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionModelTraining.pdf.

- information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;
- information concerning employees' rights of redress and all available forums for adjudicating complaints; and
- information addressing conduct by supervisors and any additional responsibilities for such supervisors.[1052]

Every employer must utilize the model sexual harassment prevention training program or establish a training program for employees to prevent sexual harassment that equals or exceeds the minimum standards provided by the model training. Employers must provide the sexual harassment prevention training to all employees on an annual basis.[1053] Training time is compensable. Employers must follow federal regulations, which generally require that employer-provided training time is counted as regular work hours.[1054]

For purposes of the training requirement, *employee* includes all workers, regardless of immigration status, and also includes exempt or non-exempt employees, part-time workers, seasonal workers, and temporary workers. Only employees who work or will work in New York State need the training. However, if an individual works a portion of their time in New York State, even if based in another state, they must be trained.[1055]

Employers should provide employees with training in the language spoken by their employees. Model materials will be made available in Spanish, Chinese, Korean, Bengali, Russian, Italian, Polish and Haitian-Creole. If the model training is not available in an employee's primary language, the employer may provide that employee an English-language version. However, as employers may be held liable for the conduct of all of their employees, employers are strongly encouraged to provide a policy and training in the language spoken by the employee.[1056]

3.11(d)(iii) *Local Guidelines on Antiharassment Training*

Following the statewide push to curb workplace harassment, New York City law requires employers of 15 or more employees to conduct, on an annual basis, an interactive anti-sexual harassment training for all employees employed within New York City, including supervisory and managerial employees. The employer must conduct training within 90 days of initial hire for employees who work more than 80

[1052] N.Y. LAB. LAW § 201-g(2)(a), (b).

[1053] N.Y. LAB. LAW § 201-g(2)(c).

[1054] N.Y. Dept. of Lab., *Combating Sexual Harassment: Frequently Asked Questions*, available at http://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers.

[1055] N.Y. Dept. of Lab., *Combating Sexual Harassment: Frequently Asked Questions*, available at http://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers.

[1056] N.Y. Dept. of Lab., *Combating Sexual Harassment: Frequently Asked Questions*, available at http://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers.

hours in a calendar year and who perform work on a full-time or part-time basis.[1057] The term *employee* includes interns.[1058]

Interactive training means participatory teaching whereby the trainee is engaged in a trainer-trainee interaction, and includes use of audio-visuals, computer, or online training program or other participatory forms of training as determined by the New York City Human Rights Commission. However, the training is not required to be live or facilitated by an in-person instructor.[1059]

The interactive training must include, but need not be limited to, the following elements:

- an explanation of sexual harassment as a form of unlawful discrimination under local law;
- a statement that sexual harassment is also a form of unlawful discrimination under state and federal law;
- a description of what sexual harassment is, using examples;
- any internal complaint process available to employees through their employer to address sexual harassment claims;
- the complaint process available through the New York City Human Rights Commission, the New York State Division of Human Rights, and the federal Equal Employment Opportunity Commission, including contact information;
- the prohibition on retaliation and examples thereof;
- information concerning bystander intervention, including but not limited to any resources that explain how to engage in bystander intervention; and
- the specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation, and measures that such employees may take to appropriately address sexual harassment complaints.[1060]

These requirements establish a minimum threshold and cannot be construed to prohibit any private employer from providing more frequent or additional anti-sexual harassment training.[1061]

The Human Rights Commission will develop an online interactive training module that employers may use as an option to satisfy the requirements of the law, provided that an employer must inform all employees of any internal complaint process available to employees through their employer to address sexual harassment claims. The training module will be made publicly available at no cost on the Commission's website, and will allow for the electronic provision of certification each time any module is accessed and completed.[1062]

An employee who has received the required interactive training at one employer within the required training cycle is not required to receive additional such harassment training at another employer until

[1057] N.Y.C. ADMIN. CODE § 8-107(30)(b).

[1058] N.Y.C. ADMIN. CODE § 8-107(30)(e).

[1059] N.Y.C. ADMIN. CODE § 8-107(30)(a).

[1060] N.Y.C. ADMIN. CODE § 8-107(30)(b).

[1061] N.Y.C. ADMIN. CODE § 8-107(30)(c).

[1062] N.Y.C. ADMIN. CODE § 8-107(30)(c).

the next cycle. An employer that is subject to training requirements in multiple jurisdictions may assert that it is compliant with this law provided that the training the employer provides as required in the other jurisdictions fulfills the minimum requirements outlined in this law, and the employer provides proof of compliance.[1063]

Employers must keep a record of all trainings, including a signed employee acknowledgement that the employee completed the training. The acknowledgment may be electronic. Employers must also maintain these records for at least three years and make the records available for Commission inspection upon request.[1064]

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

3.12(a)(i) *Federal Guidelines on Whistleblowing*

Protections for whistleblowers can be found in dozens of federal statutes. The federal Occupational Safety and Health Administration ("Fed-OSHA") administers over 20 whistleblower laws, many of which have little or nothing to do with safety or health. Although the framework for many of the Fed-OSHA-administered statutes is similar (*e.g.*, several of them follow the regulations promulgated under the Wendell H. Ford Aviation Investment and Reform Act (AIR21)), each statute has its own idiosyncrasies, including who is covered, timeliness of the complaint, standard of proof regarding nexus of protected activity, appeal or objection rights, and remedies available. For more information on whistleblowing protections, see LITTLER ON WHISTLEBLOWING & RETALIATION.

3.12(a)(ii) *State Guidelines on Whistleblowing*

New York labor law prohibits all employers (regardless of size) from retaliating against employee, former employee, and independent contractor whistleblowers.[1065] Specifically, no adverse action can be taken against an individual because the person:

1. "discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation" of any law or regulation or that the employee "reasonably believes poses a substantial and specific danger to the public health or safety";
2. gives information to or testifies before any public body conducting an investigation, hearing, or inquiry into the employer's alleged activity, policy, or practice; or
3. "objects to, or refuses to participate in any such activity, policy or practice."[1066]

Public body is defined broadly to include essentially any investigatory, judicial, or enforcement agency, including the U.S Congress, legislative, judicial and administrative bodies, local law enforcement, and any "division, board, bureau, office, committee, or commission" of any of the listed bodies.[1067] Nonetheless, an employee is not entitled to protection for disclosure to a public body unless the

[1063] N.Y.C. ADMIN. CODE § 8-107(30)(f), (g).

[1064] N.Y.C. ADMIN. CODE § 8-107(30)(c).

[1065] N.Y. LAB. LAW § 740.

[1066] N.Y. LAB. LAW § 740(2).

[1067] N.Y. LAB. LAW § 740(1).

employee previously made a good faith effort to inform a supervisor of the alleged violation and afforded the employer a reasonable chance to correct the alleged misconduct, with some exceptions.[1068]

An employee may sue an allegedly discriminating employer within two years after the alleged retaliatory action.[1069] Remedies for successful whistleblowing claims include: injunctive relief, reinstatement of position and benefits or front pay in lieu thereof, compensatory damages, attorneys' fees and costs; and a civil penalty of up to $10,000. Punitive damages may be awarded if the violation is willful, malicious, or wanton.[1070] Employers must post a notice informing employees of their protections, rights and obligations under this law. The notice must be posted conspicuously in easily accessible and well-lighted places frequented by employees and applicants for employment.[1071]

In addition, New York's labor law has a general provision prohibiting employers from retaliating against employees who complain to the employer or the state about an alleged leave law violation, cooperate with an investigation, or exercise their rights under leave provisions.[1072] Violating employers may be subjected to penalties ranging from $1,000 to $10,000, with greater penalties possible for multiple violations within a six-year period.[1073]

3.12(b) *Labor Laws*

3.12(b)(i) *Federal Labor Laws*

Labor law refers to the body of law governing employer relations with unions. The National Labor Relations Act (NLRA)[1074] and the Railway Labor Act (RLA)[1075] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

Labor policy in the United States is determined, to a large degree, at the federal level because the NLRA preempts many state laws. Yet, significant state-level initiatives remain. For example, *right-to-work laws* are state laws that grant workers the freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment.

[1068] N.Y. LAB. LAW § 740(3).

[1069] N.Y. LAB. LAW § 740(4)(a), (d).

[1070] N.Y. LAB. LAW § 740(4)(d), (5).

[1071] N.Y. LAB. LAW § 740.

[1072] N.Y. LAB. LAW § 215(1)(a).

[1073] N.Y. LAB. LAW § 215(1)(b).

[1074] 29 U.S.C. §§ 151 to 169.

[1075] 45 U.S.C. §§ 151 *et seq*.

3.12(b)(ii) *Notable State Labor Laws*

New York has identified a number of employer unfair labor practices, which are similar to those practices prohibited by federal law. The state prohibits, for example, the surveillance of employees or their representatives, blacklisting, refusal to bargain collectively, interfering with the formation, existence, or administration of a union, and other forms of coercion.[1076]

New York has not passed a right-to-work law. On a related note, however, it is an unfair labor practice in New York for an employer to require an employee or applicant, as a condition of employment, to join a *company union*,[1077] which is defined as "any committee, employee representation plan or association of employees which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms and conditions of employment" and "which the employer has initiated or created" or otherwise has supervised or financed.[1078] It is also an unfair labor practice for an employer to prohibit an employee or applicant "from forming, or joining or assisting a labor organization of his [or her] own choosing."[1079]

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[1080] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local government where the closing or layoff is to occur.[1081] There are exceptions that either reduce or eliminate notice requirements. For more information on the WARN Act, see LITTLER ON REDUCTIONS IN FORCE.

4.1(b) *State Mini-WARN Act*

New York has enacted its own mini-WARN act (NY WARN), which imposes more stringent requirements than the federal law.[1082] Most notably, NY WARN requires 90 days' advance notice when triggered, which is 30 days longer than the federal WARN.

[1076] N.Y. LAB. LAW § 704.

[1077] N.Y. LAB. LAW § 704(4).

[1078] N.Y. LAB. LAW § 701(6).

[1079] N.Y. LAB. LAW § 704(4).

[1080] 29 U.S.C. § 2101(1)-(3). Business enterprises employing: (1) 100 or more full-time employees; or (2) 100 or more employees, including part-time employees, who in aggregate work at least 4,000 hours per week (exclusive of overtime) are covered by the WARN Act. 20 C.F.R. § 639.3.

[1081] 20 C.F.R. §§ 639.4, 639.6.

[1082] N.Y. LAB. LAW §§ 860 *et seq*.

Coverage & Exclusions

NY WARN applies to employers with either: (1) 50 or more full-time employees (including remote workers based at the employment site in New York); or (2) 50 or more employees, including part-time employees who meet certain criteria. Part-time employees are factored into this calculation only if they work 20 or more hours per week (including remote workers based at the employment site in New York) and work in the aggregate at least 2,000 hours per year, including any overtime hours.[1083] Part-time employees are not included if they work less than 20 hours per week or have been employed for less than six of the 12 months preceding the applicable date for notice.[1084]

Employees who are on temporary layoff or leave are included in the calculation if they are not part-time and if they "have a reasonable expectation of recall."[1085] Employees have such an expectation if: (1) the employer notified the employee that their employment disruption was temporary and that they would be recalled to the same or similar job; or (2) the employee received similar notice through an industry practice.[1086]

In addition, according to the regulations and the NYDOL, officers and directors who work for and are paid directly by the entity are considered "employees."[1087]

Triggering Events

NY WARN requires that employees be given, at least 90 days' advance, written notice in the event of a mass layoff, plant closing, relocation, or other qualifying employment loss.[1088] Because the statutory definitions are important to understanding the NY WARN obligations, key provisions are reviewed briefly below.

The statute defines a *mass layoff* as an involuntary termination, without cause, other than a plant closing, affecting either: (1) 250 or more nonpart-time employees from a single site of employment; or (2) at least 25 nonpart-time employees, provided they represent at least 33% of the workforce at the site.[1089] A *plant closing* occurs under NY WARN when 25 or more nonpart-time employees suffer an employment loss for at least 30 days due to the permanent or temporary shutdown of a single employment site.[1090] In determining whether a mass layoff or plant closing has occurred or will occur, employers should combine employment losses for two or more groups working at a single site, even if those losses alone would not meet the threshold, so that employers treat the aggregated losses as triggering events under NY WARN.[1091] An employer, however, need not combine such losses if it

[1083] N.Y. LAB. LAW § 860-a(3).

[1084] N.Y. LAB. LAW § 860-a(5); *see also* N.Y. COMP. CODES R. & REGS. tit. 12, § 921-1.1.

[1085] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-1.1(e)(7).

[1086] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-1.1(e)(7).

[1087] *See* N.Y. COMP. CODES R. & REGS. tit. 12, § 921-1.1(a), (e); *see also* N.Y. State Dep't of Labor, Op. Ltr., File No. RO-10-0044 (Apr. 13, 2010).

[1088] N.Y. LAB. LAW § 860-b(1).

[1089] N.Y. LAB. LAW § 860-a(4); N.Y. COMP. CODES R. & REGS. tit. 12, § 921-1.1(i).

[1090] N.Y. LAB. LAW § 860-a(6); N.Y. COMP. CODES R. & REGS. tit. 12, § 921-1.1(m). This definition of *plant closing* covers losses related to the shutdown of "one or more facilities or operating units within a single employment site" so long as the shutdown generates loss at the single site for 25 or more individuals for at least 30 days. N.Y. LAB. LAW § 860-a(6).

[1091] N.Y. LAB. LAW § 860-e.

"demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade" the requirements of NY WARN.[1092]

NY WARN defines a *relocation* as "the removal of all or substantially all of the industrial or commercial operations of an employer to a different location fifty miles or more away."[1093] Job losses are not required to trigger the relocation notice requirement. In other words, notice of relocation is mandated by NY WARN even if jobs are not expected to be lost, unless some exception applies.

Employment loss is a broader term under the statute and regulations, and is defined to include: (1) a termination, for reasons other than cause, voluntary resignation, or retirement; (2) a mass layoff exceeding six months in duration; (3) a plant closing affecting 25 or more nonpart-time employees; (4) a reduction in hours of work more than 50% per month for a six-month period; and (5) a relocation where 25 or more nonpart-time employees lose their jobs.[1094]

Under these defined circumstances—mass layoff, relocation, plant closing, or other employment loss—employers must provide advance written notice to affected employees and their representatives (*i.e.*, any applicable union). Notice is also due to the New York Department of Labor (NYDOL) and the local workforce investment board (LWIB).[1095]

To assess whether NY WARN has been or will be triggered in connection with such employment losses, an employer must measure the average number of individuals employed by the employer, and count those affected by the decision, over a set time period.[1096] Employers contemplating whether notice is required for a plant closing or mass layoff should "look ahead 30 days and behind 30 days" to see if planned or implemented employment actions will, "in the aggregate, for any 30-day period" meet the threshold and trigger notice.[1097] For all types of smaller employment losses, employers should "look ahead 90 days and behind 90 days from the date of each employment action to determine" to determine whether actions both taken and planned will, "in the aggregate, for any 90-day period, reach the minimum standards to trigger the notice requirement."[1098]

Exceptions & Special Rules

NY WARN provides several exceptions and other rules applicable in special circumstances, which are summarized below.

Notice Not Required. Employers are not obligated to provide notice under NY WARN if the employment losses stem from physical calamity or an act of either terrorism or war.[1099] If a mass layoff, relocation, or employment loss is necessitated by a physical calamity or an act of terrorism or war, notice is not required. A business circumstance that is not reasonably foreseeable may be established by the

[1092] N.Y. LAB. LAW § 860-e.

[1093] N.Y. LAB. LAW § 860-a(8).

[1094] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-1.1(f)(1). Additional requirements apply to the definition of losses associated with reductions in hours worked. N.Y. COMP. CODES R. & REGS. tit. 12, § 921-1.1(f)(1)(iii).

[1095] N.Y. LAB. LAW § 860-b(1).

[1096] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.1(e).

[1097] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.1(e)(1).

[1098] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.1(e)(2).

[1099] N.Y. LAB. LAW § 860-b(3).

occurrence of some sudden, dramatic and unexpected action or condition outside the employer's control. Examples include a principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, an unanticipated and dramatic major economic downturn, a public health emergency, including but not limited to a pandemic, that results in a sudden and unexpected closure, a terrorist attack directly affecting operations, or a government-ordered closing of an employment site that occurs without prior notice.[1100] An employer cannot be eligible for a reduction or excusal of the notice requirement without a determination by the Commissioner that the employer established all elements of the claimed exception. The employer must present a request for consideration for eligibility for a claimed exception in addition to the required notice to be provided to the Commissioner. The request shall be submitted within 10 business days of the required notice being provided to the Commissioner, unless an extension of time is granted by the Commissioner.[1101]

There is also an exception for transfers offered in connection with plant closings and mass layoffs based on the relocation or consolidation of part of all of a business. There can be no employment loss, and thus no notice requirement, in two particular scenarios where the employer offers a transfer to the employee before the closing or layoff takes place. First, the exception applies if the "employer offers to transfer an employee to a different site of employment within a reasonable commuting distance with no more than a six-month break in employment," whether or not the employee accepts the transfer.[1102] *Reasonable commuting distance* is defined as the distance an employee "could be reasonably expected to commute" and will vary with local conditions, including available transportation and travel time.[1103] Second, this exception applies if the employer offers a transfer to "any other site of employment regardless of distance with no more than a six-month break in employment and the employee accepts" the transfer within 30 days of the offer or of the closing/layoff, whichever is later.[1104]

While NY WARN notice is not mandatory under these circumstances, New York employers are encouraged to voluntarily comply with the notice requirements, to the extent possible, particularly in the event of a plant closing or permanent reduction in force.[1105]

Shorter Notice Permissible. NY WARN explicitly allows for a shorter notice period for plant closings in certain situations. Specifically, employers need not comply with the notice provision if the need for notice was not reasonably foreseeable at the time the notice would have been required.[1106] NY WARN contains exceptions to the notice periods for natural disasters and for strikes and lockouts.[1107] Employers are also exempted from the 90-day notice requirement for plant closings involving a temporary facility or particular project, if the affected employees understood the temporary nature of their work when hired.[1108] NY WARN also provides a "faltering company" exception, which permits an

[1100] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-6.3 (a).

[1101] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-6.6.

[1102] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-4.1(a).

[1103] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-4.1(c).

[1104] N.Y. LAB. LAW § 860-a(2).

[1105] N.Y. LAB. LAW § 860-b(7); *see* N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.1(g).

[1106] N.Y. LAB. LAW § 860-c(1)(b).

[1107] N.Y. LAB. LAW § 860-c(1)(d)-(e).

[1108] N.Y. LAB. LAW § 860-c(1)(c).

employer to order a plant closing with less than 90 days' notice if it is seeking capital or business and if the giving of notice would jeopardize the company's ability to obtain the required capital or business.[1109]

Although the timeframe for notice under these exceptions is more flexible, *notice is required*. Even where an employer cannot provide the full 90-day advance notice, it must provide "as much notice as is practicable."[1110] At that time, it must also submit a brief statement explaining the reason that it could not give notice for the full 90-day period.[1111]

Special Rules for Sale of a Business. NY WARN also specifically addresses which employer is responsible for notification in the context of the sale of all or part of a business.[1112] Up to and including the effective date of the sale, the seller is responsible for any required notice associated with a plant closing or mass layoff. After the effective date, the purchaser becomes responsible for any such notice. Sellers will not have an obligation to give WARN notice if the transfer of employees in the sale is a good-faith condition of the purchasing condition, and the purchasing employer does not uphold that condition – the notice obligation would fall to the purchasing employer in such a situation.[1113] The statute further clarifies that any employee of the seller as of the effective date "shall be considered an employee of the purchased immediately after" the deal closes.[1114]

Content of Notice & Delivery Requirements

Under NY WARN, the employer must provide notice to affected employees, their representatives (including union representatives), the NYDOL, and the LWIB for the locality in which the mass layoff, reduction, or plant closing will occur.[1115] The required contents of each notice are listed below. The written notice to affected employees must also be drafted in a language the employee understands.[1116]

Notice to Affected Employees. Notice to affected employees must include the following information:

- the complete legal business name and any business names used in the operation of the business, the address of the employment site where the plant closing, mass layoff, relocation or covered reduction in work hours will occur, and the expected date of the first separation of employees (*i.e.*, a specific date or a 14-day period in which it is expected) and the date when the individual employee will be separated;
- a statement as to whether the planned action is expected to be permanent or temporary, and whether the entire plant is to be closed;[1117]
- a statement as to whether bumping rights exist;

[1109] N.Y. LAB. LAW § 860-c(1)(a); *see* N.Y. COMP. CODES R. & REGS. tit. 12, § 921-6.2 (providing additional requirements for the faltering company exception).

[1110] N.Y. LAB. LAW § 860-c(2).

[1111] N.Y. LAB. LAW § 860-c(2).

[1112] N.Y. LAB. LAW § 860-b(5).

[1113] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.1.

[1114] N.Y. LAB. LAW § 860-b(5).

[1115] N.Y. LAB. LAW § 860-b(1)(a)-(c).

[1116] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.3.

[1117] If the action is expected to affect certain units of employees differently from others, all notices must include that information.

- the name and telephone number of an employer representative to contact for further information; and
- information concerning unemployment insurance, job training, and reemployment services for which affected employees may be eligible.[1118]

Notice to impacted employees must also include relevant information known at the time the notice is provided, including information on severance packages or financial incentives if the employee remains and works until the effective date of the layoff, relocation or employment loss, available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration of the planned action.

Notice to Employee Representatives. Notice to employee representatives must include the following information:

- the complete legal business name and any business names used in the operation of the business and address of the employment site where the plant closing, mass layoff, relocation or covered reduction in work hours will occur;
- the name, business address, telephone number(s), and email addresses(es) of the agent of employer to contact for further information;
- a statement as to whether bumping rights exist;
- a statement as to whether the planned action is expected to be permanent or temporary, and whether the entire plant is to be closed;
- the expected date of the first separation of employees and the anticipated schedule of any additional separations;
- the name, address (including home address), personal telephone number(s), personal email address(es) (if known), job title, and work location of each employee to be laid off;
- information concerning unemployment insurance, job training, and re-employment services for which affected employees may be eligible;
- a statement as to whether the other notices required under the Act have been given, including the date notices were sent; and
- a statement as to the means of delivery utilized to deliver notice to affected employees.[1119]

[1118] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.3(b). The regulation explains that this last element is met by including, at a minimum, the following notice:

> You are also hereby notified that, as a result of your employment loss, you may be eligible to receive job retraining, re-employment services, or other assistance with obtaining new employment from the New York State Department of Labor or its workforce partners upon your termination. You may also be eligible for unemployment insurance benefits after your last day of employment. Whenever possible, the New York State Department of Labor will contact your employer to arrange to provide additional information regarding these benefits and services to you through workshops, interviews, and other activities that will be scheduled prior to the time your employment ends. If your job has already ended, you can also access reemployment information and apply for unemployment insurance benefits on the Department's website or you may use the contact information provided on the website or visit one of the Department's local offices for further information and assistance.

Notice to the New York Commissioner of Labor. Notice to the New York Commissioner of Labor must include the following information:

- the complete legal business name, and any business names used in the operation of the business, and the address of the sites where the closing, layoff, relocation or reduction will occur;
- the business addresses and email addresses of the employer and its agents;
- the business address, phone number, and email address(es) of an employee representative, including the name of each employee representative of the affected employees, and the name, business address, phone number and email address of the chief elected officer of such employee representative;
- the name, address (including home address), personal phone number, personal email address, job title, and work locations of each employee to be laid off, including how each employee is paid (such as hourly, commission, full-time or part-time) and union affiliation;
- the total number of full-time employees in New York State and at each affected site, as well as the total number of employees at each affected site; and
- the total number of part-time employees in New York State and at each affected site, as well as the total number of employees at each affected site.
- the expected date of the first separation of employees and the anticipated schedule of separations;
- a statement whether bumping rights exist;
- a statement whether the planned action is expected to be permanent or temporary, and whether the entire plant is to be closed. If the planned action is expected to affected identifiable units of employees differently, the notice must so state;
- a statement whether the other notices required have been given, including the date notices were sent;
- a statement as to the means of delivery utilized to deliver notice to affected employees; and
- a sample of the notice provided to employees and to the employee representative(s).

Notice to the LWIB. Notice to the LWIB must include the following information:

- the complete legal business name and any business names used in the operation of the business and address of the employment site where the plant closing, mass layoff, relocation or covered reduction in work hours will occur;
- the name business address and telephone number(s) and email address(es) of an employer representative to contact for further information;
- the name business address and telephone number(s), and email address(es) of an employee representative to contact for further information;

[1119] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.3(c).

- a statement as to whether the planned action is expected to be permanent or temporary, and whether the entire plant is to be closed;
- the expected date of the first separation of employees and the anticipated schedule of any additional separations;
- the job titles of the positions to be affected, and the number of affected employees in each title;
- a statement as to whether bumping rights exist;
- the name of each union representing affected employees, and the name, address, telephone number, and email address of the chief elected officer of each such employee representative;
- a statement as to whether the other notices required have been given, including the date notices were sent; and
- a statement as to the means of delivery utilized to deliver notice to affected employees.[1120]

Delivery Requirements. Notice must be sent by a reasonable and timely method of delivery, such as first-class mail or personal delivery. If first-class mail is selected, notice must be postmarked at least 90 days prior to the employee's separation date.[1121] Delivery is also acceptable by inserting notice into envelopes containing pay or paystubs.[1122] Notices to the NYDOL and the appropriate LWIB should be mailed.[1123]

Email notification is sufficient "only where all affected employees have regular access in the workplace to personal computers at which email may be received and viewed during work hours."[1124] If an employer elects to use email for notice, the employer must be able to demonstrate that such notice was received by each affected employee. Additional requirements apply, including, for example, that the email must be marked as "urgent."[1125]

The required notice must either be sent using the employer's computer network or be sent on the employer's official letterhead. Regardless of the manner of delivery, the notice must be signed by someone with authority to represent the employer, with an original signature provided on the notice to the NYDOL.[1126]

Employers should also be aware that the notification requirements under federal WARN are slightly different than under NY WARN. For example, the notice to the LWIB under NY WARN would not necessarily satisfy the federal requirement for notification to the local chief elected official, unless they happen to be the same person.[1127]

[1120] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.3(d).

[1121] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.2(a).

[1122] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.2(b)(1).

[1123] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.2(e)-(f).

[1124] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.2(b)(2).

[1125] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.2(b)(2).

[1126] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.2(c).

[1127] N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.2(d).

State Enforcement, Remedies & Penalties

Failure to provide the requisite notices under NY WARN may expose an employer to damages of up to 60 days' back pay, plus benefits, for each affected employee who was entitled to notice.[1128] Benefits would include "the cost of any medical expenses incurred by the employee that would have been covered under an employee benefit plan."[1129]

An aggrieved employee, local government, or an employee representative may bring a civil action on behalf of the person and/or those similarly situated in any court of competent jurisdiction within six years of the violation, and if they prevail, may recover reasonable attorneys' fees.[1130] Damages—including liability and attorneys' fees—may be reduced if the employer can prove it conducted a reasonable investigation in good faith and had reasonable grounds to believe its conduct was not in violation of NY WARN.[1131] Injunctive relief is not available.[1132]

Violators may also be assessed civil penalties of up to $500 per day for each violation, up to the maximum permitted under federal law.[1133] An employer will not be subject to penalties if it pays all amounts due to affected employees for its liability within three weeks from the date that the mass layoff or other employment loss is ordered.[1134] The NYDOL may reduce the amount of any penalty if the employer demonstrates that it acted in good faith and had reasonable grounds to believe its conduct was not in violation of NY WARN. In evaluating any potential reduction, the NYDOL will consider: (1) the size of the employer; (2) the hardships to employees as a result of the violations; (3) any efforts by the employer to mitigate the violation; and (4) the grounds for the employer's belief that it was not in violation.[1135]

4.1(c) *State Mass Layoff Notification Requirements*

Beyond the NY WARN requirements, New York does not require that an employer notify the state unemployment insurance department or another department in the event of a mass layoff.

4.2 Documentation to Provide When Employment Ends

4.2(a) *Federal Guidelines on Documentation at End of Employment*

Table 26 lists the documents that must be provided when employment ends under federal law.

Table 26. Federal Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Consolidated Omnibus	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the

[1128] N.Y. LAB. LAW § 860-g(1)-(2); N.Y. COMP. CODES R. & REGS. tit. 12, § 921-7.2.

[1129] N.Y. LAB. LAW § 860-g(1)(b).

[1130] N.Y. LAB. LAW § 860-g(7); N.Y. C.P.L.R. § 213.

[1131] N.Y. LAB. LAW § 860-g(7).

[1132] N.Y. LAB. LAW § 860-g(8).

[1133] N.Y. LAB. LAW § 860-h(1)-(2); N.Y. COMP. CODES R. & REGS. tit. 12, § 921-7.2.

[1134] N.Y. LAB. LAW § 860-h(1); N.Y. COMP. CODES R. & REGS. tit. 12, § 921-7.2.

[1135] N.Y. LAB. LAW § 860-h(4).

Table 26. Federal Documents to Provide at End of Employment	
Category	**Notes**
Budget Reconciliation Act (COBRA)	covered employee (if any) of the right to continuation coverage provided under the plan.[1136] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[1137]

4.2(b) *State Guidelines on Documentation at End of Employment*

Table 27 lists the documents that must be provided when employment ends under state law.

Table 27. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: mini-COBRA, etc.— Notice of Termination & Benefits Continuation	New York employers are required to provide all departing employees with a letter notifying them of: (1) the exact date of termination; and (2) the exact date that employee benefits will be terminated. This notice must be provided no more than five working days after the date of termination.[1138] Employers that fail to provide this notice of termination and benefits continuation face a civil penalty of up to $5,000.[1139] Certain officers of the policyholder may also be liable for any penalty. Employers that violate this requirement may be further liable to affected employees for damages in a civil action, including reimbursement for medical expenses.[1140]

[1136] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[1137] See the section "Notice given to participants when they leave a company" at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

[1138] N.Y. LAB. LAW § 195(6).

[1139] N.Y. LAB. LAW §§ 195(6), 217(7). The penalty is provided under labor code section 217, which also governs employer duties, including notice requirements, if group accident or health policies are terminated or substituted. N.Y. LAB. LAW § 217.

[1140] N.Y. LAB. LAW § 217(7)(b).

Table 27. State Documents to Provide at End of Employment	
Category	**Notes**
Unemployment Notice	**Generally.** Employers must inform separating employees of their right to file a claim for unemployment benefits with a field office of the New York Department of Labor (NYDOL). The notice must be in writing on the form furnished by the NYDOL: Form IA 12.3 ("Record of Employment"). The notice includes: 1. the employer's name and registration number; 2. the employer's address, to which requests for payment and information should be sent; 3. a statement instructing the employee that they should have the form on hand if and when reporting to the field office to file for benefits; and 4. any such other information required by the Commissioner of Labor.[1141] Notice will not be required if the employer's pay vouchers, envelopes, or stubs include the first three items listed above. **Multistate Workers.** New York does not require that employees be again notified as to the jurisdiction under whose unemployment compensation law services have been covered. It is recommended, however, that employers consider providing notice of the jurisdiction where services will be covered for unemployment purposes. Employers should also follow that state's general notice requirement, if applicable.[1142]

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

Federal law does not specifically address providing former employees with references.

4.3(b) *State Guidelines on References*

New York law does not specifically address providing former employees with references.

As noted in **3.12(b)**, however, it is an unfair labor practice in New York for an employer to blacklist individuals who have exercised their rights to participate in union activity. Employers therefore cannot inform other employers about an individual's concerted activity in an effort to prevent those former employees from obtaining or retaining employment.[1143]

Moreover, an employer may be subject to a claim for defamation in New York if it releases inaccurate or misleading information about a current or former employee. *Defamation* refers to any false and

[1141] N.Y. LAB. LAW § 590; N.Y. COMP. CODES R. & REGS. tit. 12, § 472.8(a). This notice (Form IA 12.3) is available at https://dol.ny.gov/system/files/documents/2023/11/ia12.3_0.pdf.

[1142] *See, e.g.*, N.Y. LAB. LAW § 536; N.Y. COMP. CODES R. & REGS. tit. 12, § 473.5.

[1143] N.Y. LAB. LAW § 704(2), (9).

unprivileged communication, oral or written, that damages a person's reputation.[1144] Even a mere statement that someone has been discharged from employment could be defamatory if the statement implies or insinuates that the discharge was due to misconduct or lack of professional competence.[1145]

[1144] *See Golub v. Enquirer/Star Grp., Inc.*, 681N.E.2d 1282, 1283 (N.Y. 1997); *see also Tischmann v. ITT/Sheraton Corp.*, 882 F. Supp. 1358, 1370-71 (S.D.N.Y. 1995).

[1145] *See Davis v. Ross*, 754 F.2d 80, 84(2d Cir. 1985).