

Fox Rothschild's

New York Hospitality Guide

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Although it skipped a few generations, hospitality is in my blood. At the turn of the last century, my great-grandfather immigrated to New York from Eastern Europe. While I never got to meet “Papa Joe,” my grandfather told me a lot of stories about the industry, including that Papa Joe was an opening Captain at Tavern on the Green in 1934. Through my grandfather and parents, I learned to love restaurants, including the Brasserie (the best French onion soup) and Maxwell’s Plum (I never left without a balloon), the Automat and Peter Luger’s. It was not until I began practicing law in 1994 that I began working right alongside of restaurateurs. Among my first cases was a truly tough hotel union campaign in Midtown and a nasty termination of a general manager at a popular New Jersey restaurant. Within that first year, I also had the pleasure to begin working with Shelly Fireman, and I began to learn about the characters and employees who make this industry run. It took three more years until I met my mentor, Steve Hanson. One snowy President’s Day in 1998 sitting in his office (technically on the floor amidst piles and piles of paper), he introduced me to New York’s arcane tipping rules and Restaurant Wage Order. Even today, almost 25 years later, Steve and I have continued work together to translate often arcane and counter-intuitive employment laws into practice and policy. Based on those experiences, I have built a team that continues to advise and counsel restaurants around the country about how to avoid liability and create employee-centric businesses.

While restaurants always had employment law disputes and discrimination claims came with some regularity, wage and hour disputes were virtually nonexistent when I began practicing in 1994. In the early 2000s, that all changed for a number of legal, industry and societal reasons—reasons that I won’t bore you with today. While these changes were occurring, social justice groups became very active in New York, assisting individuals in filing lawsuits, organizing employees and demanding significant amendments to wage and hour laws at the local, state and federal level. This resulted in a legal assault on the industry. Five years after we first started drafting this guidebook, New York State and City have expanded the employment laws that control the hospitality industry by a startling amount. Our second edition of this guide offers additional guidance on COVID, new protective classes and significant changes to leave and wage and hour laws. While we cannot provide all the answers, we can guide operators as to the broad rules of the game. We are proud to offer the industry our guidebook. Please find the time to review it and keep it nearby. It is still only a guideline, and we encourage you to speak with your own counsel if there are particular issues of concern. Enjoy!



Carolyn D. Richmond

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CHAPTER 1

Wage & Hour Law



Overview

What are the minimum wage laws in NY?

The minimum wage in New York depends upon where the employee physically works, whether the employee works in the fast food industry, and, in some cases, the number of employees employed by the employer within the City of New York. Further, the minimum wage rate for some areas of the State will increase on a yearly basis. The below chart indicates the current and future minimum wage rates around New York:

Effective Date	Minimum Wage Rates (all rates are hourly rates)				
	Employers in New York City	Nassau, Suffolk, and Westchester Counties	Rest of New York	Fast Food Employees in New York City, Nassau, Suffolk, and Westchester	Fast Food Employees in Rest of New York
Current	\$15.00	\$15.00	\$14.20	\$15.00	\$15.00
Jan 1, 2024	\$16.00	\$16.00	\$15.00	\$16.00	\$15.00
Jan 1, 2025	\$16.50	\$16.50	\$15.50	\$16.50	\$15.50
Jan 1, 2026	\$17.00	\$17.00	\$16.00	\$17.00	\$16.00

A “Fast Food Employee” is any employee who works at a “Fast Food Establishment” regardless of the individual’s job duties. A “Fast Food Establishment” is an establishment which:

- (1) has as its primary purpose serving food or drink items;
- (2) 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) offers limited service;
- (4) is part of a chain; and
- (5) is one of thirty (30) or more establishments nationally, including: (i) an integrated enterprise which owns or operates thirty (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 operate thirty (30) or more such establishments in the aggregate nationally.

“Fast Food Establishment” shall include such establishments located within non-Fast Food Establishments, such that they are considered an “integrated enterprise.” For purposes of determining if the establishment is a “Fast Food Establishment,” an “integrated enterprise” is defined as two or more entities sufficiently integrated so as to be considered a single employer as determined by application of the following factors: (i) degree of interrelation between the operations of multiple entities; (ii) degree to which the entities share common management; (iii) centralized control of labor relations; and (iv) degree of common ownership or financial control.

When do I have to pay overtime?

Under federal and New York law, an employee is entitled to overtime, regardless of the employee's rate of pay (or whether the employee is paid a salary or above minimum wage), when the employee works more than forty (40) hours during the workweek, unless the employee is legally exempt from overtime requirements as discussed below. Most employees are entitled to overtime. Any overtime that is owed must be paid at the same time that the employee's regular wages for the week at issue are paid.

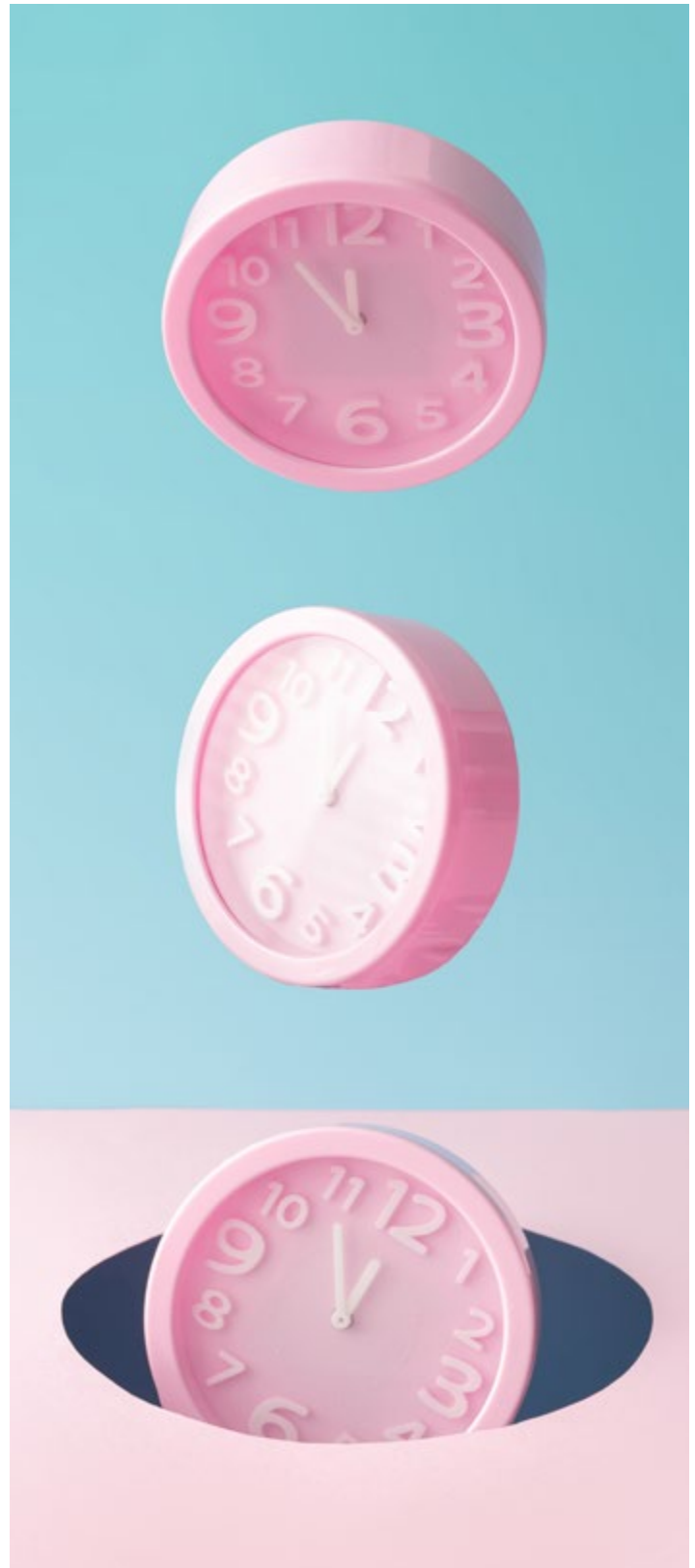
How do you calculate overtime?

For every hour (or portion thereof) worked over forty (40) hours during a workweek, overtime is calculated at one and one-half times the employee's regular rate of pay:

Overtime = (Hours over 40) x 1.5 x Regular Rate of Pay

An employee's "regular rate of pay" is an hourly rate of pay generally calculated by aggregating all remuneration paid by the employer to the employee for time worked, subtracting out certain statutory deductions, and dividing that figure by the hours worked during the week. Payments which are subtracted out in calculating the regular rate include: (i) payments made to insurance and related entities on the employee's behalf such as employer contributions to medical, retirement, and other benefits plans; (ii) pay for expenses incurred on the employer's behalf; (iii) premium payments for overtime work or certain premiums paid for work on Saturdays, Sundays, and holidays; (iv) discretionary bonuses (including holiday bonuses, most referral bonuses, and longevity bonuses); (v) gifts and payments in the nature of gifts on special occasions; (vi) payments for occasional periods when no work is performed due to vacation, holidays, or illness; and (vii) tips and gratuities paid by customers.

When an employee is paid only an hourly wage rate, the calculation of overtime is simply the wage rate multiplied by 1.5 multiplied by the number of weekly hours (or portion thereof) in excess of forty (40) hours. When employees receive commissions, bonuses, revenue shares, and other forms of compensation, the calculation can get complex.



How do you calculate overtime if an employee works more than one job?

In multi-job (or multi-rate) situations, the employee's regular rate of pay for a workweek is the weighted average of all of the rates divided by the number of hours worked at all jobs.

The best way to explain how to calculate a blended overtime rate is by example:

In a New York City Restaurant, Employee A worked a total of 49 hours in a single workweek. He worked 23.5 hours as a dishwasher (paid at \$15.00 per hour) and 25.5 hours as a line cook (paid at \$19.00 per hour):

- (1) Multiply the number of hours Employee A worked in the first position (Dishwasher) by the minimum wage rate:
23.5 hours x \$15.00 (minimum wage) = \$352.50
- (2) Multiply the number of hours Employee A worked in the second position (Cook) by his direct wage for that position:
25.5 hours x \$19.00 (wage as cook) = \$484.50
- (3) Employee A's "gross blended compensation" is the sum of the wages in both positions:
\$352.50 + \$484.50 = \$837.00
- (4) Thus his "gross blended regular rate of pay" is the total gross blended compensation divided by the total number of hours worked:
\$837.00 ("gross blended compensation") ÷ 49 (total hours) = \$17.08

To calculate the gross blended overtime premium owed to Employee A:

- (5) Multiply the "gross blended regular rate of pay" by one-half times
\$17.08 x 0.5 = \$8.54

It is only multiplied by ½ rather than 1.5 because the fulltime has already been calculated above and thus only ½ is left to be paid

- (6) Multiply the number of overtime hours worked by the blended overtime premium rate:
(49 total hours – 40 hours) = 9 hours x \$8.54 = \$76.86

To calculate the total gross wages owed to Employee A:

- (7) Add the overtime premium amount to the gross blended compensation:
\$76.86 + \$837.00 = \$913.86

Employee A will be owed \$913.86 for working 25.5 hours at a rate of \$19.00 per hour and 23.5 hours at a rate of \$15.00.

Does it matter what corporate entity actually pays an employee?

If the corporate entities are related and the same individuals control the day-to-day affairs of the corporate entities, then it does not matter which entity pays the employee. Further, if an employee works for two related entities, and in the aggregate works more than 40 hours in a week, the employee will be entitled to overtime even if the employee did not work more than 40 hours for any single entity.

What is the “Tip Credit” and when does it apply?

Under limited and specific circumstances, an employer may be able to take a tip credit towards its minimum wage obligations for its service and food service employees. Thus, under these limited circumstances, the employer can use a portion of the employee’s tips to count towards the minimum wage and therefore pay an employee a lower cash wage. However, if an employee’s cash wage and tips do not equal the minimum wage for all hours worked, the employer must make up the difference. Further, for some employees, New York requires that in order to take a tip credit, a tip threshold must be met, meaning that an employee must earn a certain amount in tips each hour. The tip threshold plus the cash wage is more than the applicable minimum wage.

If a tip credit is lawfully taken, the following charts show the various tip credits and cash wages that can be paid to employees:

Employers in New York City

Effective Date	Minimum Wage Rates and Tip Credits (all rates are hourly rates)						
	Minimum Wage	Cash Wage (Food Service)	Tip Credit (Food Service)	Cash Wage (Service)	Tip Credit (Service)	Tip Threshold (Service)	Tip Threshold (Resorts)
Current	\$15.00	\$10.00	\$5.00	\$12.50	\$2.50	\$3.25	\$8.40
Jan 1, 2024	\$16.00	\$10.65	\$5.35	\$13.35	\$2.65	\$3.45	\$8.95
Jan 1, 2025	\$16.50	\$11.00	\$5.50	\$13.75	\$2.75	\$3.55	\$9.25
Jan 1, 2026	\$17.00	\$11.35	\$5.65	\$14.15	\$2.85	\$3.65	\$9.55

Employers in Nassau, Suffolk, and Westchester Counties

Effective Date	Minimum Wage Rates and Tip Credits (all rates are hourly rates)						
	Minimum Wage	Cash Wage (Food Service)	Tip Credit (Food Service)	Cash Wage (Service)	Tip Credit (Service)	Tip Threshold (Service)	Tip Threshold (Resorts)
Current	\$15.00	\$10.00	\$5.00	\$12.50	\$2.50	\$3.25	\$8.40
Jan 1, 2024	\$16.00	\$10.65	\$5.35	\$13.35	\$2.65	\$3.45	\$8.95
Jan 1, 2025	\$16.50	\$11.00	\$5.50	\$13.75	\$2.75	\$3.55	\$9.25
Jan 1, 2025	\$17.00	\$11.36	\$5.65	\$14.15	\$2.85	\$3.65	\$9.55

Rest of New York

Effective Date	Minimum Wage Rates and Tip Credits (all rates are hourly rates)						
	Minimum Wage	Cash Wage (Food Service)	Tip Credit (Food Service)	Cash Wage (Service)	Tip Credit (Service)	Tip Threshold (Service)	Tip Threshold (Resorts)
Current	\$14.20	\$9.45	\$4.75	\$11.85	\$2.35	\$3.05	\$7.95
Jan 1, 2024	\$15.00	\$10.00	\$5.00	\$12.50	\$2.50	\$3.20	\$8.40
Jan 1, 2025	\$15.50	\$10.35	\$5.15	\$12.90	\$2.60	\$3.30	\$8.70
Jan 1, 2026	\$16.00	\$10.70	\$5.30	\$13.30	\$2.70	\$3.40	\$9.00

There are no tip thresholds for food service employees. A food service employee is any employee who is primarily engaged in the serving of food or beverages to guests, patrons or customers in the hospitality industry, including, but not limited to, wait staff, bartenders, captains and bussing personnel; and who regularly receives tips from such guests, patrons or customers. The term food service worker shall not include delivery workers. An individual may not be classified as a food service worker on any day in which the employee has been assigned to work in an occupation in which tips are not customarily received for 2 hours or more or for more than 20 percent of her or his shift, whichever is less. This is known as the “80/20 Rule.”

The “80/20/30 Rule”

In addition to compliance with the 80/20 Rule, under recent changes to the tip regulations under the Fair Labor Standards Act, an employer also may not pay an employee at the tip credit rate for any time in excess of 30 continuous minutes in which the employee is not performing directly tip-producing work, but is performing work that directly supports tip-producing work (e.g., work performed by a tipped employee in preparation of or to otherwise assist tip-producing customer service work, such as, depending on the occupation, rolling silverware, making drink mixes, and stocking the busser station).

A service worker is an employee, other than a food service worker or fast food employee, who customarily receives tips at or above the tip threshold rates.

A “resort” is a hotel which offers lodging accommodations of a “vacation” nature to the public or to members or guests of members, and which: (i) operates for not more than seven months in any calendar year; or (ii) being located in a rural community or in a city or village of less than 15,000 population, increased its number of employee workdays during any consecutive four-week period by at least 100 percent over the number of employee workdays in any other consecutive four-week period within the preceding calendar year; or (iii) being located in a rural community or in a city or village of less than 15,000 population, increased its number of guest days during any consecutive four-week period by at least 100 percent over the number of guest days in any other consecutive four-week period within the preceding calendar year.

A tip credit cannot be taken toward the minimum wage obligations of fast food employees.

What do I have to do to protect my restaurant's right to take the tip credit?

In order to lawfully take a tip credit in New York, at the commencement of employment and any time there is a change in the employee's rate of pay, the employee must be informed in writing in English and the employee's primary language (if not English) about the employee's:

- Regular hourly pay rate;
- The cash wage that will be paid;
- Overtime hourly pay rate;
- The amount of tip credit, if any, to be taken from the basic minimum hourly rate;
- The regular payday;
- Information that in the event the employee's cash wage and tips do not equal the minimum wage for all hours worked, the employer will pay the difference; and
- That all tips received by the employee will be retained by the employee except for tips contributed to a valid tip out or tip pool system.

Further, if the employer requires directly tipped employees to tip out other employees or participate in a tip pool, the employer must ensure that such tip out and tip pool system only involve food service employees. Service employees, such as coat check personnel and delivery workers, cannot be required to tip out or participate in a tip pool. In the event a non-food service worker participates in a tip pool with a food service worker, the employer may lose the tip credit (and be required to pay it back to the employees) for all employees who participate in the tip pool or tip out arrangement. In addition, employees can never be required to share tips with managers.

How do I calculate overtime when I take a tip credit?

When an employer takes a tip credit towards its minimum wage obligations to an employee and that employee works more than forty hours during the week, the overtime rate shall be the employee's regular rate of pay before subtracting any tip credit, multiplied by 1½, minus the tip credit. It is a violation of the overtime requirement for an employer to subtract the tip credit first and then multiply the reduced rate by one and one half.

For example, for a large employer in New York City, the employer takes a tip credit of \$5.00 towards its minimum wage obligations to Employee B.

Employee B works 43 hours during the week, earns \$700.00 in tips and earns no other remuneration.

Overtime is calculated as follows:

$$(1) \$15.00 \times 1.5 \times (43-40) = \$67.50$$

Overtime Payment made after the tip credit is taken is:

$$(2) \$67.50 - (3 \text{ hours} \times \$5.00 \text{ credit}) = \$52.50$$

What wage and hour documents do I need?

W-4

This is the standard IRS form that all employees must complete in order for the employer to determine how much in taxes the employer needs to withhold from employee wages.

Rate of Pay Form

At the time of hire an employer must provide an employee notice in English and the employee's primary language (if not English) containing the following information:

- the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other;
- allowances (also called "credits"), if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances/credits;
- the regular pay day designated by the employer;
- the name of the employer;
- any "doing business as" names used by the employer;
- the physical address of the employer's main office or principal place of business, and a mailing address if different; and
- the telephone number of the employer.

Whenever there is a change in the above information the employer must provide the employee with a new notice in both English and the employee's primary language (if not English) at least 7 days in advance of any such changes. Rate of Pay forms can be obtained from the website of the New York State Department of Labor. If the New York State Department of Labor has not created a Rate of Pay form in a specific employee's primary language, then the notice only needs to be provided in English to such employee.

Tip Pool Agreement

If an employer requires its food service employees to pool their tips, then the employer should have a document that the employee signs detailing how the tip pool operates, including how each individual employee's share of the tip pool is calculated. Further, if the employer is taking a tip credit, it is advisable for this document to notify the employee of the information required in order for the employer to lawfully take a tip credit.

Tip Credit Acknowledgement

This is an acknowledgment that the employee has been provided, in writing, with the information required in order for an employer to take a tip credit. This acknowledgment could be set forth in the Rate of Pay Form, the Tip Pool Agreement (if applicable), or the Employee Handbook. In fact, it is a best practice to have all three documents reference the information necessary for the employer to lawfully take a tip credit.

What wage and hour records do I have to maintain and for how long?

In New York, an employer is required to maintain all employee time records and payroll records for at least six years. Further, additional documents such as Rate of Pay Forms, Tip Credit Acknowledgments, and Tip Pool Agreements should be maintained for as long as the individual is employed by the employer and for six years following the separation of employment, regardless of the reason for the separation or whether the separation was voluntary or involuntary.

Are my employees entitled to meal breaks?

New York meal break rules are complicated. Under New York law, technically, meal breaks must be provided as follows:

- (1) Every person employed in or in connection with a factory shall be allowed at least sixty minutes for the noon day meal.
- (2) Every person employed in or in connection with a mercantile or other establishment or occupation coming under the provisions of this chapter shall be allowed at least thirty minutes for the noon day meal. The noon day meal period is recognized as extending from eleven o'clock in the morning to two o'clock in the afternoon. An employee who works a shift of more than six hours which extends over the noon day meal period is entitled to at least thirty minutes off within that period for the meal period.
- (3) Every person employed for a period or shift starting before eleven o'clock in the morning and continuing later than seven o'clock in the evening shall be allowed an additional meal period of at least twenty minutes between five and seven o'clock in the evening.
- (4) Every person employed for a period or shift of more than six hours starting between the hours of one o'clock in the afternoon and six o'clock in the morning, shall be allowed at least sixty minutes for a meal period when employed in or in connection with a factory, and forty-five minutes for a meal period when employed in or in connection with a mercantile or other establishment or occupation coming under the provisions of this chapter, at a time midway between the beginning and end of such employment

The statute also allows the Commissioner of Labor to revise the above requirements. The Commissioner has done so, in a number of significant ways. First, in #3, the period has been extended from 20 minutes to 30 minutes. Second, in #4, the period for mercantile and other establishments has been decreased from 45 minutes to 30 minutes. Third, for hospitality employers, the New York Department of Labor has a policy that employees should be given a 30 minute meal break for every 6 hours that an employee works. If possible, the meal break should be provided during the middle of the shift, although this is not required.

Generally, the meal break cannot be voluntarily waived by the employee. Therefore, it is prudent for employers to make sure that employees take their required meal breaks, even if they do not want to do so.

If I provide employees with meals, can I get financial credit for it?

Under New York law, meals furnished by an employer to an employee may be considered part of the employee's wages. In other words, most employers may lawfully take a "meal credit" against an employee's wages for each shift that they furnish a meal to the employee; provided, the meal consists of at least one of the types of food from all four of the following groups:

- (1) fruits or vegetables;
- (2) grains or potatoes;
- (3) eggs, meat, fish, poultry, dairy, or legumes; and
- (4) tea, coffee, milk or juice.

If a hospitality employer furnishes meals contains all four of the above categories, the employer can take a meal credit as follows:

Employers in New York City, Long Island, and Westchester County

Effective Date	Meal Credits (Per Meal)					
	Food Service Employees	Service Employees	Non-Service Employees	Residential Hotel Food Service Employees	Residential Hotel Service Employees	Residential Hotel Non-Service Employees
Current	\$3.60	\$4.15	\$5.15	\$3.95	\$5.40	\$6.75
Jan 1, 2024	\$3.85	\$4.45	\$5.50	\$4.20	\$5.75	\$7.20
Jan 1, 2025	\$3.95	\$4.60	\$5.65	\$4.35	\$5.95	\$7.45
Jan 1, 2026	\$4.05	\$4.75	\$5.80	\$4.50	\$6.15	\$7.70

Rest of New York

Effective Date	Meal Credits (Per Meal)					
	Food Service Employees	Service Employees	Non-Service Employees	Residential Hotel Food Service Employees	Residential Hotel Service Employees	Residential Hotel Non-Service Employees
Current	\$3.60	\$3.90	\$4.90	\$3.90	\$5.10	\$6.40
Jan 1, 2024	\$3.80	\$4.10	\$5.20	\$4.10	\$5.40	\$6.75
Jan 1, 2025	\$3.95	\$4.25	\$5.35	\$4.25	\$5.60	\$7.00
Jan 1, 2026	\$4.10	\$4.40	\$5.50	\$4.40	\$5.80	\$7.25

Employers must keep records of the meals they provide to employees and the actual cost of such meals.

Are my employees entitled to smoking or other breaks?

There is no legal requirement to provide smoking breaks or any other breaks to employees in New York with the exception that lactating mothers must be provided breaks at reasonable periods in order to express breast milk.

What is the Spread of Hours and when do I have to pay it?

In New York, an employee's "spread of hours" is defined as the period between when the employee commences work (i.e., clocks in) at the start of the day until the employee finishes work (i.e., clocks out) at the end of the day, inclusive of all breaks, whether paid or unpaid.

In the hospitality industry, if an employee's spread of hours on any given day is greater than ten (10), the employee is entitled to one hour of pay paid at the applicable minimum wage rate even if the employee's regular hourly wage is greater than the minimum wage. If an employer takes a tip credit towards its minimum wage obligations for an employee and that employee is entitled to a spread of hours payment, the payment is made at the regular minimum wage applicable to the employee and not at the cash wage paid to the employee.

Outside the hospitality industry, if an employee's spread of hours on any given day is greater than ten (10) and the employee is paid at or very near the minimum wage, then the employee is entitled to one hour of pay paid at the applicable minimum wage rate. If the employee is paid well in excess of the minimum wage, then no spread of hours payment is required.

Regardless of the industry, managerial, administrative, professional, and outside salespersons who are exempt from overtime are not entitled to spread of hours payments when they work a spread of hours of more than ten (10) on a given day.

What is Call-In pay and when do I have to pay it?

In the hospitality industry, if an employee who by request or permission of the employer reports for duty on any day, whether or not assigned to actual work, shall be paid at the applicable wage rate:

- (1) for at least three hours for one shift, or the number of hours in the regularly scheduled shift, whichever is less;
- (2) for at least six hours for two shifts totaling six hours or less, or the number of hours in the regularly scheduled shift, whichever is less; and
- (3) for at least eight hours for three shifts totaling eight hours or less, or the number of hours in the regularly scheduled shift, whichever is less.

In all other industries, an employee who by request or permission of the employer reports for duty on any day, whether or not assigned to actual work, shall be paid at the applicable wage rate for at least four hours.

The term "applicable wage rate" means: (1) payment for time of actual attendance calculated at the employee's customary rate of pay, minus any customary and usual tip credit; and (2) payment for the balance of the period calculated at the basic minimum hourly rate with no tip credit subtracted.

A regularly scheduled shift is a fixed, repeating shift that an employee normally works on the same day of each week. If an employee's total hours worked or scheduled to work on a given day of the week changes from week to week, there is no regularly scheduled shift. For example, if an employer requires employees to come in on their day off for a one-hour training session, the employees are entitled to call-in pay, as the one-hour training session is not a "regularly recurring shift". If, on the other hand, all employees are required to report to work for a two-hour training session every Monday at noon every week, that weekly training session is a regularly recurring shift for which call-in pay is not required.

Who can be exempt from overtime?

Depending on their job duties and payment scheme, certain employees may be exempt from overtime requirements. The most common overtime requirements are as follows:

Executive/Managerial Employees

In order to be exempt as an Executive/Managerial employee, the employee must satisfy (i) a salary test and (ii) a duties test.

- i. **Salary Test:** The individual must be paid on a salary basis and earn at least the amount set forth in the below chart.

Effective Date	New York Salary Thresholds for Executives/Managers (all figures are per week)		
	Employers in New York City	Nassau, Suffolk, and Westchester Counties	Rest of New York
Current	\$1,125.00 (\$58,500.00 per year)	\$1,125.00 (\$58,500.00 per year)	\$ 1,064.25 (\$55,341.00 per year)
Jan 1, 2024	\$1,200.00 (\$62,400.00 per year)	\$1,200.00 (\$62,400.00 per year)	\$1,124.20 (\$58,458.40 per year)
Jan 1, 2025	\$1,237.50 (\$64,350.00 per year)	\$1,237.50 (\$64,350.00 per year)	\$1,161.65 (\$60,405.65 per year)
Jan 1, 2026	\$1,275.00 (\$66,300.00 per year)	\$1,275.00 (\$66,300.00 per year)	\$1,199.10 (\$62,353.20 per year)

While federal law allows employers to pay up to 10% of the salary threshold set forth above through non-salary income, such as commissions or bonuses, New York law does not. As such, in order to be exempt as an Executive Employee, the employee must earn a salary in an amount set forth in the above chart. A salary is defined as a predetermined amount paid each pay period that does not vary based on the quality or quantity of the work performed.

- ii. **Duties Test:** In order to satisfy the Executive Employee exemption, the employee must have the following duties as their primary duties:
- Management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
 - Customarily and regularly directs the work of two or more other employees;
 - Has the authority to hire or fire other employees or give suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees that are given particular weight; and
 - Customarily and regularly exercises discretionary powers.

Administrative Employees

In order to be exempt as an Administrative Employee, the employee must satisfy (i) a salary test and (ii) a duties test.

- i. Salary Test: The individual must be paid on a salary basis and earn at least the amount set forth in the below chart.

Effective Date	New York Salary Thresholds for Administrative Employees (all figures are per week)		
	Employers in New York City	Nassau, Suffolk, and Westchester Counties	Rest of New York
Current	\$1,125.00 (\$58,500.00 per year)	\$1,125.00 (\$58,500.00 per year)	\$1,064.25 (\$55,341.00 per year)
Jan 1, 2024	\$1,200.00 (\$62,400.00 per year)	\$1,200.00 (\$62,400.00 per year)	\$1,124.20 (\$58,458.40 per year)
Jan 1, 2025	\$1,237.50 (\$64,350.00 per year)	\$1,237.50 (\$64,350.00 per year)	\$1,161.65 (\$60,405.65 per year)
Jan 1, 2026	\$1,275.00 (\$66,300.00 per year)	\$1,275.00 (\$66,300.00 per year)	\$1,199.10 (\$62,353.20 per year)

While federal law allows employers to pay up to 10% of the salary threshold set forth above through non-salary income, such as commissions or bonuses, New York law does not. As such, in order to be exempt as an Administrative Employee, the employee must earn a salary in an amount set forth in the above chart. A salary is defined as a predetermined amount paid each pay period that does not vary based on the quality or quantity of the work performed.

- i. Duties Test: In order to satisfy the Administrative Employee exemption, the employee must have the following duties as their primary duties:
- Performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
 - Includes the exercise of discretion and independent judgment with respect to matters of significance.

The phrase “directly related to the management or general business operations” refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment. Examples include work in functional areas such as tax; finance; accounting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; human resources; employee benefits; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

The phrase “discretion and independent judgment” must be applied in light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee has authority to commit the

employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term “discretion and independent judgment” does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review.

Professional Employees

In order to be exempt as a Professional Employee, the employee must satisfy (i) a salary test (except for doctors, lawyers, and teachers who do not have to meet a salary test) and (ii) a duties test.

- i. Salary Test: The individual must be paid on a salary basis and earn at least the amount set forth in the below chart.

Effective Date	Salary Thresholds for Professional (all figures are per week)			
	Employers in New York City	Employers with Less Than 11 Employees in New York City	Nassau, Suffolk, and Westchester Counties	Rest of New York
Current	\$684.00	\$684.00	\$684.00	\$684.00

Employers may pay up to 10% of the salary threshold set forth above through non-salary, non-discretionary income, such as commissions or bonuses. A salary is defined as a predetermined amount paid each pay period that does not vary based on the quality or quantity of the work performed.

- i. Duties Test: In order to satisfy the Professional Employee exemption, the employee must have the following duties as their primary duties:
- 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, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes; or
 - Original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training); and the result of which depends primarily on the invention, imagination or talent of the employee; and
 - Whose work requires the consistent exercise of discretion and judgment in its performance; or
 - Whose 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.

Computer Professional Employees

In order to be exempt as a Computer Professional Employee, the employee must satisfy (i) a compensation test and (ii) a duties test.

- i. Compensation Test: The individual must be paid at least \$27.63 per hour or on a salary basis of at least \$684 per week as of January 1, 2020.

Employers may pay up to 10% of the salary threshold set forth above through non-salary, non-discretionary income, such as commissions or bonuses. A salary is defined as a predetermined amount paid each pay period that does not vary based on the quality or quantity of the work performed.

- ii. Duties Test: In order to satisfy the Computer Professional exemption, the employee must have the following duties as their primary duties:
 - Whose work requires the consistent exercise of discretion and judgment in its performance; or
 - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - A combination of the aforementioned duties, the performance of which requires the same level of skills.

Outside Salesperson

An individual who is employed as an outside salesperson may be exempt from overtime. The term outside salesperson means an individual who 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. In order to satisfy this exemption, the employee must spend at least 50% of time away from the employer's premises and earns a commission or similar payment for the work performed.

Inside Salesperson

Employees in the hospitality industry cannot satisfy the inside salesperson exemption under New York law. However, it may be applicable to employees outside of the hospitality industry. An individual employed by a retail or service establishment (other than in the hospitality industry) can be exempt from overtime if the employee's (i) regular rate of pay is in excess of one and one-half times the minimum wage hourly rate, and (ii) more than half of the employee's compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a *bona fide* commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

Do I have to give employees a pay stub and, if so, what information needs to be on it?

Under New York law, all employees, including those exempt from overtime, must be given with each payment of wages a pay stub (also called a wage statement) that contains the following information:

- the dates of work covered by that payment of wages;
- name of employee;
- name of employer;
- address and phone number of employer;
- rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other;
- overtime rate of pay;
- regular hours worked;
- the amount of sick leave provided;
- overtime hours worked;
- gross wages;
- deductions/withholdings;
- allowances/credits, if any, claimed as part of the minimum wage, including the rate of the allowance/credit (e.g., tip credit rate, meal credit rate, etc...), the number of units (e.g., hours for which a tip credit was taken, meal taken, etc...), and total allowance/credit taken; and
- net wages.

Furthermore, New York requires that every pay stub also include: (1) the amount of safe/sick time accrued and used during a pay period and (2) an employee's total balance of accrued safe/sick time.

Can I require employees to use automatic deposit and have a bank account?

No, under New York law, an employee cannot be required to have a bank account and an employer cannot require that an employee be paid via direct deposit.

If I loan my employees money, can I get it back?

In New York, employers cannot loan money to employees unless it is a core part of the employer's business (e.g., banks, credit unions, etc...). Under certain circumstances, an employer may advance an employee money.

An employer and employee can voluntarily agree that the employer will advance the employee the employee's wages and the employee will repay the advance through payroll deductions. In order for this transaction to occur, the employee must voluntarily consent, in writing, to the advance. The written consent must also contain the following information:

- Amount of the advance;
- The amount to be deducted each pay period in order to repay the advance;
- A statement that the employer may recoup the entire outstanding amount of the advance should the employment relationship end prior to repayment in full (this is not required but recommended);
- The date(s) on which the advance repayment deductions will occur; and
- Notice to the employee that the employee may contest any deduction not taken in accordance with the written provisions of the authorization.

The written consent must be obtained before the advance is given by the employer. Further, the employer may not give an employee additional advances until the original advance has been repaid in full.

In addition, the employer must inform the employee in writing of the manner in which the employee can dispute the amount and frequency of a deduction that the employee believes is not in accordance with the terms of the authorization. At a minimum, the mechanism to challenge a deduction must include:

- The ability of the employee to provide written notice of the employee's objection to the deduction;
- That the employer shall reply in writing to the employee's objection as soon as practical;
- Such reply shall address the issues raised by the employee's objection, and contain a clear statement indicating the employer's position with regard to the deduction, including whether the employer agrees with the employee's position(s) regarding the deduction or disagrees with the employee's position(s) and provide a reason why the employer agrees or disagrees; and
- Should an employee avail themselves to these procedures, the employer shall cease deductions until such reply has been given and any appropriate adjustments made. Any delay in repayment caused by this procedure shall extend the authorized time frame within which the employer may recover the advance through deductions.

The failure of an employer to afford this process to the employee will create the presumption that the contested deduction was impermissible.

What happens if my employees are overpaid? Can I get the money back?

If an employee was overpaid within the past 8 weeks due to a mathematical or clerical error, the employer may be able to recoup the overpayment through a payroll deduction. However, if the error was not due to a mathematical or clerical error or occurred more than 8 weeks ago, the employer may not recoup the money through a payroll deduction and the employer's only alternative is to ask for the money back or to file a claim against the employee in court. A misallocation of tips or gratuities are generally not monies from which an employer can recoup an overpayment; therefore, if an employer accidentally overpays an employee his or her tips, absent extraordinary circumstances, the employer will not be able to recoup the overpayment.

If the payroll error occurred within the prior 8 weeks, and the employer seeks to recoup the money through a payroll deduction, the employer must go through the following process:

- (1) Notice of Intent: The employer shall provide the employee with notice of the intent to commence the deductions to recover the overpayment. In such cases where the entire amount of the overpayment may be reclaimed in the next wage payment, notice shall be given at least three days prior to the deduction. In all other cases, notice shall be given at least three weeks before the deductions may commence. Such notice shall contain:
 - The amount overpaid in total and per pay period;
 - The total amount to be deducted and the date each deduction shall occur followed by the amount of each deduction; and
 - Information about how the employee may contest the overpayment, provide the date by which the employee shall contest, and the procedure by which the employee may contest the overpayment and/or terms of recovery (or provide a reference to where such procedure can be located).
- (2) Challenge Procedure: The employer shall implement a procedure by which the employee may dispute the overpayment and terms of recovery, and/or seek a delay in the recovery of such overpayment.
 - The employee may respond within one week from the date of the receipt of the notice of intent to recover overpayments;
 - The employer shall reply to the employee's response within one week of receipt of the employee's response;
 - Such reply shall address the issues raised by the employee in his or her response, and contain a clear statement indicating the employer's position with regard to the overpayment, including whether the employer agrees with the employee's position(s) regarding the overpayment or disagrees with the employee's position(s) and provide a reason why the employer agrees or disagrees;
 - The employer shall give the employee written notice of the opportunity to meet with the employer within one week of receiving the employer's reply to discuss any disagreements that remain regarding the deductions; and

- The employer shall provide the employee with written notice of the employer's final determination regarding the deductions within one week of this meeting. In making a final determination regarding the existence of an overpayment, the employer shall consider the agreed upon wage rate paid to the employee and whether the alleged overpayment appeared to the employee to be a new agreed upon rate of pay. When making a final determination regarding the amount of the deduction to be made per pay period and the date such deduction(s) shall commence, the employer shall consider the issues raised in the employee's request regarding the amount of each deduction.

Should employees avail themselves of the procedure set forth above, the employer may not commence taking the deduction until at least three weeks after issuing the final determination.

Are there special rules for employing minors?

Yes, there are specific rules concerning what jobs a minor (someone under 18 years of age) can perform and the hours that the minor can work. The types of jobs and hours that they can work vary depending upon the age of the minor and whether the minor is in school and if school is in session. Generally, a child under the age of 14 cannot work under any circumstances except in a family business. For more information about what jobs minors can and cannot perform and when they can and cannot work, employers should review the New York Department of Labor's website at: <https://dol.ny.gov/employment-minors>.

Do I have to pay double time for work on holidays?

No, there is no legal requirement to pay employees double time for working on a holiday.

Can I pay my managers shift pay?

Managers, who are exempt from overtime, cannot be paid shift pay; they must be paid a weekly salary. If the manager is not exempt from overtime, the manager could be paid shift pay unless the individual works in the hospitality industry in which case, under New York law, shift pay is prohibited.



Tips & Service Charges

What is a tip?

The definition of “tip” can vary depending on the statute or law at issue. Generally, a tip (or gratuity, the terms are used interchangeably) is a payment left for an employee by a customer for service provided to the customer. For most purposes, an automatic charge assessed by a business, whether it is called a “mandatory gratuity,” “automatic gratuity,” “service charge,” “administrative fee,” or something else is not a gratuity, even if the proceeds from such mandatory charge, in whole or in part, are given to service employees. In addition, under New York law there are certain mandatory charges that the employer is required to give to the employees even if they are not legally a tip.

What is a service or other charge?

A service or other charge, if mandatory, is not a tip and therefore, if assessed, is subject to applicable sales tax. Further, if the proceeds from the mandatory charge are given to the employees, the monies are added into the calculation of overtime as discussed above.

Despite the fact that the service or other mandatory charge is not legally a tip, if the reasonable customer would think that the charge was a tip or purported to be a tip (even though it is not), the proceeds from the charge must be given to the service employees. The only way in which such monies do not have to be paid to the service employees is if:

- (1) the charge is called something other than a service charge;
- (2) in all references to the charge on all documents provided to the customer, the employer informs the customer that the charge is not a gratuity and is not paid to the service staff; and
- (3) in all references to the charge on all documents provided to the customer, the employer explains what the charge is for.

Who must share in tips and who should not?

Under New York law, an employer cannot require non-food service employees to share or pool their tips. Nor can employers encourage such employees to share or pool their tips. Employers can require food service employees to pool or share their tips with other food service workers, although there is no legal requirement to do so. If tips are pooled or shared, it is a best practice to have a Tip Agreement explaining how the tip pool/share operates and how an individual’s portion of the pool/share is calculated.

A food service employee is any employee who is primarily engaged in the serving of food or beverages to guests, patrons or customers in the hospitality industry, including, but not limited to, wait staff, bartenders, captains and bussing personnel; and who regularly receives tips from such guests, patrons or customers. The term food service worker does not include delivery workers. An individual may not be classified as a food service worker on any *day* in which the employee has been assigned to work in an occupation in which tips are not customarily received for 2 hours or more or for more than 20 percent of her or his shift, whichever is less. An individual may also not be classified as a food service worker for any *time* in excess of 30 continuous minutes in which the employee has performed non-tip producing work (see the discussion above concerning the “80/20/30 Rule”). Examples of typical food service workers include, but are not limited to: servers, bussers, runners, bartenders, and barbacks.

Food service workers cannot be required to share or pool tips with non-food service workers, such as coat check personnel and delivery workers. Further, no employee can share tips with managers or supervisors, even if the manager or supervisor is classified as non-exempt and is paid an hourly wage.

What are the requirements for having a tip system?

Tip pools and tip shares organized by the employer are limited to food service employees. In order to establish a tip pool or tip share, it is strongly recommended that the employer have employees sign a Tip Agreement that details how the pool/share operates, its parameters, and how an individual's portion of the tip pool/share is calculated. Further, the tip pool/share must be reasonable and customary for the labor market where the employer is located.

Can I charge certain parties an extra fee for large parties, corkage, etc.?

For additional service, such as large parties or corkage, New York employers may charge customers an extra fee. However, the fee must be properly disclaimed and explained; otherwise, the employer may be required to turn over the proceeds from the fee to the service employees. The definition of a "large party" is not clear under the law. Certainly, a party of ten or more is a "large party" and a party of less than seven is not a "large party."

If I want to charge a mandatory fee or charge, what must I do and when can I use it?

In New York City, a restaurant may not charge a mandatory fee unless the fee is for a special service such as large parties, special events, or splitting dishes. Such prohibitions on mandatory fees include the assessment of automatic or mandatory gratuities. All other businesses in New York City and all business outside of New York City (including restaurants) may assess mandatory charges.

If a business wants to assess a mandatory charge and keep the proceeds, the business must:

- (1) Not call it a "service charge," "food service charge," "mandatory gratuity," or "automatic gratuity." If the charge is called any of the aforementioned names, there is a strong presumption that the charge purports to be a gratuity and therefore must be paid to the service employees.
- (2) In all menus, contracts, POS slips, and any other documents that reference prices or mention the charge, the employer must state in 12 point font or greater, that the charge is not a gratuity or tip and is not paid or

distributed to the employees.

- (3) The employer must explain in writing, in 12 point font or greater, the purpose of the charge (e.g., for administration of the event).
- (4) If a portion of the charge is given to the employees, the employer, in writing, must break down for the guest the amount (or percentage) given to the employees and the amount (or percentage) retained by the employer.
- (5) Include the proceeds from the charge in the employer's general revenues for sales tax purposes (unless the employer is exempt).

Can I require employees to hand over all cash tips to be paid out on a paycheck?

When customers pay tips in cash, employers may, as a service to their employees, allow employees to leave cash tips earned over the course of a pay period with the employer. The employer must issue a tip payment for the total amount of those cash tips along with any wage payment for the same pay period. A request by an employee for the employer to provide this service must be voluntary. The agreement cannot be a pre-condition of employment or a condition of continued employment.

Is overtime impacted if I pay employees a portion of a mandatory charge?

Yes. As set forth above, a mandatory charge is not a gratuity and therefore the proceeds from the mandatory charge that are given to the employee are included in the calculation of overtime. For example:

An employee works 45 hours at \$20.00 per hour and receives \$700 from automatic gratuities for the week. The calculation of overtime is as follows:

Regular Rate of Pay

- Regular Rate of Pay = All compensation/All hours worked
- Regular Rate of Pay = $((45 \times \$20.00) + \$700)/45$
- Regular Rate of Pay = \$35.56

Overtime

- Overtime = $\$35.56 \times 0.5^1 \times 5$
- Overtime = \$88.90

Total to Employee

- Total to Employee = $\$900 + \$700 + \$88.90$
- Total to Employee = \$1,688.90

¹ The formula uses 0.5 instead of 1.5 because full time has already been paid and the only issue is the half time premium as overtime is time and one-half.

Employee Benefits and Pay

What methods of payment can I use to pay my employees?

- (1) Employees may be paid in **cash** or by **check, direct deposit or a payroll debit card**. If an employer pays wages by direct deposit or payroll debit card, certain restrictions and requirements apply.
- (2) **Direct Deposit** requires voluntary, advance written consent by the employee, which may be obtained electronically. Employees are allowed to revoke their consent to receive their wages via direct deposit at any time and employers must make the requested method of payment change within two (2) payroll periods. A copy of an employee's direct deposit consent form must be provided to the employee and retained by the employer during the employee's employment and for six (6) years after the last payment by direct deposit.
- (3) If an employer wishes to pay an employee's wages via a **Payroll Debit Card**, employees must provide voluntary, advance written consent, which may be obtained electronically. Employees cannot be charged any fees for services required to access their wages in full and the payroll card must include at least one method of withdrawing up to the employee's full wages or account balance *and* local access to one or more ATMs offering free withdrawal. The employer must provide a list of locations, or a link to a website that lists the locations, where the employee can access and withdraw his or her wages for free within a reasonable distance from his or her home or place of work. Further, the employer is not permitted to charge the employee, whether directly or indirectly, any of the following fees:

- an application, initiation, loading, or participation fee;
- a fee for point of sale transactions;
- a fee for overdraft, shortage, or low balance status;
- a fee for account activity;
- a maintenance fee;
- a fee for telephone or online customer service;
- a fee for retrieving balance and account information online;
- a fee for ordering a replacement card;
- a fee for providing the employee with written statements, transaction histories, or the issuer's policies;
- a fee for closing the account or issuing payment of the remaining balance;
- a fee for declined transactions; or
- any other fee not explicitly stated in the contract between the employer and the card issuer or in the conditions of the card provided to the employee.

Employers must also notify employees of any change in the payroll debit card program terms and conditions at least 30 days in advance of any such change.

How frequently must I pay my employees?

- (1) Manual Workers—*i.e.*, individuals who spend more than 25% of their working time engaged in “physical labor”, which has been defined extremely broadly—must be paid weekly and not later than seven (7) calendar days after the end of the week in which the wages are earned. While the term “physical labor” may invoke an image of lifting heavy objects and other back-breaking work, because the term has been defined very broadly, it generally covers employees who perform any type of physical task using their body. Employees in the hospitality, retail, and construction industries are more likely to qualify as manual workers under the law. For example, in the hospitality industry, employees who are deemed manual workers include, but is not limited to, servers, bartenders, bussers, barbacks, hosts, cooks, dishwashers, and delivery personnel. If an employer has any doubt about whether their employees perform “physical labor,” it is best to pay employees weekly or speak with counsel.
- (2) All other workers must be paid at least semi-monthly, except for commissioned salespersons, who may be paid in accordance with the terms of their commission agreement, but in no case less frequent than monthly.

What deductions can be taken from an employee's pay?

In New York, permissible deductions from an employee's pay are extremely limited and the deductions must be made in a very specific manner. When contemplating making a deduction from an employee's pay, employers should consult with counsel to ensure the deductions are permissible and made correctly. Generally, only the following types of deductions are allowed in New York:

- (1) Deductions made in accordance with the provisions of any law, rule, or regulation;
- (2) Deductions that are expressly authorized in writing by the employee and are for the benefit of the employee if the employee's authorization is voluntary and only given following receipt by the employee of written notice of all terms and conditions of the deduction and/or its benefits and the details of the manner in which deductions will be made. Convenience for an employee is not considered "for the benefit of the employee." Rather, deductions that are "for the benefit of the employee" are limited to the following:

- Insurance premiums and prepaid legal plans;
- Pension or health and welfare benefits;
- Contributions to a *bona fide* charitable organization;
- Purchases made at events sponsored by a *bona fide* charitable organization affiliated with the employer where at least 20% of the event's profits are being contributed to a *bona fide* charitable organization;
- United States bonds;
- Dues or assessments to a labor organization;
- Discounted parking or discounted passes, tokens, fare cards, vouchers, or other items that entitle the employee to use mass transit;
- Fitness center, health club, and/or gym membership dues;
- Pharmacy purchases made at the employer's place of business;
- 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;
- Tuition, room, board, and fees for pre-school, nursery, primary, secondary, and/or post-secondary educational institutions;
- Daycare, before-school, and after-school care expenses;
- Payments for housing provided at no more than market rates by non-profit hospitals or affiliates thereof; and
- Similar payments for the benefit of the employee, such as deductions for other health and welfare benefits, pension and savings benefits, charitable benefits, union benefits, transportation benefits, or food and lodging benefits.

- (3) Deductions that are related to recovery of an overpayment of wages where the overpayment is due to a mathematical or other clerical error by the employer;
- (4) Repayment of advances of salary or wages made by the employer to the employee (if the payment is contingent on interest accruing, fees, or a repayment amount higher than the money advanced by the employer, then it does not qualify as an advance—employers cannot recover such "loans" through payroll deductions); and
- (5) Deductions made in conjunction with an employer sponsored pre-tax contribution plan approved by the IRS or other local taxing authority.

Can I charge the employee for a uniform?

While *deductions* from an employee's wages for the cost of a uniform are not permitted (under New York law, deductions from wages are only permitted in very limited circumstances and the cost of a uniform is not one of them), an employer may charge an employee if that employee wishes to purchase additional uniforms in excess of the number of uniforms provided by the employer to the employee (note, however, that when an employer provides employees with uniforms, it must provide enough uniforms for an average workweek).

Do I have to pay for the maintenance of an employee's uniform?

If a hospitality employer requires its employees to wear a uniform, then it is generally responsible for either: (a) paying employees for the maintenance of their uniforms, or (b) laundering the employees' uniforms itself.

A "uniform" is clothing which an employer requires employees to wear while at work. Whether a "dress code" constitutes a uniform under New York law can be difficult to determine. For example, clothing with an employer's business logo on it is a "required uniform." On the other hand, regular, basic clothing that an employee can wear while not at work is not a "required uniform." For example, black pants and a white dress shirt would not be considered a "required uniform," and an employer does not have to pay an employee to maintain this regular clothing.

If an employer chooses not to launder its employees' uniforms, then it must provide employees with an allowance to enable them to launder and pay for the upkeep of their required uniforms. This is known as "Uniform Maintenance Pay," and employers must compensate an employee every week, in addition to the employee's regular wages.

The amount that an employer must pay an employee in Uniform Maintenance Pay depends on how many hours an employee works per week and where the employer is located:

Employers in New York City, Long Island, and Westchester County

Effective Date	New York Uniform Maintenance Pay (Per Week)		
	20 or Fewer Weekly Hours	Over 20 and Up to 30 Weekly Hours	Over 30 Weekly Hours
Current	\$8.90	\$14.75	\$18.65
Jan 1, 2024	\$9.50	\$15.75	\$19.90
Jan 1, 2025	\$9.80	\$16.25	\$20.50
Jan 1, 2025	\$10.10	\$16.75	\$21.10

Rest of New York

Effective Date	New York Uniform Maintenance Pay (Per Week)		
	20 or Fewer Weekly Hours	Over 20 and Up to 30 Weekly Hours	Over 30 Weekly Hours
Current	\$7.85	\$13.00	\$16.40
Jan 1, 2024	\$8.95	\$14.80	\$18.65
Jan 1, 2025	\$9.25	\$15.30	\$19.25
Jan 1, 2025	\$9.55	\$15.80	\$19.85

Can I charge employees for guest/customer walk-outs?

It is illegal under New York law for an employer to fine an employee or otherwise deduct money from their wages due to guest walk outs.

Can I charge employees for cash register shortages?

No, an employer may not charge an employee or deduct from an employee's pay the amount of any cash register shortages. Nor can an employer charge an employee or deduct an employee's pay due to other employer losses, spoilage, or breakage. The employer is limited to employee discipline for these types of issues.

Can I require employees to buy their own wine corks, bicycles, knives and other "necessary" tools?

No, an employer is prohibited from requiring employees to buy—whether through a required payment to the employer or deductions from an employee's wages—any "tools of the trade" such as corks, bicycles, knives, and other necessary tools.

Can I deduct an employee's pay for an accidental overpayment of wages?

If an employer inadvertently overpays an employee, the employer may deduct the overpayment if it is due to a mathematical or other clerical error. However, very specific steps must be followed in order to lawfully deduct an overpayment:

- (1) The deductions can only cover overpayments that occurred eight (8) weeks prior to notifying the employee of the overpayment;
- (2) The deduction can only be made once per paycheck;
 - If the amount of the overpayment is less than or equal to the net wages earned in the next paycheck, the employer can recover the entire overpayment in the next wage payment.

- If, however, the amount of the overpayment exceeds the net wages in the next paycheck, recovery may not exceed 12.5% of gross wages in the next wage payment and cannot reduce the employee's effective hourly wage below the minimum wage.
- (3) The employer must provide notice to the employee of its intent to make deductions to recover an overpayment;
- If the amount to be reclaimed is less than or equal to the net wages in the next payment, notice must be given three (3) days before the deduction.

If the amount to be reclaimed is more than the net wages in the next payment, notice must be given three (3) weeks before the deductions start.

The notice must contain:

- (1) The amount overpaid in total and per pay period;
- (2) The total amount to be deducted, the date each deduction shall occur, and the amount of each deduction; and
- (3) Notice that the employee may contest the overpayment, including the date by which the employee must contest the overpayment and the procedure for contesting the overpayment/method of deductions.
- (4) The procedure for contesting the overpayment/method of deductions must conform to the following rules:
 - The employee may respond to/contest the notice within one (1) week;
 - That the employer will respond to the employee within one (1) week and the response will contain the employer's position regarding the overpayment and whether the employer agrees/disagrees with the employee's position and why or why not;
 - The employer must give employee written notice of the opportunity to meet within one (1) week of the employer's reply to discuss any disagreements; and
 - In all cases, the employer must provide a written notice of its final determination regarding the deductions within one (1) week of the meeting referenced above. In making a final determination regarding the overpayment, the employer must consider the agreed-upon wage rate paid to the employee and whether the alleged overpayment may have appeared to the employee to be a new agreed-upon rate of pay.
- (5) Finally, if an employee initiates this dispute procedure, the employer may not commence the deductions until at least three (3) weeks after it issues its final determination.

Can I offer my employees a discount on food & beverages at our business? Are there tax consequences?

Yes, employers may offer employees a discount on food and beverages at their business or a discount on dining at their establishment. However, any such employee discount should be capped at (1) for services (such as dining at an employer's restaurant on the employee's night off), 20% of the price of any services offered to customers, or (2) for goods/property (such as purchasing an item sold to the public), the gross profit percentage of the price at which the goods/property is being offered by the employer to customers. Any discount exceeding these thresholds must be included in the employee's taxable income and must be reported on the employee's IRS Form W-2. The amount that is taxable income is the entire amount of the discount, not just the amount in excess of 20 percent.

CHAPTER 2

Time Off and Leaves of Absence Overview



Overview

Am I Required to Give My Employees Paid Time Off?

As of January 1, 2021, large employers in New York State (those with more than 99 employees) are required to provide up to 56 hours (seven days) of paid sick and safe leave per year to their employees; small employers (those with 99 employees or less) are required to provide up to 40 hours (five days) of sick and safe leave. In addition, certain jurisdictions in New York State have passed laws requiring employers to provide certain types of paid leave to employees. New York State has also implemented a Paid Family Leave program that provides employees with a partially paid leave of absence for an employee to care for a family member with a serious health condition, bond with a new child, or assist a loved one when a family member is deployed in military service. New York has also enacted paid sick leave requirements for employees impacted by COVID-19.

What is Paid Family Leave?

New York State's Paid Family Leave law requires employers to provide employees with job-protected time off in order to:

- Bond with a newly born, adopted or fostered child;
- Care for a family member with a serious health condition; or
- Assist loved ones when a family member is deployed abroad on active military service.

The time off is paid through insurance coverage most private employers in New York are required to carry that is typically added to the employer's existing disability benefits policy. Employees are paid a percentage of their salary while on Paid Family Leave. Costs of this insurance policy and the payments are covered by deductions from employee paychecks.

As of January 1, 2021, employees are entitled to up to 12 weeks of Paid Family Leave and to receive payment of up to 67% of the employee's Average Weekly Wage, up to 67% of the New York State Average Weekly Wage.

Full-time employees who work a regular schedule of 20 or more hours per week are eligible to take Paid Family Leave after 26 consecutive weeks of employment with their employer. Part-time employees who work a regular schedule of less than 20 hours per week are eligible for Paid Family Leave after working 175 days for their employer, which do not need to be consecutive.

Family members covered by Paid Family Leave for whom an employee may take leave to provide care for are the employee's spouse, domestic partner, child/stepchild, parent/stepparent, parent-in-law, grandparent, or grandchild.

What is Paid Sick Leave and How Do I Track it?

New York City and Westchester County both require that employers provide paid sick and safe leave to employees. As of January 1, 2021, New York State also requires that employers provide paid sick and safe leave to employees. While both sick and safe leave laws are discussed more fully below, it should be noted that New York City and Westchester employers may have one uniform sick and safe leave policy that also complies with New York State's sick and safe leave law.

New York State Paid Sick Leave

New York State recently enacted a paid sick leave law that requires employers to provide sick leave to their employees. The amount of paid sick leave that employers will be required to provide depends on the number of employees that they have during each calendar year:

- Employers with four (4) or fewer employees and a net income of \$1 million or less in the prior tax year shall provide employees with a minimum of five (5) days of unpaid sick leave each calendar year.
- Employers with four (4) or fewer employees and a net income greater than \$1 million in the prior tax year shall provide employees with a minimum of five (5) days of paid sick leave each calendar year.
- Employers with five (5) to 99 employees shall provide employees with a minimum of five (5) days of paid sick leave each calendar year.
- Employers with 100 or more employees shall provide employees with a minimum of seven (7) days of paid sick leave each calendar year.

Under the state law, an employee will be able to take sick leave for the following reasons:

- For a mental or physical illness, injury or health condition of such employee or such employee's family member, regardless of whether such illness, injury or health condition has been diagnosed or requires medical care at the time that such employee requests such leave;
- For the diagnosis, care or treatment of a mental or physical illness, injury or health condition of, or need for medical diagnosis of, or preventive care for, such employee or such employee's family member; or
- For an absence from work due to any of the following reasons when the employee or employee's family member has been the victim of domestic violence pursuant to subdivision 34 of section 292 of the executive law, a family offense, sexual offense, stalking or human trafficking:
 - To obtain services from a domestic violence shelter, rape crisis center or other services program;
 - To participate in safety planning, temporarily or permanently relocate, or take other actions to increase the safety of the employee or employee's family members;
 - To meet with an attorney or other social services provider to obtain information and advice on, and prepare for or participate in any criminal or civil proceeding;
 - To file a complaint or domestic incident report with law enforcement;
 - To meet with a district attorney's office;
 - To enroll children in a new school; or
 - To take any other actions necessary to ensure the health or safety of the employee or the employee's family member or to protect those who associate or work with the employee.

The term "family member" is defined under the law to include the employee's child, spouse, domestic partner, parent, sibling, grandchild or grandparent, as well as the child or parent of an employee's spouse or domestic partner. "Parent" is further defined to mean a biological, foster, step- or adoptive parent, or a legal guardian of an employee, or a person who stood in loco parentis when the employee was a minor child. "Child" is further defined to mean a biological, adopted or foster child, a legal ward, or a child of an employee standing in loco parentis.

Employees began accruing sick leave as of September 30, 2020 or at the commencement of their employment, whichever is later, at a rate of one hour of sick leave for every 30 hours worked. Employers have the option of front-loading the sick leave at the beginning of the calendar year so long as they do not reduce or revoke any leave based on the hours that the employees actually worked.

All accrued unused sick leave hours must be carried over into the following year. Additionally, employers who choose to front-load sick leave at the beginning of the calendar year cannot cap unused sick leave carryover. Employers have two options: (1) give employees the option to voluntarily elect to use and receive payment for paid sick leave prior to the end of the calendar year or carry over unused sick leave; or (2) only allow employees to carry over unused sick leave.

Employees may take any accrued sick leave upon accrual or immediately upon hire if an employer front-loaded sick leave. Employees will be permitted to take sick leave in partial-day increments, and employers may set a reasonable minimum increment for the use of sick leave, provided it is no greater than four hours. Employers may not require employees to disclose certain confidential information in order to take the leave. Employees must be paid their regular rate of pay (or the minimum wage, if greater) when taking sick leave.

Only after the third day absent from work may an employer request that an employee provide documentation supporting the need for sick leave. An employer may not deny an employee leave while attempting to confirm the basis of the leave. An employer likewise cannot deny sick leave when an employee is unable to obtain documentation. However, if the employer discovers the request to be false or fraudulent, the employer may take disciplinary action against the employee. Employers may not require employees to pay any costs or fees associated with obtaining verification of the employee's eligibility to use sick leave.

There is no distinction between regular appointments or emergencies when requesting sick leave. As such, employers cannot require employees to provide advanced notice for sick leave for foreseeable events, such as a pre-scheduled doctor's appointment, and cannot discipline employees for requesting time off at the last minute.

Upon returning to work, employees must be restored to the position that they held prior to the sick leave with the same pay and other terms and conditions of employment. As is typical with employment law statutes, there is a provision prohibiting employers from discriminating or retaliating against employees for exercising their rights to sick leave. Employers must allow employees to carry over any unused sick leave to the following calendar year. However, if an employer has fewer than 100 employees, the employer can limit the use of sick leave to 40 hours per calendar year, and if an employer has 100 or more employees, the employer can limit the use of sick leave to 56 hours per calendar year. Employers are not required to pay employees for unused sick leave upon their separation from employment.

The law also requires employers to provide information to employees about the amount of sick leave they have accrued and used on three (3) business days' notice. Additionally, employers must ensure that their payroll records show the amount of sick leave provided to each employee for each week worked. Such records must be maintained for at least six years.

New York City Earned Safe and Sick Time

New York City's Earned Safe and Sick Time Act ("ESSTA") requires that employers provide employees with paid or unpaid safe and sick leave. ESSTA was amended in September 2020 to mirror many of the requirements of the New York State Paid Sick Leave Law. As with the New York State Paid Sick Leave law, the amount of sick leave an employer must provide under ESSTA will depend on the number of employees and revenue:

- Employers with four or fewer employees and net income of less than \$1 million must provide 40 hours of unpaid sick leave each calendar year.
- Employers with four or fewer employees and net income greater than \$1 million or 5-99 employees must provide 40 hours of paid sick leave each calendar year.
- Employers with 100 or more employees must provide 56 hours of paid sick leave each calendar year.

Employees must be allowed to use this leave time for any of the following reasons:

- As a result of the employee's own illness, injury or medical condition, diagnosis, or for preventative medical care;
- To care for the employee's family member who needs medical diagnosis, care or treatment for an illness or medical condition or who needs preventative medical care;
- As a result of closure of the employee's place of business by order of a public health official due to a public health emergency or such employee's need to care for a child whose school or childcare provider has been closed by order of a public health official due to a public health emergency;
- To obtain services from a domestic violence shelter, rape crisis center, or other shelter or services program for relief from a family offense matter, sexual offense, stalking, or human trafficking;
- To participate in safety planning, temporarily relocate, or take other actions to increase the safety of the employee or employee's family members from future family offense matters, sexual offenses, stalking, or human trafficking;
- To meet with a civil attorney or other social service provider to obtain information and advice on, and prepare for or participate in, any criminal or civil proceeding, including, but not limited to, matters related to a family offense matter, sexual offense, stalking, human trafficking, custody, visitation, matrimonial issues, orders of protection, immigration, housing, discrimination in employment, housing, or consumer credit;
- To file a complaint or domestic incident report with law enforcement where the employee or an employee's covered family member has been the victim of a family offense matter, sexual offense, stalking or human trafficking;
- To meet with a district attorney's office where the employee or an employee's covered family member has been the victim of a family offense matter, sexual offense, stalking or human trafficking;
- To enroll children in a new school where the employee or an employee's covered family member has been the victim of a family offense matter, sexual offense, stalking or human trafficking; or
- To take other actions necessary to maintain, improve, or restore the physical, psychological, or economic health or safety of the employee or employee's family member or to protect those who associate or work with the employee where the employee or an employee's covered family member has been the victim of a family offense matter, sexual offense, stalking or human trafficking.

For purposes of ESSTA, the term “family member” means an employee’s child, parent, spouse, domestic partner, sibling, grandparent, grandchild, the child or parent of an employee’s spouse or domestic partner, any other individual related to the employee by blood, and any other individual whose close association with the employee is the equivalent of a family relationship.

The protections for employee’s accrual, carryover, and use of New York State Paid Sick Leave apply to sick leave under ESSTA. Specifically, sick leave may be provided all at once to employees at the beginning of the year or accrue over time. Employees must accrue safe and sick time at a rate of no less than one hour of leave accrued for every thirty hours worked. Employers must inform employees of the amount of leave used and accrued each pay period and the employee’s leave balance on a document issued each pay period (e.g., a pay stub). Employees must be allowed to use safe and sick leave in “reasonable” minimal daily increments, but such increments cannot be more than four hours per day. As discussed in more detail below, an employer may only ask for a doctor’s note or other documentation for an employee using time under ESSTA after that employee has been absent for more than three consecutive working days.

Westchester County Safe Leave

Westchester County’s Earned Sick Leave Law has been pre-empted by New York State’s Paid Sick Leave Law.

Are my Employees Entitled to Time Off to Vote?

Yes. Under New York State Election Law § 3-110, New York employees must be allowed to take up to two hours of paid time off from work to vote in any election (this includes local, state or federal) if the employee does not have sufficient time to vote on the day of the election. An employee will be deemed not to have sufficient time to vote if the time between when the polls open and the start of the employee’s shift is less than four hours or if the time the employee’s shift ends and the closing of the polls is less than four hours. The employee may be granted such time off at the beginning or end of their shift as the employer may designate. If an employee requires time off to vote, the employee must notify the employer not less than two working days before the day of the election. Employers must post a notice conspicuously in the workplace setting forth the provisions of New York State Election Law § 3-110 at least ten working days before every election and keep such notice posted until the close of polls on election day.



Does an Employer Have to Provide Employees with Vacation or Personal Leave?

No. New York law does not require that employers provide employees with vacation or personal leave.

What Happens if an Employee is Called to Jury Duty?

Do I Have to Let My Employees Serve on a Jury?

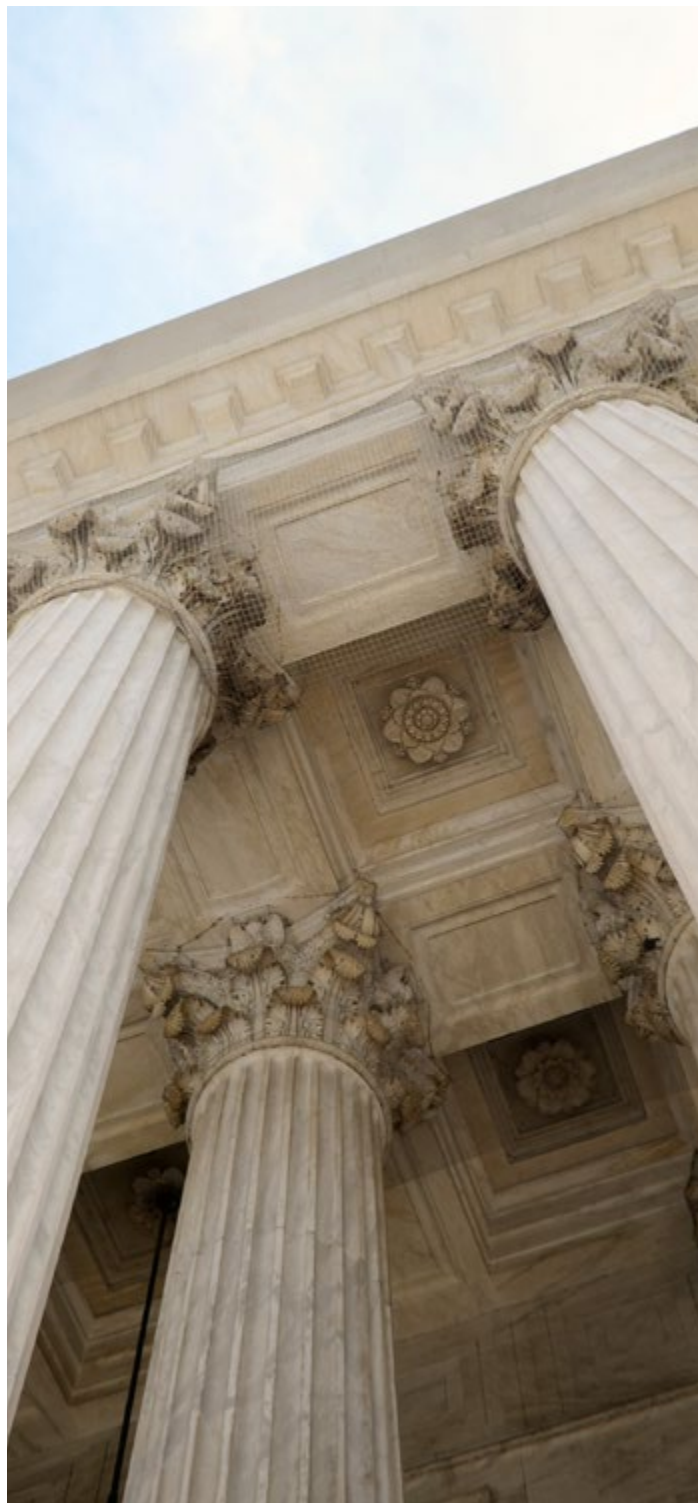
Yes, New York employers must allow employees time off from work to serve as a juror. Employees are not limited in the amount of time they may take off from work to serve as a juror. If, for example, an employee is selected for a jury on a lengthy trial, the employer must provide the employee with time off to serve on the jury for the length of that trial.

Can I Ask Employees to Work a Different Schedule When They are on Jury Duty?

Employers may change an employee's schedule to accommodate the employee's obligation to serve as a juror, but cannot change the schedule to penalize that employee. Employers also may not require an employee who serves as a juror to work on days they are normally not scheduled to work in order to make up time, nor can an employee who has reported or served for a full day of jury service be required to then work a full evening or night shift.

Do I Have to Pay My Employees While They Are On Jury Duty?

Employers are not required to pay an employee's full daily wage while the employee is reporting to serve as a juror. Employers of more than 10 employees must pay jurors a jury fee of \$40 or the employee's wage (whichever is lower) each day for the first three days of jury service. After three days, New York State pays the jury fee to jurors who are not paid at least the jury fee by their employers. Employers may not require an employee to take vacation or other paid leave while serving.



What Other Kinds of Leave Should I Be Concerned With?

Military Leave

New York employees are entitled to leave in order to fulfill their obligations to the armed forces, national guard and military reserves. This includes participation in drills and other equivalent training, reserve training, instruction, annual full-time training duty, active duty for training or other annual training. The law does not place a limitation on the amount of leave that an employee may take.

Federal FMLA

The federal Family and Medical Leave Act (“FMLA”) applies to employers in New York State if those employers have 50 or more employees. Employers must provide an eligible employee with up to 12 weeks (26 weeks to care for certain covered service members) of unpaid leave each year for any of the following reasons:

- For the birth and care of the newborn child of an employee;
- For placement with the employee of a child for adoption or foster care;
- To care for an immediate family member (i.e., spouse, child, or parent) with a serious health condition;
- To take medical leave when the employee is unable to work because of a serious health condition;
- To care for certain service members of the Armed Forces or National Guard; or
- For certain qualifying exigencies due to the employee’s spouse, parent, or child being called to active duty in the Armed Forces.

Employees are eligible for leave if they have worked for their employer at least 12 months, at least 1,250 hours over the past 12 months, and work at a location where the company employs 50 or more employees within 75 miles.

If an employee qualifies for a leave of absence under both the New York Paid Family Leave law and the FMLA, an employer may require the employee to use both leaves concurrently but must inform the employee of this designation. Please note, however, that there are certain types of leave that are available under FMLA but not under PFL, such as leave to care for the employee’s own serious health condition. Employers need to be sure to track both PFL and FMLA time separately to ensure compliance with both laws.

Crime Victim/Witness Leave

All employees in New York State who are victims of a crime, including those who are the victim of domestic violence, or who are subpoenaed as a witness in a criminal proceeding are eligible for certain leave. The law does not specify the minimum or maximum amount of leave than an employee can take. Eligible employees are eligible for leave to appear as witnesses, consult with the district attorney, or exercise other rights under the law. “Victims” include:

- The aggrieved party;
- The aggrieved party’s next of kin, if the aggrieved party died because of the crime;
- The victim’s representative (for example, an attorney, guardian or parent of a minor);
- Good Samaritans; and
- Any person applying for or seeking to enforce an order of protection under the criminal procedure law or the family court act.

Family Military Leave

New York State employers with 20 or more employees working in at least one site must give an employee who works an average of twenty (20) or more hours per week and whose spouse or domestic partner is a military serviceman or servicewoman deployed during a period of military conflict up to ten (10) days of leave during the period their spouse or domestic partner is on leave from deployment.

Blood Donation Leave

New York State employers with 20 or more employees working in at least one site must provide eligible employees with time off to donate blood. An employer must either (a) grant an employee three (3) hours off work per calendar year to donate blood; or (b) allow employees to donate blood during working hours at least twice each year at a convenient time and place set by the employer, which includes at a blood drive at the employee's place of employment.

Bereavement Leave

New York State employers may, but are not required to, provide employees with funeral or bereavement leave for the death of an employee's spouse or child, parent or other relative of the spouse. If the employer chooses to provide bereavement leave, certain state law requirements apply.

Bone Marrow Donation Leave

New York State employers with 20 or more employees working in at least one site must provide eligible employees with leave time to donate bone marrow. The law applies to employees who work an average of 20 or more hours per week. Employees may take leave in order to donate bone marrow, to recover from the procedure and for resulting medical care. The employee's physician will determine the amount of leave required by the employee. However, the leave need not exceed 24 work hours unless additional leave is agreed to by the employer. There is no limitation on how frequently an employee may take such leave.

Emergency Responder Leave

Employees in New York State who are volunteer firefighters or an enrolled member of a volunteer ambulance service are entitled to a leave of absence while the employee is engaged in the performance of their duties as an emergency responder following a declaration of a state of emergency. However, an employer is not required to grant such leave if the employee's absence would impose an undue hardship on the conduct of the employer's business. The law does not provide a minimum or maximum amount of time that an employee may take. However, such leave may only be taken during a declared state of emergency.

Leave As an Accommodation

A leave of absence may be necessary as a reasonable accommodation for an employee's disability under the New York State and New York City Human Rights Laws, even if the employee would not otherwise be entitled to leave time under any applicable federal, state, or local law, or the employer's other leave policies.



Are My Employees Entitled to a Day of Rest (e.g. Time Off During the Week)?

Certain employees in New York State must be provided with at least 24 hours of rest within any calendar week. Covered employers include hotels and restaurants and employers operating factories, mercantile establishments, or freight or passenger elevators. Typical operators of hospitality venues will not need to provide a day of rest to their employees, but if the operator also falls within one of the following categories of employers, then they must provide 24 hours of rest in a given calendar week:

- For employers operating places where motion pictures are shown: projectionists, operators, engineers, or firemen.
- For employers operating a place where legitimate theater productions are shown: engineers and firemen; all other employees unless motion pictures, vaudeville, incidental stage presentations or a combination thereof are regularly given throughout the week as established policy of such place.
- For employers who are the owner, lessee and operator of a dwelling, apartment, loft and office building, garage, storage place and building: watchman or watchmen or engineer or fireman.
- For employers who are the owner, lessee or operator of a warehouse, storagehouse, office, dwelling, apartment, loft and any other building or structure: janitor, superintendent, supervisor, manager, engineer or fireman.

The following are exceptions to the requirement that the above-listed employees be provided with at least 24 consecutive hours of rest in a week:

- Foreman in charge.
- Employees in dairies, creameries, milk condenseries, milk powder factories, milk sugar factories, milk shipping stations, butter and cheese factories, ice cream manufacturing plants and milk bottling plants, where not more than seven persons are employed
- Employees engaged in an industrial or manufacturing process necessarily continuous, in which no employee is permitted to work more than eight hours in any calendar day, if approved by the State.
- Employees whose duties include not more than three hour's work on Sunday in setting sponges in bakeries, caring for live animals, maintaining fires, or making necessary repairs to boilers or machinery.
- Employees in resort or seasonal hotels and restaurants in rural communities and in cities and villages having a population of less than fifteen thousand inhabitants.
- Employees in dry dock plants engaged in making repairs to ships.

What Documents Can I Require from an Absent Employee? Can I Require a Return to Work Certificate or Medical Note from an Employee that is Absent from Work?

New York State generally does not have any requirements about the documents you can require from an absent employee. The various leave laws discussed above have different requirements.

New York State Paid Family Leave

Employees must submit a Request for Paid Family Leave form and a certification from a health care provider, documentation concerning the birth, adoption, or fostering of a child, and/or copies of duty papers or other supporting documentation concerning military deployment.

New York State Paid Sick Leave Law

The text of the New York State Paid Sick Leave Law does not address if, or under what circumstances, an employer can request documentation from an employee that supports the employee's need to take leave. Under proposed regulations that have not been enacted as of the time of this publication, employers may request a written statement from the employee that the employee needed to take leave for an eligible reason only when the employee has taken leave for more than three consecutive previously scheduled workdays or shifts. These regulations would also prohibit employers from requesting documentation from an employee's health care provider supporting the employee's need to take sick leave unless the employee has taken leave for more than three consecutive previously scheduled workdays or shifts. If an employer is permitted to request such documentation, the employer has to pay all costs/fees incurred by the employee in obtaining the documentation. Further, the documentation can only state that the employee needed to take sick leave, the duration of the leave, and when the employee can return to work; it cannot provide confidential information about the employee or any family member.

New York City Earned Safe & Sick Time Leave Law

Employers cannot require that an employee provide documentation supporting the employee's need for such leave until the employee has been absent for more than three consecutive work days and the employer has a written policy in place prior to the employee's taking of the leave that requires that such documentation be produced.

For the use of sick leave, employers can require the employee to provide written documentation signed by a licensed health care provider confirming both (1) the need for the amount of sick leave taken and (2) that the use of sick leave was for a purpose authorized under the law. For the use of safe leave, the employer can require "reasonable documentation" which may include a document from a social service provider, legal service provider, or member of the clergy, a copy of a police report, court record, or a notarized letter written by the employee indicating the need for safe leave.

The documentation need only verify that there is a need to take safe leave; employers cannot require an employee to provide the specific details of any act or threat for which the employee needs to take safe leave. Employees must be given seven days from the date they return to work to submit any requested documentation. In New York City, if an employer requires that an employee provide documentation after an absence of more than three days the employer must reimburse the employee for the costs/fees of obtaining such documentation.

Can I Fire an Employee for Being Late?

Unless the employee is covered by New York City Fair Workweek Law, there is no law in New York State or New York City that specifically prohibits an employer from terminating employees for being late.

Employers must ensure, however, that the employee's lateness would not be considered protected under any of the aforementioned leave laws, or if a schedule change may be needed as an accommodation for that employee's disability, before taking any disciplinary action for a late employee. Employers must also ensure that they do not discipline employees for lateness in a discriminatory manner based on a protected class.

Can I Fire an Employee for "No-Call No-Show"?

Unless the employee is covered by New York City Fair Workweek Law, there is no law in New York State or New York City that specifically prohibits an employer from terminating an employee who is a "no-call no-show" for a shift. Employers must ensure, however, that the employee's absence is not one that is considered protected under any of the aforementioned leave laws, or if the absence would be necessary as a reasonable accommodation for that employee's disability. For example, if an employee is unable to follow an employer's established call-in procedures because that employee has been hospitalized, employers should be prepared to excuse that absence.

Are There Any Leave Laws that Address Employees Impacted by COVID-19?

COVID-19 Sick Leave

New York State requires that employers provide sick leave for any employee “who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19.”

The amount and type of leave that must be provided depends on the number of employees an employer had as of January 1, 2020 and, for small employers, their 2019 net income:

- Employers who had ten or fewer employees as of January 1, 2020 and a 2019 net income of less than \$1,000,000 must provide unpaid sick leave and any other benefit as provided by any other provision of law to an employee under quarantine or isolation until the termination of any order of quarantine or isolation. During quarantine or isolation, employees will be eligible for New York State Paid Family Leave (PFL) and short-term disability benefits.
- Employers who had 10 or fewer employees as of January 1, 2020 and a 2019 net income greater than \$1,000,000, must provide at least five days of paid sick leave, and unpaid leave until the termination of any order of quarantine or isolation. After five days, the employee is eligible for PFL and short-term disability benefits.
- Employers who had between 11 and 99 employees as of January 1, 2020 must provide at least five days of paid sick leave, and unpaid leave until the termination of any order of quarantine or isolation. After five days, the employee is eligible for PFL and short-term disability benefits.
- Employers with 100 or more employees as of January 1, 2020 must provide at least 14 days of paid sick leave.

Sick leave required by this new law must be provided without loss of an employee’s accrued sick leave. That is, this leave required for quarantined employees must be provided on top of any other sick leave already provided by an employer. To the extent any provisions of the New York law overlap with any federal law, the federal law shall apply, provided that if the provisions of New York law provide benefits in excess of federal law then employees will be able to claim such additional sick leave or benefits in the amount of such difference.

The provisions of the law do not apply in cases where an employee is deemed asymptomatic or has not yet been diagnosed with any medical condition and is physically able to work while under a mandatory quarantine through remote access or other means. Employees are also not eligible for leave under the law if the employee is subject to quarantine because: (1) the employee returned to the United States after traveling to a country for which the CDC has issued a level two or three health notice; (2) travel to that country was not taken as part of the employee’s employment or at the direction of the employer; and (3) the employee was provided notice of the travel health notice and the limitations of the law prior to travel. However, such employee will still be eligible to use other accrued leave available under an employer’s policy or unpaid sick leave for the duration of the quarantine or isolation.

COVID-19 Vaccine Leave Policy

Until December 31, 2022, New York State requires that employers provide paid leave to its employees for “a sufficient period of time” not to exceed four (4) hours, for each COVID-19 vaccine injection. For approved vaccines that require two injections, employees will be entitled to two separate leaves of absence (one period of leave for each injection, with each leave periods not to exceed four hours).

COVID-19 vaccination paid leave must be provided without loss to an employee’s accrued sick leave.

CHAPTER 3

Employee Benefits and Pay



NYC HOSPITALITY ALLIANCE

Fox Rothschild

Overview

What methods of payment can a restaurant or similar business use to pay its employees?

- (1) Employees may be paid in **cash** or by **check**, **direct deposit** or a **payroll debit card**. If an employer pays wages by direct deposit or payroll debit card, certain restrictions and requirements apply.
- (2) **Direct Deposit** requires voluntary, advance written consent by the employee, which may be obtained electronically. Employees are allowed to revoke their consent to receive their wages via direct deposit at any time and employers must make the requested method of payment change within two (2) payroll periods. A copy of an employee's direct deposit consent form must be provided to the employee and retained by the employer during the employee's employment and for six (6) years after the last payment by direct deposit.
- (3) If an employer wishes to pay an employee's wages via a **Payroll Debit Card**, employees must provide voluntary, advance written consent, which may be obtained electronically. Employees cannot be charged any fees for services required to access their wages in full and the payroll card must include at least one method of withdrawing up to the employee's full wages or account balance and local access to one or more ATMs offering free withdrawal. The employer must provide a list of locations, or a link to a website that lists the locations, where the employee can access and withdraw his wages for free within a reasonable distance from his home or place of work.

Further, the employer is not permitted to charge the employee, whether directly or indirectly, any of the following fees:

- an application, initiation, loading, or participation fee;
- a fee for point of sale transactions;
- a fee for overdraft, shortage, or low balance status;
- a fee for account activity;
- a maintenance fee;
- a fee for telephone or online customer service;
- a fee for retrieving balance and account information online;
- a fee for providing the employee with written statements, transaction histories, or the issuer's policies;
- a fee for ordering a replacement card;
- a fee for closing the account or issuing payment of the remaining balance;
- a fee for declined transactions; or
- any other fee not explicitly stated in the contract between the employer and the card issuer or in the conditions of the card provided to the employee. Employers must also notify employees of any change in the payroll debit card program terms and conditions at least 30 days in advance of any such change.

How frequently must a restaurant or similar business pay its employees?

Manual workers—*i.e.*, individuals who spend more than 25% of their working time engaged in “physical labor”, which has been defined extremely broadly—must be paid weekly and not later than seven (7) calendar days after the end of the week in which the wages are earned. While the term “physical labor” may invoke an image of lifting heavy objects and other back-breaking work, because the term has been defined very broadly, it generally covers employees who perform any type of physical task using their body. Generally, restaurant employees are considered “manual workers” and therefore must be paid weekly. If an employer has any doubt about whether their employees perform “physical labor,” it is best to pay employees weekly or speak with counsel.

All other workers must be paid at least semi-monthly, except for commissioned salespersons, who may be paid in accordance with the terms of their commission agreement, but in no case less frequent than monthly.

What deductions can be taken from an employee's pay?

In New York, permissible deductions from an employee's pay are extremely limited and the deductions must be made in a very specific manner. When contemplating making a deduction from an employee's pay, employers should consult with counsel to ensure the deductions are permissible and made correctly. Generally, only the following types of deductions are allowed in New York:

- (1) Deductions made in accordance with the provisions of any law, rule, or regulation;
- (2) Deductions that are expressly authorized in writing by the employee and are for the benefit of the employee if the employee's authorization is voluntary and only given following receipt by the employee of written notice of all terms and conditions of the deduction and/or its benefits and the details of the manner in which deductions will be made. Convenience for an employee is not considered "for the benefit of the employee." Rather, deductions that are "for the benefit of the employee" are limited to the following:

- Insurance premiums and prepaid legal plans;
- Pension or health and welfare benefits;
- Contributions to a *bona fide* charitable organization;
- Purchases made at events sponsored by a *bona fide* charitable organization affiliated with the employer where at least 20% of the event's profits are being contributed to a *bona fide* charitable organization;
- United States bonds;
- Dues or assessments to a labor organization;
- Discounted parking or discounted passes, tokens, fare cards, vouchers, or other items that entitle the employee to use mass transit;
- Fitness center, health club, and/or gym membership dues;
- Pharmacy purchases made at the employer's place of business;
- 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;
- Tuition, room, board, and fees for pre-school, nursery, primary, secondary, and/or post-secondary educational institutions;
- Daycare, before-school, and after-school care expenses;
- Payments for housing provided at no more than market rates by non-profit hospitals or affiliates thereof; and
- Similar payments for the benefit of the employee, such as deductions for other health and welfare benefits, pension and savings benefits, charitable benefits, union benefits, transportation benefits, or food and lodging benefits.

- (3) Deductions that are related to recovery of an overpayment of wages where the overpayment is due to a mathematical or other clerical error by the employer;
- (4) Repayment of advances of salary or wages made by the employer to the employee (if the payment is contingent on interest accruing, fees, or a repayment amount higher than the money advanced by the employer, then it does not qualify as an advance—employers cannot recover such "loans" through payroll deductions); and
- (5) Deductions made in conjunction with an employer sponsored pre-tax contribution plan approved by the IRS or other local taxing authority.

Can a restaurant or similar business charge employees for a uniform?

While *deductions* from an employee's wages for the cost of a uniform is not permitted (under New York law, deductions from wages are only permitted in very limited circumstances and the cost of a uniform is not one of them), an employer may charge an employee if that employee wishes to purchase additional uniforms in excess of the number of uniforms provided by the employer to the employee (note, however, that when an employer provides employees with uniforms, it must provide enough uniforms for an average workweek).

Note: while an employer is not required to provide uniforms if they establish a dress code that permits employees to wear regular, basic street clothing, if the employer does not provide employees with uniforms (enough for a standard workweek), they must pay employees for uniform maintenance costs for laundry and/or dry cleaning.

Can a restaurant or similar business charge employees for guest/customer walk-outs?

No. Employers may not charge employees for the cost of breakage or spoiled materials, and guest/customer walk-outs generally fall within this category, such that employers may not charge employees if their customer walks out without payment.

Can a restaurant or similar business deduct employee pay if the employee misses a day of work?

For salaried (exempt) employees, an employer may deduct a full day of pay for full-day unexcused absences or full-day excused absences due to personal reasons or sick/disability leave.

For hourly (non-exempt) employees, an employer need not pay employees for hours they do not work. So, while it is not a "deduction" if an hourly employee walks off the job, the employer does not need to pay the employee for the hours the employee was scheduled to work.



Can a restaurant or similar business charge employees for cash register shortages?

No, an employer may not charge an employee or deduct from an employee's pay the amount of any cash register shortages. Nor can an employer charge an employee or deduct an employee's pay due to other employer losses, spoilage, or breakage. The employer is limited to employee discipline for these types of issues.

Can a restaurant or similar business require employees to buy their own wine corks, bicycles, knives and other "necessary" tools?

No, an employer is prohibited from requiring employees to buy—whether through a required payment to the employer or deductions from an employee's wages—any "tools of the trade" such as corks, bicycles, knives, and other necessary tools.

Can a restaurant or similar business deduct an employee's pay for an accidental overpayment of wages?

If an employer inadvertently overpays an employee, the employer may deduct the overpayment if it is due to a mathematical or other clerical error. However, very specific steps must be followed in order to lawfully deduct an overpayment:

- (1) The deductions can only cover overpayments that occurred eight (8) weeks prior to notifying the employee of the overpayment;
- (2) The deduction can only be made once per paycheck;
 - If the amount of the overpayment is less than or equal to the net wages earned in the next paycheck, the employer can recover the entire overpayment in the next wage payment.
 - If, however, the amount of the overpayment exceeds the net wages in the next paycheck, recovery may not exceed 12.5% of gross wages in the next wage payment and cannot reduce the employee's effective hourly wage below the minimum wage.
- (3) The employer must provide notice to the employee of its intent to make deductions to recover an overpayment;

- If the amount to be reclaimed is less than or equal to the net wages in the next payment, notice must be given three (3) days before the deduction.
 - If the amount to be reclaimed is more than the net wages in the next payment, notice must be given three (3) weeks before the deductions start.
 - The notice must contain:
 - a. The amount overpaid in total and per pay period;
 - b. The total amount to be deducted, the date each deduction shall occur, and the amount of each deduction; and
 - c. Notice that the employee may contest the overpayment, including the date by which the employee must contest the overpayment and the procedure for contesting the overpayment/method of deductions.
- (4) The procedure for contesting the overpayment/method of deductions must conform to the following rules:
- The employee may respond to/contest the notice within one (1) week;
 - That the employer will respond to the employee within one (1) week and the response will contain the employer's position regarding the overpayment and whether the employer agrees/disagrees with the employee's position and why or why not;
 - The employer must give employee written notice of the opportunity to meet within one (1) week of the employer's reply to discuss any disagreements; and
 - In all cases, the employer must provide a written notice of its final determination regarding the deductions within one (1) week of the meeting referenced above. In making a final determination regarding the overpayment, the employer must consider the agreed-upon wage rate paid to the employee and whether the alleged overpayment may have appeared to the employee to be a new agreed-upon rate of pay.
- (5) Finally, if an employee initiates this dispute procedure, the employer may not commence the deductions until at least three (3) weeks after it issues its final determination.

Is a restaurant or similar business required to provide my employees with health care benefits?

For most employers, offering employer-sponsored health insurance is not required (but it may be a benefit worth offering to improve employee morale, employee retention, and keep the workforce healthy and productive). However, under the Affordable Care Act's ("ACA") employer shared responsibility provisions, employers with 50 or more full-time employees must either offer minimum essential coverage that is "affordable" and that provides "minimum value" to their full-time employees (and their dependents), or potentially make an employer shared responsibility payment to the IRS. More information on the ACA requirements can be found [here](#) and [here](#). New York City also offers guidance on health insurance and insurance plans, which can be found [here](#).

What happens to an employee's benefits if the employee is terminated?

If an employer offers health insurance and an employee who has employer-sponsored health insurance is terminated, upon termination of employment, the employer must notify the departing employee of his/her right to continuation of health insurance coverage, at the employee's own expense, through the Consolidated Omnibus Budget Reconciliation Act ("COBRA") and/or the New York Insurance Law. The employer's health insurance carrier can provide the required documentation for this continuation of coverage.

Does a restaurant or similar business have to provide employees with a 401k or other retirement fund? And, if so, is it up to the employer who is offered such a benefit?

No, employers are not currently required to offer employee a 401(k) or other retirement fund—doing so is entirely optional. However, New York City is contemplating legislation that would require covered businesses to offer eligible employees access to a retirement savings program created by the City. A covered business is any business with a physical presence in New York City with 10 or more employees that has been in continuous operation for at least two years and has not offered, in the previous two years, a retirement plan to its eligible employees. An eligible employee is any employee who is at least 18 years old, is employed part-time or full-time, and has not been offered a retirement plan by the covered employer during the preceding two years. If the legislation passes, employees would be automatically enrolled unless they choose to opt out and the retirement savings accounts would be funded through payroll deductions at a default rate. Although employers would have to help administer the paperwork, they would not have to contribute to the savings. This proposed legislation is something New York City employers should keep an eye on.

For employers who do offer 401(k) plans to employees, those plans must meet a non-discrimination test to prove the plans do not discriminate in favor of employees with higher incomes. Although the 401(k) plan administrator is supposed to perform the non-discrimination test, employers offering 401(k) plans should speak with counsel to ensure the plans are in compliance with the non-discrimination test.

Does a restaurant or similar business need to carry workers' compensation insurance? And if so, what is required?

The New York Workers' Compensation Law requires that employers obtain and continuously keep in effect workers' compensation coverage for all their employees. Employers must post in a conspicuous location a Certificate of NYS Workers' Compensation Insurance Coverage, which can be obtained from the employer's workers' compensation insurance carrier. This form must include the name, address and phone number of the insurer and the policy number of the employer. Violations of this requirement can result in a fine of up to \$250 per violation. Additional information for employers about workers compensation can be found [here](#).



What is short term disability and how does it work?

Employers in New York must provide disability benefits coverage to employees for an off-the-job injury or illness. The Disability Benefits Law provides weekly cash benefits to replace, in part, wages lost due to injuries or illnesses that do not arise out of or in the course of employment. If an employee gets injured or becomes disabled while the employee is eligible for or is collecting unemployment benefits, the employee may still be eligible for disability benefits if the injury or disablement results in the employee being ineligible for unemployment benefits.

Disability benefits are provided through an employer's disability benefits insurance carrier. Employers are allowed, but not required, to take a contribution from its employees to offset the cost of providing disability benefits. However, an employee's contribution is computed at only one-half of one percent of his/her wages, but in no event more than 60 cents per week.

An employer's failure to provide disability benefits coverage in accordance with the law can result in steep penalties, including a penalty of 1/2 of one percent of the employer's payroll during the period of noncompliance plus an additional sum of \$500 for each period of noncompliance. In addition to the penalties that may be assessed, the employer is liable for either the total value of any disability benefits claims paid during the period of noncompliance or one percent of the employer's payroll during the period of noncompliance, whichever is greater.

New York State has provided a helpful Q & A with additional information about short term disability benefits [here](#).

In light of the COVID-19 pandemic, employees may also be eligible for short term disability as a result of any order of quarantine or isolation:

- (1) For employers with 10 or fewer employees as of January 1, 2020, and a 2019 net income of less than \$1,000,000, employees may be eligible for short term disability benefits for the duration of any quarantine or isolation order;
- (2) For employers with 10 or fewer employees as of January 1, 2020, and a 2019 net income greater than \$1,000,000, employees may be eligible for short term disability benefits after an employee utilizes five (5) days of paid sick leave under New York's emergency sick leave law; and
- (3) For employers who have between 11 and 99 employees as of January 1, 2020, employees may be eligible for short term disability benefits after an employee utilizes five (5) days of paid sick leave under New York's emergency sick leave law.

For short term disability benefits related to the COVID-19 pandemic, employers have the following responsibilities:

- (1) Employers must let employees know that short term disability benefits are available to them, should they, or their minor dependent child, be subject to a mandatory or precautionary order of quarantine or isolation, as well as any specific process for handling these claims.
- (2) Employers must respond to requests for COVID-19 disability benefits:
 - Employees must notify employers of their intent to request leave and fill out the appropriate forms (or employers can provide the [form](#) to their employees).
 - Employers must complete the employer portion of the form and return it to the employee within three (3) business days; employees are responsible for submitting the form directly to the employer's disability benefits carrier within 30 days of their first day of leave (employees may ask for this information and employers should assist their employees in obtaining this information).
- (3) Employers are responsible for ensuring the following employee protections:
 - Job protection: Employers must reinstate the employee to the same or a comparable position, upon returning from leave.
 - No discrimination: Employers cannot discriminate or retaliate against an employee for requesting or taking disability leave.
 - Continued health insurance: Employers must continue to provide health insurance on the same terms as if the employee had continued to work while they are on leave. If employees regularly contribute to the cost of their health insurance, they must continue to pay their portion of the cost while on leave.

Can a restaurant or similar business offer its employees a discount on food & beverages at our business? Are there tax consequences?

Yes, employers may offer employees a discount on food and beverages at their business or a discount on dining at their establishment. However, any such employee discount should be capped at (1) for services (such as dining at an employer's restaurant on the employee's night off), 20% of the price of any services offered to customers, or (2) for goods/property (such as purchasing an item sold to the public), the gross profit percentage of the price at which the goods/property is being offered by the employer to customers. Any discount exceeding these thresholds must be included in the employee's taxable income and must be reported on the employee's IRS Form W-2.

CHAPTER 4

EEO, Diversity and Employee Relations



NYC HOSPITALITY ALLIANCE

Fox Rothschild

Overview

Fair Employment Practices: What Are Protected Classes in New York?

With certain distinctions between New York City and the remainder of New York State, generally, it is illegal to discriminate against employees (and job applicants) on the basis of:

- Age;
- Alienage or Citizenship or Immigration Status;
- Arrest or Conviction Record;
- Bankruptcy;
- Caregiver Status (New York City Only);
- Color;
- Credit History (New York City Only);
- Disability (physical or mental);
- Familial Status (New York State Only);
- Gender (including sexual harassment);
- Gender Identity or Expression;
- Genetic Information or Predisposing Genetic Characteristics;
- Height (beginning Nov. 22, 2023 - New York City Only)
- Lawful Conduct Performed Outside of Work Hours (New York State Only);
- Marital or Partnership Status;
- Military Status;
- National Origin;
- Pregnancy (including Childbirth or Related Conditions) and Lactation Accommodations;
- Race;
- Religion/Creed;
- Reproductive Health Decision Making;
- Salary History;
- Sex;
- Sexual and Reproductive Health Decisions (New York City Only);
- Sexual Orientation;
- Status as a Veteran or Active Military Service Member;
- Status as Victim of Domestic Violence, Sexual Violence, or Stalking;
- Transgender Status;
- Unemployment Status (New York City Only);
- Union Membership
- Weight (beginning Nov. 22, 2023 - New York City Only)

Do Employers Need to Accommodate an Employee or Applicant's Disability?

Yes, employers must provide reasonable accommodations to qualified employees (and job applicants) with known physical and/or mental disabilities under the Americans with Disabilities Act (if the employer has at least 15 employees), the New York State Human Rights Law (regardless of the employer's size), and the New York City Human Rights Law (if the employer has at least 4 employees) as long as the accommodations do not impose an undue hardship on the employer and will enable the employee to perform the essential functions of the job in question.

Employers have an obligation to engage in a good faith interactive process (or cooperative dialogue) with the employee or applicant to determine whether a reasonable accommodation is available for that individual. An employer is also obligated to proactively engage in this process if it is clear to the employer that an employee has a physical and/or mental disability and needs a reasonable accommodation. Examples of specific impairments that an employer may conclude to be a disability may include deafness, blindness, or partially or completely missing limbs.

Reasonable accommodations for physical and/or mental disabilities may include:

- Making existing facilities used by employees readily accessible to and usable by an individual with a disability;
- Modifying the employee's work schedules;
- Acquiring or modifying the employee's office equipment, (e.g., ergonomic workstations);

- Assistance with physically demanding tasks (i.e., light duty); and
- Reassigning a current employee to a vacant position for which the individual is qualified if the individual is unable to perform the original position because of a disability even with an accommodation.

Employers may require medical verification of the disability in question and the alleged need for an accommodation. Under certain circumstances, unpaid leave may be a reasonable accommodation for a disability—even if the employee has exhausted leave under the Family and Medical Leave Act or any other statutory leave of absence.

Employers are prohibited from discriminating against a current employee (or job applicant) because of a known or perceived physical and/or mental disability. Examples of discrimination include:

- Terminating an employee because of a disability;
- Declining to hire a job applicant because of a disability;
- Offsetting the cost of providing a reasonable accommodation to an employee with a disability by lowering the employee’s salary or paying them less than other employees in similar positions;
- Assigning an employee with a disability to a location where customers cannot hear or see them even though the employee is capable of communicating with clients; and
- Making harassing or threatening comments related to an employee’s disability.

Do Employers Need to Provide Accommodations for Pregnancy?

Yes, New York employers must provide reasonable accommodations to employees (and job applicants) for pregnancy, childbirth, or related conditions as long as the accommodations do not impose an undue hardship on the employer and will enable the employee to perform the essential functions of their job. Employers have an obligation to engage in a good faith interactive process (or, if a New York City employer, a “cooperative dialogue”) with the employee or applicant to determine whether



a reasonable accommodation is available for that individual. The interactive process (or the cooperative dialogue) requires employers to engage in a good faith written or oral conversation with the employee regarding the employee's accommodation needs, potential accommodations (including alternatives to the accommodation proposed by the employee), and any difficulties that the proposed accommodations could pose for the employer. For more information on the interactive process, please continue reading.

Reasonable accommodations for pregnancy-related conditions may include but are not limited to:

- Breaks (e.g., to use the bathroom, eat or drink, or provide necessary rest);
- Changes to the employee's work environment, (e.g., providing a seat or fan);
- Assistance with physically demanding tasks (i.e., light duty);
- Time off or adjustments to the employee's schedule;
- A private, clean, non-bathroom space for expressing breast milk;
- A temporary transfer to a different position;
- Leave for related medical needs; and
- Time off to recover from childbirth.

It is unnecessary and a violation of the law for an employer to request medical documentation for minor accommodations related to an employee's pregnancy, such as minor or temporary modifications to work schedules; adjustments to uniform requirements or dress codes; additional or longer food, drink, bathroom, or rest breaks; permission to sit or eat at locations where eating or drinking is not typically allowed; moving a workstation so as to permit movement or stretching of extremities or to be closer to a bathroom; limitations on lifting; and temporary transfers to less strenuous or hazardous work. If an employee requests an accommodation for a reason unrelated to pregnancy, however, an employer may request medical documentation supporting the need for the requested accommodation.

In limited circumstances, an employer may request medical documentation to confirm that an individual requires one of the following accommodations based on pregnancy, childbirth, or a related medical condition:

- The employee is requesting time away from work, including for medical appointments (other than the presumptive eight-week period following childbirth or recovery from childbirth) and the employer typically requests verification from other employees requesting leave-related accommodations for reasons other than pregnancy, childbirth, or a related medical condition; or
- An employee is requesting to work from home, either on an intermittent basis or a longer-term basis.

Employees on leave due to pregnancy or a pregnancy-related condition have the right to return to work, and employers must hold their job open as long as they do for employees on leave for other reasons. In addition to obligations regarding current employees, employers may not discriminate against a pregnant employee (or job applicant) because they are pregnant.

Examples of discrimination include:

- An employer decides not to offer a promotion to a pregnant employee who is otherwise qualified based on the assumption that they will likely decide not to return to work after childbirth;
- An employer elects not to assign a pregnant employee to a new project after learning the employee is pregnant because they are concerned that the employee will be distracted by the pregnancy; or
- An employer does not hire someone otherwise qualified because the applicant is pregnant and the employer assumes that they will likely miss too much work after childbirth.



Do Employers Need to Accommodate Religious Practices?

Yes, employers must provide reasonable accommodations to qualified employees (and job applicants) based on their religious practices and sincerely held religious beliefs if doing so does not cause the employer undue hardship and will enable the employee to perform the essential functions of the job in question. Employers must complete and document the interactive process (or the cooperative dialogue) to determine whether a reasonable accommodation exists for such an employee.

Reasonable accommodations for religious practices or sincerely held religious beliefs may include:

- Allowing the employee to take time off, or modifying their work schedule, to allow them to observe the Sabbath and other holy days (however, an employer is not required to provide paid time off);
- Allowing the employee to take a break (and designation of a work location) to fulfill any prayer requirements an employee may have;
- Designating a location in the workplace where the employee may pray; or
- Relaxing existing personal appearance standards or dress code requirements as necessary for the employee to comply with their religious beliefs, including allowing the employee to wear religiously mandated clothing or headgear and to maintain certain hairstyle and beard requirements.

Employers should not question their employees' religious beliefs, as employees have the right to change those beliefs and their degree of adherence to the practices of their religion as they desire. Accommodations may be denied in cases of undue hardship. However, we strongly recommend that employers consult with counsel before denying a requested accommodation for an employee's religious practice or belief.

Employers are prohibited from discriminating against a current employee (or job applicant) because of religious practices or sincerely held religious beliefs. Examples of discrimination may include:

- Ordering the employee to restrict, change, or conceal their hairstyle or facial hair, in violation of their religious beliefs, to remain in a public-facing position;
- Terminating the employee because they convert to or adopt a different faith and begin wearing religious headwear, such as a turban, hijab, or yarmulke;
- Segregating the employee based on religious grooming or dress by assigning them to a position that does not have contact with customers; or
- Failing to hire the job applicant, or denying the employee a promotion, because their religious beliefs differ from other employees.

Do Employers Need to Accommodate Gender Identity and/or Gender Expression?

Yes, employers must provide reasonable accommodations to employees based on gender identity and/or expression so long as it does not pose an “undue hardship” on the employer. Employers must engage in the interactive process (or cooperative dialogue) with an employee requesting such an accommodation. Reasonable accommodations for gender identity and/or expression are largely the same as those accommodations an employer would provide for any other medical condition and may include leave to undergo gender transition; to recover from gender-affirming procedures, surgeries, and treatments (i.e., like any other medical condition); or to attend counseling appointments.

Additionally, employers are prohibited from maintaining grooming and appearance standards that have gender-based distinctions or are applied differently based on gender or sex. Technically, there is no need for an accommodation because employers already are required to take these issues into consideration when promulgating their policies. We urge employers to review their dress codes and appearance standards to ensure that they are gender neutral in all respects.

Employers are prohibited from discriminating against a current employee (or job applicant) because of their gender identity or expression. Examples of discrimination may include:

- Questions about gender identity or expression, or assigned sex at birth, such as in a job interview;
- Denying the use of restrooms or other facilities consistent with a person’s gender identity;
- Asking a transgender individual to use a single-occupancy restroom because of someone else’s concerns;
- Requiring individuals to show medical or other documents in order to use facilities, such as locker rooms, consistent with their gender identity;
- Utilizing grooming, uniform, or appearance standards based on gender stereotypes; or
- Refusing to use the employee’s requested name or pronouns.



Do Employers Need to Accommodate Employees Who Are Victims of Domestic Violence, Sexual Violence, or Stalking?

Yes, employers must make reasonable accommodations to the needs of individuals who have been subject to certain acts or threats of domestic or sexual violence or stalking. Employers must engage in the interactive process (or cooperative dialogue) to determine whether a reasonable accommodation exists without posing an undue hardship on the employer.

Reasonable accommodations for victims of domestic violence, sexual violence, or stalking may include time off to:

- Seek medical attention for injuries caused by domestic violence;
- Obtain services from a domestic violence shelter, program, or rape crisis center or to obtain psychological counseling;
- Participate in safety planning or to take other actions to increase safety from future incidents of domestic violence; or
- Obtain legal services, assist in the prosecution of the offense, or appear in court in relation to the incident of domestic violence.

In addition to providing unpaid leave as a reasonable accommodation, employees may be entitled to use accrued paid time off for these purposes pursuant to the New York City Earned Safe and Sick Time Act and/or New York State's paid sick leave requirements.

An employee granted time off for any of the above matters is required to provide an employer with reasonable advance notice. If advance notice is not feasible, an employee must provide as much notice as practicable. An employer may request documentation to support the request for time off, which may be in the form of a police report, an order of protection, evidence of a court appearance, or documentation from a medical professional, health care provider, domestic violence advocate or counselor demonstrating that the employee underwent treatment related to domestic violence. Employers must keep confidential any information or documentation related to an employee's status as a victim of domestic violence, sexual violence, or stalking to the extent permissible by law.

Employers are prohibited from discriminating against a current employee (or job applicant) because of their status as a victim of domestic violence, sexual violence, or stalking. Examples of discrimination may include:

- Terminating the employee because of time off to seek psychological counseling because of a domestic violence incident;
- Harassing the employee because of their status as a victim of domestic violence; and
- Terminating the employee because the employee's abuser shows up at the workplace.



How Does an Individual's Disability Affect an Employer's Brick and Mortar Stores and Internet Web Sites?

Generally, employers that operate physical locations or websites/mobile applications that are visited/used by the public must ensure that they are accessible to persons with disabilities and comply with the Americans with Disabilities Act and the New York State and City Human Rights Laws. Employers should be cognizant of and proactive regarding the physical and digital accessibility of their workplaces (as well as public facilities and services used by their customers and guests).

Employees with certain disabilities may require physical changes to their workplace, such as a wheelchair accessible ramp to climb any existing steps, or the use of a service animal as a reasonable accommodation. Employers should consult with counsel and appropriate experts in the fields of physical accessibility to ensure that individuals with disabilities have the same access to their facilities and services as people without disabilities.

Similarly, applicants for employment may require an accessible job application, if, for example, they have the ability to apply for employment on an employer's website. To be accessible, websites should be usable by job applicants (and the general public) with various sight, hearing, and mobility disabilities. Persons with these disabilities must have access to all content and functionalities of the website through the use of screen readers and other assistive technologies. For example:

- Persons with low vision need to be able to resize text;
- Persons with hearing impairments need captioning to access the audio for videos shown on websites; and
- Persons with limited dexterity need to be able to navigate a website using a keyboard instead of a mouse.

Employers should consult with legal counsel and their web designers to ensure that their websites and mobile applications are accessible to the public and to prospective and current employees. Engaging a web accessibility consultant to review their online platforms and, ultimately, certify compliance is also strongly recommended.

Should We Be Concerned About Equal Pay?

Yes, the Equal Pay Act of 1963 and the New York Labor Law §194 explicitly prohibit employers from paying an employee less than an employee of the opposite sex for equal work (e.g., work that requires equal skill, effort, and responsibility, and is performed under similar working conditions). Differentials in pay may, however, be based on:

- A seniority system;
- A merit system;
- A system that measures earnings by quantity or quality of production; or
- A bona fide factor other than sex, such as education, training, or experience.

A bona fide factor other than sex is one that (i) is not based upon or derived from a sex-based differential in compensation, (ii) is job-related with respect to the particular position, and (iii) is consistent with business necessity.

A bona fide factor is not one where (i) an employer's actions or practices cause a disparate impact on the basis of sex, (ii) an alternative employment practice exists that would serve the business purpose and not produce a disparate impact on the basis of sex, and (iii) the employer has refused to adopt such alternative practice.

Since the "Me Too" era, we have noticed an increase in claims over equal pay and other forms of gender discrimination in the workplace. Employers should review their compensation practices and ensure that employees are paid without regard to their gender.

Can My Employees Talk About Their Wages and Salaries Among One Another?

Yes, generally, employees may discuss their compensation with each other, and employers may not prohibit employees from inquiring about, discussing, or disclosing their wages or another employee's wages. However, an employer may provide, in a written policy, reasonable workplace and workday limitations on the time, place, and manner for inquires about, discussion of, or the disclosure of wages. Such restrictions may not specifically reference the inquiry, discussion, and disclosure of wages, nor can they be so restrictive as to completely remove employees' ability to engage in such inquiry, discussion, or disclosure. Further, the restrictions cannot apply when the employees are on non-working time (e.g., breaks, pre-shift, or post-shift). No employee is required to discuss their wages with another employee, and employees who have access to other employees' wage information as a result of their job duties (e.g., Human Resources staff) may be limited in the disclosure of such information by their employer. Employers should consult with counsel before establishing any limitations.

Are Whistleblowers Protected in New York?

Yes, New York Labor Law §740 protects employees from retaliation by their employer for providing information regarding their employer's illegal actions. Specifically, an employer may not retaliate against employees who disclose (or threaten to disclose) an activity, policy, or practice of the employer that is in violation of law, rule, or regulation and presents a substantial and specific danger to the public health or safety (or constitutes health care fraud). Employers similarly may not retaliate against employees who provide information to or testify before a public body about such violation. Finally, employers may not retaliate against employees who object to or refuse to participate in any such unlawful activity, policy, or practice. In other words, you may not discharge, suspend, demote, or otherwise take any adverse action against a whistleblower.

Effective January 26, 2022, New York Labor Law §740 was expanded in both scope and application. The law



expanded to encompass not only employees who report violations of a law, rule, or regulation, but employees who report, object to, refuse to participate in, disclose or participate in an investigation into an employer's activity, policy or practice that the individual reasonably believes is a violation of a law, rule, or regulation. Where an employee's claim is based on a disclosure to a public body, the law will require that the employee first make a good faith effort to notify the employer. However, there are five enumerated exceptions to this notice requirement:

- There is imminent and serious danger to the public health or safety;
- The employee reasonably believes that reporting the improper activity to the supervisor would result in a destruction of evidence or other concealment of the activity;
- The improper activity could reasonably be expected to lead to endangering the welfare of a minor;
- The employee reasonably believes that reporting to the supervisor would result in physical harm to the employee or another; or
- The employee reasonably believes that the supervisor is already aware of the improper activity and will not correct it.

The law will also be expanded to include not only current employees, but also former employees and independent contractors. Because of these amendments, New York employers should prepare to see an uptick in whistleblower actions with new unique claims asserted by both current and former employees.

Does My Company Have to Fill Out an EEO-1 Report?

The EEO-1 Component 1 report is a mandatory annual data collection that requires certain employers to submit to the Equal Employment Opportunity Commission certain demographic workforce data, including data by race/ethnicity, sex, and job categories. Submission of an EEO-1 report is mandated by Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972.

With certain exceptions, companies only have to complete and file an EEO-1 report if they are a private employer and have 100 or more employees. Companies with fewer than 100 employees do not have such an obligation unless they are a "single enterprise" with one or more other companies—and the entire enterprises employs 100 or more employees. A single enterprise may be found where two companies have centralized their control over personnel policies and labor relations.

What Should I Do for Employees Who Are Breastfeeding?

New York employers are prohibited from discriminating against nursing mothers based on their decision to express breast milk at work and must provide them with certain lactation accommodations. For example, employers generally are required to provide employees with a lactation room (in close proximity to their work area) where employees can pump/express breast milk in private, reasonable time for employees to pump/express breast milk, and a refrigerator suitable for breast milk storage.

State and city laws contain specific requirements for, among other things, what constitutes a "lactation room" (restrooms are insufficient), how much break time nursing mothers may have for pumping breast milk, and how frequently nursing mothers may take breaks to pump breast milk. Generally, however, the lactation room must be clean, contain a chair and a flat surface on which to place a breast pump and other personal items, have at least one

electrical outlet, and be near a sink with running water. The room may be a space available on a temporary basis for employees to pump and does not need to permanently remain a lactation space when no employees need to use it for that purpose.

If, in the exceptional case, providing a lactation room would pose an “undue hardship,” then the employer is required to engage in a cooperative dialogue with each nursing mother. However, this is a high burden for an employer to meet, and employers should thus consult with counsel before seeking to take advantage of any such exception.

New York City employers also must distribute to all new employees a compliant written lactation policy (although we recommend that all New York employers have a written policy, as employers are required to provide employees with written notice of New York Labor Law § 206-c after returning to work following the birth of a child).

Do I Have to Perform Regular Job Reviews?

There is no legal requirement to perform regular job reviews. However, it is strongly recommended that employers regularly evaluate their employees’ performance (a minimum of one time per year) and maintain written records of their employees’ performance (however good or bad it may be). Documentation is critical if and when an employer takes adverse action against an employee based on the employee’s job performance. Time and again, we encounter employers that desire to terminate or demote an employee for poor performance but do not have any record of poor performance or documented efforts to correct the employee’s performance before termination or demotion. This is often problematic if the employee challenges the termination or demotion and, for example, claims that there was an improper motive for the employment action.





What Else Do I Need to Know as a New York Employer?

Interactive Process and Reasonable Accommodations

Employers are required to engage in an interactive process (or what is known as a “cooperative dialogue” in New York City) with employees (or job applicants) regarding their individual needs for accommodations, such as for disability, pregnancy, religious reasons, gender identity or expression, or needs as a victim of domestic violence, sexual violence, or stalking (as discussed above).

Employers must engage in good faith conversation with employees (or job applicants) regarding their needs, potential accommodations, and any difficulties posed by proposed accommodations. In New York City (and generally as a best practice for all employers), employers must provide a final determination of the accommodation(s) granted or denied to the employee (or job applicant) in writing. Similarly, employers should maintain written records of the entire process and any accommodations offered to employees. Such documentation is significant in the event of potential claims. An accommodation is not “reasonable” if it would result in an “undue hardship” for the employer; however, employers should tread lightly and consult with counsel prior to making any such determination.

Progressive Discipline

Although it is not required for “at will” employment, employers should consider progressive discipline as a process for disciplining employees for poor performance. Progressive discipline allows employers to inform employees of performance issues and provide them with an opportunity to improve their performance.

For example, a poorly performing employee initially may receive a verbal warning regarding their performance. If the performance issues continue, an employer may issue a written warning (or two) before proceeding to terminate that employee (if the performance does not improve). Initially, employers should provide employees with documentation regarding their duties, expectations, and performance goals, as well as a reasonable period of time for them to improve their performance through a performance improvement program. While the progressive discipline approach is preferred, the level of disciplinary action may depend upon the nature of the infraction, and there may be situations warranting immediate dismissal. Accordingly, employers should consult with counsel before taking disciplinary action and ensure that their policies preserve the at-will employment relationship and do not create any contractual rights to the progressive disciplinary process.

Since July 4, 2021, New York City fast food employees who have completed an initial 30-day introductory period may not be terminated without cause. In other words, except where the termination is for an egregious failure by the employee to perform their duties, or for egregious misconduct, a termination shall not be considered to be based on just cause unless the fast food employer has utilized progressive discipline, it had a written policy on progressive discipline in effect, and that such progressive discipline policy was previously provided to the fast food employee. Additionally, if a fast food employee is terminated for cause, the employer is required to provide the employee with a written explanation of the precise reason for the employee's discharge within five days of the termination. Thus, fast food employers should ensure that they have a progressive discipline policy in effect and that the policy is provided to all employees, as doing so will provide the employer with the requisite paper trail to justify termination.

What If I Suspect That an Employee Is Using Marijuana?

In New York, it is legal for adults to personally possess and cultivate marijuana, and employers are generally prohibited from discriminating against employees (and job applicants) based on the legal use or possession of marijuana products while off duty and outside the workplace.

With respect to job applicants, in New York City, an employer generally may not conduct pre-employment testing for marijuana and related substances. There are a number of exceptions to this rule for various occupations and circumstances, such as:

- Police or peace officers, or other law enforcement or investigative functions;
- Certain construction and maintenance jobs;
- Jobs requiring a commercial license; and
- Jobs involving the supervision or care of children, medical patients, or vulnerable individuals.

While New York State law generally does not prohibit pre-employment drug testing for marijuana, employers cannot reject an applicant based solely on a positive marijuana test result. And, while New York State and New York City law does not prohibit testing existing employees, the employer may not take adverse action against an employee based solely on a positive marijuana test result.

An employer also may not discipline or terminate a current employee because an employee lawfully consumed marijuana outside of the workplace, during non-work hours, when the employee is not using the employer's equipment, and the consumption of marijuana does not impact the employee's ability to perform necessary job duties.

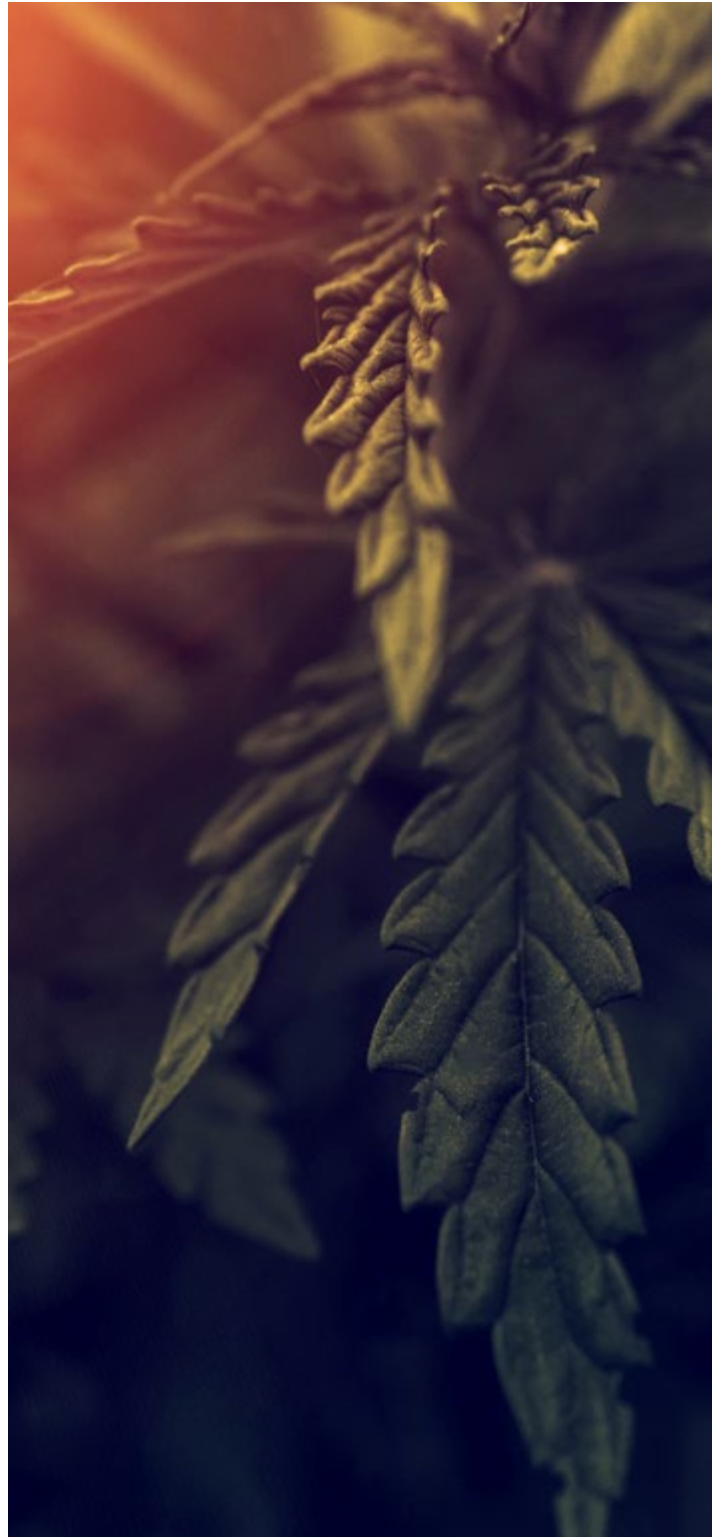
Notwithstanding the above, employers must still take into consideration the health and safety of their employees and customers by ensuring that employees are not performing duties under the influence of any substance – legal or illegal – that could impair their judgment or performance. The law makes clear that an employer may take an adverse action against an employee if:

- The employer's actions were required by New York State or federal law, regulation, ordinance, or any other New York State or federal governmental mandate;
- The employee is impaired by the use of marijuana while working such that there is a decrease in the employee's performance of their job duties; or
- The employer's actions would require it to commit an action that would cause it to be in violation of federal law.

The law defines “impairment” as an employee manifesting 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 workplace, free from recognized hazards, as required by state and federal occupational safety and health law.

Exceptions may be required for medicinal use of marijuana, but as a general rule, employers are permitted to put a policy in place prohibiting use and possession of marijuana in the workplace, on the employer’s premises, and while using the employer’s property or equipment. If an employee is impaired (as defined above), the employer should speak with the employee to determine the cause of the impairment. If the employee admits they have used marijuana recreationally during working hours (or prior to arriving at work), the employer may rely on their normal disciplinary measures. If, however, the employee claims they have used marijuana for medicinal purposes, the employer must then engage in the normal interactive process/cooperative dialogue that is required when an employee claims a disability.

Employers should review their drug and alcohol policies to ensure compliance with New York’s marijuana laws. Such revisions should include changes to off-duty conduct if necessary, as well as changes to drug testing policies. Additionally, employers should inform managers that they may still discipline employees for using marijuana at work or working under the influence if it negatively affects performance or safety. However, employers should also notify managers that they must still engage in the interactive process/cooperative dialogue if an employee claims marijuana use due to a disability. If there are any questions about these laws, or how to handle suspected marijuana use in the workplace, please speak with counsel before taking any adverse action.



Am I Required to Place Posters in the Workplace Informing My Employees of Their Rights to Be Free From Discrimination?

Yes, both New York State and New York City require employers to post certain information in a conspicuous place informing employees of their right to be free from discrimination. This information is typically posted on a bulletin board, but if physical space is tight, an employer can alternatively make this information available to employees by placing the documents in a three-ring binder or something of a similar nature. These posters can be found on the State and City websites and include:

- Notice of Prohibition on Discrimination Under the New York State Human Rights Law;
- Guidelines Regarding the Rights of Nursing Mothers to Express Breast Milk in the Workplace Under New York State Law;
- Notice of New York State's Equal Pay Provisions;
- Notice of Employee Rights, Protections, and Obligations Under New York State's Whistleblower Law, New York Labor Law § 740;
- A copy of Article 23-A of the New York State Correction Law, which relates to the employment of individuals with a criminal conviction;
- The New York City Commission on Human Rights' Notice of Pregnancy Accommodations in the Workplace (New York City Only); and
- The New York City Commission on Human Rights' Stop Sexual Harassment Factsheet (New York City Only).

Federal, state, and local law require employers to post additional information in the workplace, including certain information depending on the employer's industry. Employers should consult with counsel to ensure that they are complying with all posting requirements as it pertains to their specific business.

What Happens If I Am Sued?

Who Can Sue Me?

Employers may be sued by both current and former employees as well as applicants for employment. Additionally, independent contractors may claim to be employees under the applicable statutes and assert employment-based claims.

What Are the Damages?

Damages vary depending on the nature of the claim and the statute at issue. In certain circumstances, prevailing employees (and job applicants) may be entitled to compensatory damages (including, for example, damages for emotional distress, back pay, and front pay if the court or adjudicative body does not order reinstatement), injunctive/equitable relief (e.g., reinstatement), punitive or liquidated damages, and civil fines and penalties. Additionally, some statutes allow prevailing plaintiffs to recover their attorneys' fees, costs, and litigation expenses, as well as pre-judgment and/or post-judgment interest.

CHAPTER 5

Recruiting, Hiring and Onboarding



NYC HOSPITALITY ALLIANCE

Fox Rothschild

Overview

While the general hiring process may be a routine matter for a company, it can also expose employers to significant liability if they show a preference for or discourage an applicant from applying for a job based on their membership in a protected category. Federal, state, and local laws each expressly prohibit discriminatory job postings and hiring, and employers who hire in New York and New York City are often subject to stringent requirements.

This chapter aims to help guide employers through the recruiting, hiring, and onboarding process while complying with federal, state, and local labor laws.

What Are the Protected Categories I Should Be Aware of?

On a federal level, there are several laws that prohibit discrimination based on certain characteristics and which are relevant to the hiring process. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers with 15 or more employees from publishing job postings/advertisements that prefer or discourage individuals on the basis of:

- Race;
- Color;
- Religion;
- Sex (including gender, pregnancy, sexual orientation, and gender identity); or
- National Origin.

In addition, the Age Discrimination in Employment Act of 1967 (ADEA) protects persons 40 years of age or older from age-based employment discrimination by employers with at least 20 employees. The Americans with Disabilities Act (ADA) prohibits discrimination by employers with at least 15 employees against individuals with disabilities, including during the hiring process. The Equal Pay Act of 1963 protects individuals from sex-based discrimination in the payment of wages, regardless of the size of the employer. The Pregnancy Discrimination Act (PDA) forbids an employer with 15 or more employees from discriminating against a job applicant based on pregnancy, childbirth, or related medical conditions when it comes to any aspect of employment, including in the hiring process. The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits an employer with 15 or more employees from discriminating against a job applicant based on their genetic information, including the requesting, requiring, or purchasing of genetic information and using that information to make a hiring decision. The Uniformed Services Employment and Reemployment Rights Act (USERRA) forbids an employer, regardless of size, from discriminating against a past or present member of the uniformed service when making both initial employment and reemployment decisions.

On a state level, the New York State Human Rights Law (NYSHRL) prohibits employers of any size from discriminating against applicants or employees based on the following protected categories:

- Age;
- Alienage or Citizenship or Immigration Status;
- Arrest or Conviction Record;
- Bankruptcy;
- Color;
- Disability (physical or mental);
- Familial Status;
- Gender (including sexual harassment);
- Gender Identity or Expression;
- Genetic Information or Predisposing Genetic Characteristics;
- Lawful Conduct Performed Outside of Work Hours;
- Marital or Partnership Status;
- Military Status;
- National Origin;
- Pregnancy (including Childbirth or Related Conditions) and Lactation Accommodations;
- Race;
- Religion/Creed;
- Reproductive Health Decision Making;
- Salary History;
- Sex;
- Sexual Orientation;
- Status as a Veteran or Active Military Service Member;
- Status as Victim of Domestic Violence, Sexual Violence, or Stalking;
- Transgender Status; and
- Union Membership.

In New York City, the New York City Human Rights Law (NYCHRL) prohibits those employers with four or more employees (or, in the case of gender-based harassment, regardless of size) from discriminating against applicants or employees residing in New York City or applying/working in New York City based on the following protected categories:

- Age;
- Alienage or Citizenship or Immigration Status;
- Arrest or Conviction Record;
- Bankruptcy;
- Caregiver Status;
- Color;
- Credit History;
- Disability (physical or mental);
- Gender (including sexual harassment);
- Gender Identity or Expression;
- Genetic Information or Predisposing Genetic Characteristics;
- Height (beginning Nov. 22, 2023 - New York City Only)
- Marital and Partnership Status;
- Military Status;
- National Origin;
- Pre-Employment Marijuana Testing;
- Pregnancy (including Childbirth or Related Conditions) and Lactation Accommodations;
- Race;
- Religion/Creed;
- Reproductive Health Decision Making;
- Salary History;
- Sex;
- Sexual and Reproductive Health Decisions;
- Sexual Orientation;
- Status as a Veteran or Active Military Service Member;
- Status as a Victim of Domestic Violence, Sexual Violence, or Stalking;
- Transgender Status;
- Unemployment Status;
- Union Membership; and
- Weight (beginning Nov. 22, 2023 - New York City Only)

While there is no federal counterpart, under New York law, employers also cannot discriminate against an applicant because of that person’s lawful recreational activities, such as participating in political activities or the applicant’s legal use of consumable products (like use of marijuana, which is described in more depth below).

What May I and May Not Put in a Job Posting/Advertisement?

New York employers must create job postings/advertisements with care and attention. Language that may seem innocent on its face could unlawfully infer that the employer has a preference for or is discouraging someone from applying for a job because of a protected category. Examples of problematic language/terminology include:

- Gender – job postings/advertisements that use gendered terminology, such as “waitress,” “busboy,” and “hostess.”
- Age – job postings/advertisements that seek “recent college graduates,” “youthful” applicants, “energetic” applicants, and those with “a year or two” of experience in the field.
- Religion – job postings/advertisements that state, “this is a (Catholic, Protestant, Jewish) organization.”
- Disability – job postings/advertisements that seek “able bodied” candidates or those who are “in good health.”
- National Origin – job postings/advertisements that seek “American born” applicants or characterize the workplace as “English speaking only.”
- Immigration/Citizenship Status – job postings/advertisements that require that the applicant has a “right” to work in the United States or that “non-citizens need not apply.”
- Arrest/Conviction Record – job postings/advertisements that state that “felons need not apply” or “applicant must have clean record.”

Instead, job postings/advertisements should focus on a description of the position, the nature of the work involved (if not obvious from the title), desired qualifications, and how to apply. Job postings/advertisements should state that you are an equal opportunity employer.

New York City law also prohibits a job posting/advertisement from requiring that an applicant be employed at the time the applicant applies.

New York State law requires employers to disclose the compensation or range of compensation (salary range or rate of pay) in the job description. A range of pay cannot include other forms of compensation or benefits such as employer provided insurance, paid leave or retirement savings. However, employers are encouraged (but not required) to disclose such benefits separately. Employers must make a good faith effort to determine range of pay. A good faith pay range is one that an employer legitimately believes they are willing to pay at the time of the advertisement's posting. This requirement applies to job advertisements, promotion opportunities, and transfer opportunities that can or will be performed at least in part within the state. Employers must keep the history of compensation ranges and any job description for each opportunity advertised for at least three years.

What Should I Put in My Written Job Application?

A job application is not required by federal, state, or local law, but it can be very helpful from both a human resources and legal perspective. New York does not require any specific language or elements to be included in employment applications so long as it does not infer that the employer favors or discourages any individual based on a protected class.

In general, an initial application should ask for an applicant's name, contact information, availability, position desired, limited questions about the individual's authorization to work in the United States, educational and employment history, skills/qualifications relevant to the position, and professional references.

Applicants should sign the job application to confirm that everything on the application is truthful and to authorize you to contact educational institutions, past employers, and references in connection with the application. Do not ask for an applicant's protected characteristics or membership in a protected class (e.g., do not ask citizenship when asking about the applicant's right to work in the United States; instead, ask if they are authorized to work in the United States). Do not ask for an applicant's prior salary history on the job application or at any point during the hiring process. Do not ask for criminal history on the application or for authorization to run a criminal or consumer background check (inquiries and consideration of criminal history are discussed in depth below).

Federal law generally requires employers to retain applications and hiring records for at least one year but may require retention for two or three years in limited circumstances (e.g., federal contractors and financial services employers, respectively). New York State law, however, generally requires employers to retain such records for at least six years. If a charge or claim of discrimination is pending, an employer may be required to retain applications/hiring records until the final resolution of the charge/claim.

May I Require an Applicant to Attach a Photo to Their Application?

Except for in limited circumstances, such as a modeling position, an employer should not request that an applicant affix a photograph to the application form prior to hiring. This includes a driver's license with a photograph.

May I Use Automated Employment Decision Tools?

An Automated Employment Decision Tool (AEDT) is a computer-based tool that uses machine learning, statistical modeling, data analytics, or artificial intelligence, and helps employers and employment agencies make employment decisions, and "substantially assists or replaces" an employer's discretionary decision. Discretionary decisions include not just hiring but actions like promotions as well. An AEDT may do so through scores, classifications, or rankings based on a particular factor or multiple factors.

AEDTs are prohibited unless an employer has an independent auditor complete a bias audit at least one year before the use of such tools and annually thereafter. Additionally, employers must have a summary of the results of the most recent bias audit made publicly available on the employer's website along with the distribution date of the AEDT.

The summary of results must include:

- (1) The date of the most recent bias audit of the AEDT;
- (2) The source and explanation of the data used to conduct the bias audit;
- (3) The number of individuals the AEDT assessed that fall within an unknown category;
- (4) The number of applicants or candidates, the selection or scoring rates, as applicable, and the impact ratios for all categories.

Finally, job candidates who are New York City residents must receive notice that the employer or employment agency uses an AEDT.

What May I Ask About During an Interview?

Like job postings/advertisements, job interviews should be focused on the position, the nature of the work involved, and the applicant's qualifications for the position, including their education, experience, and availability. Do not directly ask about an applicant's protected traits or membership in a protected class (listed in the first section of this chapter), but also avoid indirect questions that unnecessarily touch on those traits/membership.

For example, if Spanish fluency is a qualification for the job, ask the applicant if they can speak Spanish fluently rather than asking if they are a native Spanish speaker, if they grew up in a Spanish-speaking country, or the like, all of which can be misinterpreted as questions about race, ethnicity, ancestry, and national origin. If language skills are not a qualification for the job, there is no reason to ask any questions about language. Do not ask about salary history, criminal history, or health issues (including genetic information, such as the applicant's family medical history). The United States Equal Employment Opportunity Commission (EEOC) has helpful materials on its website [here](#).

An employer may ask whether the applicant has any commitments that preclude them from meeting job schedules. If such questions are routinely asked, they must be asked of both sexes. However, it is unlawful to ask if the applicant is married, single, divorced, separated, or the name or other information about a spouse. Questions to discover marital status, familial status, or caregiver status, such as asking whether an applicant wishes to be addressed as Ms., Miss, or Mrs., if they have (or wish to have) kids, or if they have older or ailing relatives, are unlawful.

An employer may ask if the applicant is over the age of eighteen (18). However, an employer may not ask the applicant how old they are or what their birthday is. Inquiries designed to discover age, such as what year they graduated, are also unlawful.

While an employer may lawfully inquire whether an applicant can perform specific tasks necessary in the position for which the person has applied, an employer may not ask whether an applicant has a disability (physical, mental, or medical), has been treated for specific diseases, or is taking medication.

An employer may ask whether an applicant can work a specific day of the week. Employers, however, should not ask an applicant what their religion is, whether they will need time off for religious reasons, what church they go to, or whether their religious beliefs will affect their work.

An employer should not ask an applicant where they were born or where their spouse or other family members were born.

The following are examples of foundational questions an employer can ask of an applicant:

- How did you hear about the position?
- Do you have any experience in this field?
- What project would you consider your most significant career accomplishment to date?
- Why do you deserve the job over other candidates?
- Where do you see yourself in five years?
- What questions do you have about the company?
- Tell me about a time when you set difficult goals.
- What are three words you would use to describe your ideal work environment?
- Talk about a time you disagreed with a decision. What did you do?
- Why do you believe you are qualified for this position?
- What is your availability during the week?

If your industry is one in which employees may have non-compete or non-solicitation agreements (explained in more depth below), ask applicants if they are subject to any such restrictive covenants. If there may be trade secret or confidentiality issues, ask applicants if they can perform the job without using or disclosing a prior employer's trade secrets/confidential information.

What Notes Can I Take During an Interview? Can I Keep Paper Notes?

While not required, unobtrusive note taking during the interview can be helpful in having a record of the information gathered to which you can refer to later. If you choose to take notes, inform the candidate at the beginning of the interview that you will be taking notes so that they do not perceive it as a threat or distraction.

Notes should:

- Include the date, time, and place of the interview
 - Explain why a candidate's answer was a good or bad one. Keep the notes with a particular question so that you are able to cross-reference at a later date
 - Be as objective and detailed as possible. Comments like, "I am not satisfied with this answer," or "I don't think this candidate is a good fit" are not descriptive or helpful.
 - Focus on facts that indicate whether a candidate can or cannot do the job in an effective manner.
 - Not be about the candidates' appearance.
- Rather, notes should focus on the particular answer given by the interviewee and specify how, based on that answer, a candidate may be helpful or unhelpful to your company, and why.

What Can I Ask an Applicant's References?

Employers generally use reference checks to verify or gather information about job applicants. An employer should ask the reference the candidate's dates of employment, job title, and duties performed. An employer cannot ask a reference the candidate's salary or criminal history. Nor should an employer phrase questions that would encourage the reference to disclose such information. An employer should also avoid questions that directly or indirectly touch upon the candidate's membership in a protected class.

Questions should focus primarily on the candidate's skills and work ethic. Acceptable questions you may wish to ask a job candidate's references include:

- How would you describe the candidate's reliability and dependability?
- What are the candidate's strengths and weaknesses?
- What was one of the candidate's most memorable accomplishments while working with you?
- What type of work environment do you think the candidate would be most likely to thrive in, and why?
- What skills would you have liked to see the candidate develop to reach their full potential?
- Would you recommend this candidate?

Can I Ask About an Applicant's Availability During the Week?

While an employer can certainly inquire as to the applicant's availability during the work week, including the general times the applicant can work on a specific day, the employer should limit their inquiry to just that. An employer should not inquire as to whether the applicant will be unavailable (and when) due to childcare arrangements, caring for a family member, religious obligations, or any other reason that may be related to the applicant's membership in a particular class.

May I Ask About, Consider, or Make a Hiring Decision Based on an Applicant's Salary History?

New York State law and New York City law both generally prohibit employers from asking about, relying on, or verifying a job applicant's salary history at any stage of the hiring process.

Employers may not, either orally or in writing, personally or through an agent (directly or indirectly), ask for any information concerning an applicant's salary history information, including compensation and benefits. The law also prohibits an employer from relying on an applicant's salary history information as a factor in determining whether to interview, offer employment, or determining what salary to offer.

All employers should review their job applications and related processes and train hiring personnel to ensure compliance. For example, employers should eliminate questions seeking an applicant's current or past salary from all job applications. Additionally, employers may wish to proactively state in job postings that it does not seek salary history information from job applicants.

An employer may ask an applicant for their salary expectations for the position instead of asking what the applicant earned in the past. An applicant may also voluntarily disclose their salary history information to a prospective employer, for example, to justify a higher salary or wage, as long as it is being done without prompting from the prospective employer. If an applicant voluntarily and without prompting discloses salary history information, the prospective employer may factor in that voluntarily disclosed information in determining the salary for that person. An employer may not, however, post an optional salary history question on a job application seeking a voluntary response.

May I Ask About, Consider, or Make a Hiring Decision Based on an Applicant's Credit History?

In New York City, the New York City Stop Credit Discrimination in Employment Act makes it an unlawful discriminatory practice for an employer to request from an applicant or use consumer credit history in making employment decisions. The Act does not apply to employers that are required by state or federal law to use an individual consumer's credit history for employment purposes.

For employers outside of New York City, the New York State Fair Credit Reporting Act requires prior specific notice to the applicant/employee and the applicant/employee's written consent before obtaining an investigative consumer report.

Under federal law, the federal Fair Credit Reporting Act requires that an employer make very specific, written disclosures in a standalone document to an employee or applicant before obtaining a consumer report (e.g., credit report, driving records, criminal records). An employer must also obtain the employee/applicant's prior written consent. If an employer intends to deny employment or take any adverse employment action based on the information contained in the consumer report, there are additional notification and disclosure requirements. Note that the Fair Credit Reporting Act only applies to consumer reports produced by a third party and does not apply to background/credit checks run by an employer's own staff.

May I Ask About, Consider, or Make a Hiring Decision Based on an Applicant's Criminal History?

New York City law is more restrictive than federal and New York State law. Under New York City's Fair Chance Act (FCA), an employer may not inquire into an applicant's criminal history before making a conditional offer of employment. This means that job postings/advertisements, applications, and interview questions cannot include inquiries into an applicant's criminal record. Once a conditional offer is made, an employer may inquire about criminal history and may use that history to withdraw the offer/reject the applicant only if the employer:

- (i) Provides the applicant with a written copy of the criminal background check;
- (ii) Analyzes the applicant's criminal history using the eight factors set forth in New York Correction Law Article 23-a, and documents the analysis;
- (iii) Using the eight factors set forth in New York Correction Law Article 23-a, determines that (i) there is a direct relationship between the criminal offense and the employment sought, or (ii) there would exist an unreasonable risk to property or the safety and welfare of specific individuals or the general public if they employ the job applicant;
- (iv) Provides the applicant with a written copy of the analysis; and
- (v) Gives the applicant at least three business days to respond (while holding the position open).

It is not until after this five-step process that an employer may withdraw a conditional offer of employment, and even then, an employer may only do so if it determines that (a) there is a direct relationship between the criminal offense and the specific job the employee is seeking, or (b) hiring the applicant would pose an unreasonable risk to property or the safety/welfare of individuals or the general public.



As of January 11, 2020, the New York City law applies to independent contractors. The New York City law does not apply where applicable law requires a criminal background check or limits employment based on criminal history.

On July 29, 2021, amendments to the New York City law took effect. The amendment modifies and expands the FCA's protections by:

- Covering current employees (the law previously only covered applicants).
- Prohibiting employers from taking an adverse action based on an employee's or applicant's pending arrest or criminal charge without considering the relevant fair chance factors.
- Prohibiting inquiry into an employee's or applicant's non-pending arrests and criminal accusations, adjournments in contemplation of dismissal, youthful offender adjudications, and convictions sealed under certain sections of the criminal procedure law.
- Amending the relevant fair chance factors to be considered when rescinding a conditional offer of employment or taking an adverse action (for an applicant or current employee) based on a pending arrest or criminal charge.

The amendments also incorporated additional steps an employer must undertake before withdrawing a conditional offer to an applicant, or taking an adverse action against a current employee. Now, an employer must:

- (i) Provide the applicant with a written copy of the criminal background check;
- (ii) Request from the applicant information relating to the eight factors set forth in New York Correction Law article 23-a (for prior arrests only, not pending arrests);

- (iii) Analyze the applicant's criminal history using the eight factors set forth in New York Correction Law article 23-a, and document the analysis;
- (iv) Provide the applicant with a written copy of the analysis, which shall include supporting documentation that helped form the basis for the analysis; and
- (v) Allow the applicant at least five business days to respond (while holding the position open).

The above amendments apply to current employees who have been convicted of a criminal offense during their employment.

Under New York State law, an employer may not inquire about or consider any arrest or accusation that is not pending and that did not result in a conviction. An employer may also not ask about or consider records that have been sealed or are youthful offender adjudications. An employer may, however, ask the applicant if they have any pending arrests or charges. An employer may not refuse to hire an applicant based on a prior conviction unless it determines that (a) there is a direct relationship between the criminal offense and the specific job the employee is seeking, or (b) hiring the applicant would pose an unreasonable risk to property or the safety/welfare of individuals or the general public. This determination must be made based on an analysis of the eight factors listed in New York Correction Law Article 23-a.

Federal law generally does not restrict the use of an applicant's criminal history in the hiring decision, except where criminal history is used in a discriminatory manner or has an unfair impact on a certain protected class. For example, an employer may not reject only male applicants with criminal records while permitting female applicants with similar records, and an employer may not impose a hiring restriction based on criminal history that is not job-related if the restriction has a disproportionate impact on applicants of a certain race.

Can I Check an Applicant's Social Media Profiles?

There are no statutes, regulations, or other guidance in New York specifically addressing scenarios where an employer searches an applicant's social media profiles. However, personal information and photos on social media sites may reveal information about an applicant that is beyond the scope of legal inquiry during an interview or the hiring process. For example, an employer may glean information about an applicant's membership in or affiliation with people in certain protected categories, such as their gender, race, religion, age, or sexual orientation.

While the law on permissible use of social media during the hiring process is still developing, employers can minimize potential legal liability by either:

- Not conducting social media searches at all during the hiring process; or
- Use someone other than the interviewer, such as a Human Resources professional, to conduct social media screening and ensure that person only provides lawful information to the interviewer.

As explained above, New York State employers must also keep in mind that they cannot discriminate against an applicant because of that person's lawful recreational activities. Thus, an employer cannot discriminate against an applicant simply based on an applicant's social media posts so long as such content is lawful in nature.

May I Have Applicants Tested for Drugs?

Under New York City law, an employer generally may not conduct pre-employment testing for marijuana and related substances. There are a number of exceptions to this rule for various occupations and circumstances, such as:

- Police or peace officers, or other law enforcement or investigative functions.
- Certain construction and maintenance jobs.
- Jobs requiring a commercial license.
- Jobs involving the supervision or care of children, medical patients, or vulnerable individuals.

While New York State law generally does not prohibit pre-employment drug testing for marijuana, employers cannot reject an applicant based solely on a positive marijuana test result. And, while New York State and New York City law do not prohibit testing existing employees, the employer may not take adverse action against an employee based solely on a positive marijuana test result.

Federal law generally does not restrict drug testing applicants or employees.



Should I Give Applicants Offer Letters When Extending an Offer of Employment? What Should I Include in an Offer Letter?

While not mandated by any law, offer letters should be given to all exempt employees. Whether to give them to non-exempt employees depends on a number of factors but is generally advisable when there are any terms that you wish to memorialize.

In general, offer letters should be drafted for the specific position and parties involved. Offer letters should include the title, whether the position is exempt, whether the position is full-time or part-time, salary or hourly rate, key benefits, paid time off limits, reporting/supervisor arrangements, and any other terms that you wish to memorialize, such as the requirement that the employee execute a confidentiality or a non-compete agreement.

All offer letters should clearly state that the employment is at will, unless the offer is for employment for a specific period of time, in which case that period and “cause” for termination should be defined.

Do I Need to Have New Employees Sign an Employment Agreement?

New York is an at-will employment state, meaning that generally, an employee can be terminated without warning at any time for any reason or for no reason at all so long as they are not terminated for a discriminatory reason. Except in special circumstances, such as an employee whose wages will include commissions, the law generally does not require a written employment agreement for at-will employment.

Since July 4, 2021, however, New York City fast food employees have certain rights and protections that go beyond New York’s at-will employment. Under the law, fast food employers cannot terminate, constructively discharge, reduce hours by more than 15%, or indefinitely suspend employees who have completed their probationary period (discussed more in depth below) without having “just cause” to do so. The law limits fast food employers from

implementing probationary periods longer than 30 days from the employee’s first day of work, and employers must first generally engage in a progressive disciplinary model before terminating an employee. Fast food employers should thus note that their employees cannot be terminated after a probationary period unless their termination is for cause, and violations of this law can result in employers owing damages to the employee, including back pay and compensatory damages, as well as attorneys’ fees and costs.

While not required, an employer may want a particular employee to enter into an employment agreement. Employment agreements are often used as a means to convey the terms and conditions of employment and the capacity in which an employee is being hired, along with the corresponding job responsibilities, and alters the at-will employment relationship wherein the employee can only be terminated if specific conditions are met.

From an employer’s standpoint, employment contracts are often utilized to help protect the business and any trade secrets. Employment agreements are useful for executives, employees who will be subject to non-competes or other restrictive covenants, or other employees whose special circumstances an employer wants to commit to writing.

In addition to describing what the employee is going to do in the position, an employment agreement should generally include:

- The employee’s salary.
- Duration of employment (and possibly the option to renew on a rolling basis).
- What benefits the employee will receive (e.g., health insurance, vacation leave, disability leave, etc.).
- Grounds for termination of the employment agreement.
- Restrictive covenants (as explained below).
- The employee’s ownership of the employee’s work product (e.g., material created by the employee for the benefit of the employer).
- A method for resolving any disputes that arise from the agreement (e.g., arbitration, litigation).

What Type of Restrictive Covenants Should I Put in an Employment Agreement?

Restrictive covenants are contract clauses that limit the activities of an employee after employment has ended. They are intended to protect the employer from former employees benefitting from the employer's confidential business information after their employment has ended. The most common types of restrictive covenants include:

- **Non-Compete:** A provision in an employment agreement (or a standalone agreement) wherein an employee agrees not to work for a competitor or start a competitive business for a specific period of time and within a specific geographic area after employment ends.
- **Non-Solicitation:** A provision in an employment agreement (or a standalone agreement) that prevents an employee from soliciting customers, suppliers, or employees from the employer. Non-solicitation provisions are used to limit the employee from using information obtained during the course of their employment to lure customers away and unfairly compete with the employer.
- **Non-Disclosure/Confidentiality:** A provision in an employment agreement (or a standalone agreement) that prevents an employee from using or disclosing an employer's proprietary information, such as trade secrets, client lists, or recipes. Non-Disclosure/Confidentiality provisions also prevent the employee from unfairly competing with the employer by using or disclosing the employer's proprietary information.

The form and content of employment agreements, and whether restrictive covenants should be added, varies based on the specific situation and the new employee's position. Because employment agreements are highly individualized, an employer should consult with an experienced attorney to ensure that it is properly tailored to the employer's need and that it is valid and enforceable.

Should I Require All of My Employees to Sign a Non-Compete and/or Confidentiality Agreement?

Non-competes, confidentiality agreements, and other restrictive covenant agreements are generally only enforceable to the extent that they (1) are necessary to protect the employer's legitimate interests, (2) do not impose an undue hardship on the employee, (3) do not harm the public, and (4) is reasonable in time period and geographic scope.

Consequently, restrictive covenants are appropriate only for employees who will have access to confidential information or trade secrets—such as customer information, your business methods, research and development information, etc.—through the course of their employment or for whom you invest significant resources into training. Making every employee sign such an agreement can water down an argument that a business has a legitimate interest to protect. Thus, employers should generally limit use of the restrictive covenants to management positions and above and consult with counsel because in some jurisdictions these types of agreements are unlawful.

In June 2023, the New York State Legislature passed a bill that, if enacted, would prohibit employers from seeking, requiring, demanding, or accepting non-compete agreements from virtually any New York employee. The bill has not yet been signed by the Governor of New York. If the bill becomes law, it would also void any other contracts “by which anyone is restrained in engaging in a lawful profession, trade, or business of any kind.” It also would create a private right of action, which would enable workers to sue their employers within two years of signing or learning of their non-compete, the termination of their employment or contractual relationship, or the date their employer acts to enforce the agreement,

whichever is latest. Courts hearing these claims would be authorized not only to void these provisions, but also to award up to \$10,000 in liquidated damages in addition to lost compensation, damages, and reasonable attorneys' fees and costs.

In addition, in January 2023, the Federal Trade Commission (FTC) announced a Notice of Proposed Rulemaking that would ban all non-compete clauses in employer-employee contracts, subject to limited exceptions, including for non-competes entered as part of the sale of a business for a person holding 25% or more of the company. The public comment period closed in April 2023, but the extent of the FTC's non-compete rule is still unknown.

Should I Require All of My Employees to Sign an Arbitration Agreement With a Class Action Waiver?

Arbitration is a process whereby the parties engage a neutral third party (or parties) to make a binding decision on claims following a closed-door trial. Arbitration is generally confidential and significantly less expensive than litigation in court. As part of an arbitration agreement—in which both the employer and the employee agree to resolve (almost) all disputes via arbitration rather than in court—an employer may require a class action waiver. This prevents the employee from initiating or participating in a class action so that an individual claim does not balloon into a claim by the individual on behalf of tens, hundreds, or more employees.

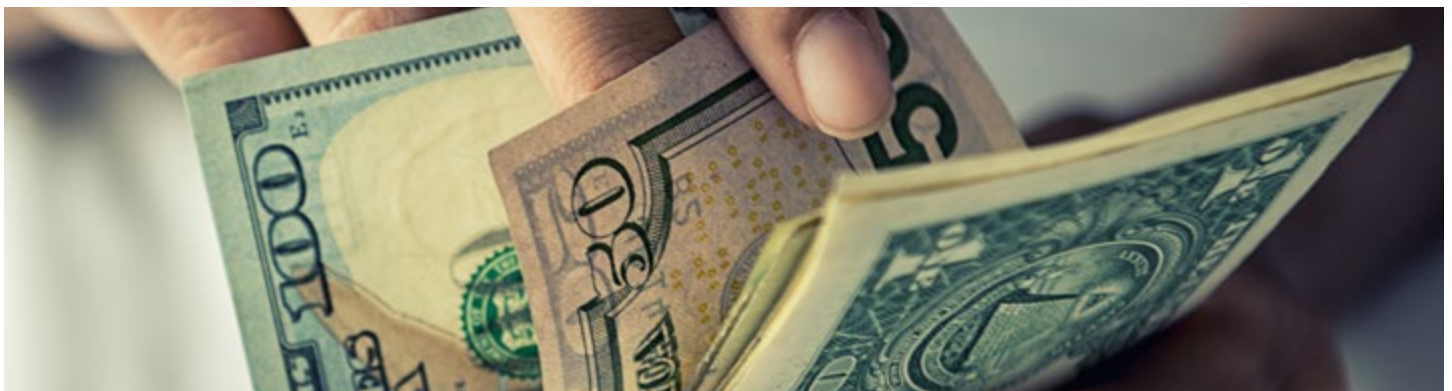
There are some limitations on which disputes may be forced into arbitration. For example, unemployment claims and workers' compensation claims may not be arbitrated. There are also advantages and disadvantages to arbitration agreements with class action waivers. For example, you may avoid a class action but then have to deal with a series of single-plaintiff arbitrations that are collectively more expensive to litigate and settle than a class action would have been.

How Do I Determine What Compensation to Offer a New Hire?

New York City's minimum wage is currently \$15 per hour. In Westchester County and on Long Island, it is \$15 per hour, and elsewhere in New York State, the minimum wage is \$13.20 per hour. However, since July 1, 2021, all fast food employees in New York State must be paid at least \$15 per hour (up from \$14.50 per hour).

Under limited and specific circumstances, an employer may be able to take a tip credit towards its minimum wage obligations for its services and food service employees. For a more in-depth discussion on when an employer may or may not take a tip credit, please refer to Chapter 1 of this book.

When determining a new hire's compensation, employers must be aware that the Equal Pay Act prohibits discrimination on account of sex in the payment of wages. Federal, state, and local law also prohibit an employer from compensating individuals more or less based on their membership in a protected class. If there is an inequality of wages due to a protected characteristic, employers may not reduce the wages of those not in the protected class to equalize pay.



What Do I Need to Do to Ensure Compliance With Immigration Laws During Onboarding?

Under the Immigration and Nationality Act of 1952 (INA), employers may only hire persons who may legally work in the United States and individuals authorized to work in the United States. Federal law places the burden of immigration compliance on the employer.

The key step in complying with immigration laws is to verify every employee's authorization to work in the United States by properly completing USCIS Form I-9. Follow the instructions included with Form I-9 carefully to ensure that employees provide proof of their identity and their authorization to work in the United States. Employers in New York may, but are not required to, use USCIS's E-Verify system, which allows employers to compare information on Form I-9 with federal records in order to identify information mismatches.

Employers must:

- Ensure each new employee completes and signs Section 1 of the Form I-9 by their first day of work.
- Review acceptable documents showing identity and employment authorization and:
 - Confirm the documents appear to be genuine and relate to the employee; and
 - Complete and sign Section 2 of the Form I-9 within three days of hire (for employees whose employment will last fewer than three days, this must be done on the first day).
- Re-verify employment authorization for employees with expiring documents by the expiration date.

An employer may not accept any documents that are not originals (such as photocopies), with one exception. A certified copy of a birth certificate, with an official seal, may be presented as a List C document showing employment authorization.

Federal, state, and local law prohibits an employer from discriminating based on the citizenship or national origin of an individual during the hiring process. This includes requesting that a new hire or employee present specific documents or more or different documents than those presented to complete the Form I-9, or refuse to accept presented documents, if the presented documents appear to be genuine and related to the person presenting them.

An employer that demands specific documents typically does so out of bias and a belief that those documents are most trustworthy. For example, an employer that:

- Requires each new hire to bring their U.S. passport on their first day to work to fill in the Form I-9 is discriminating by demanding specific documents; and
- Tells a new employee it cannot complete the Form I-9 until they bring their U.S. passport, even though they present acceptable alternate documents such as a valid driver's license and certified birth certificate, is discriminating by demanding additional documents.

Employers must not retaliate against an employee based on the employee's complaint or participation in a complaint regarding discrimination.

An employer must not keep Form I-9 and related documents within the employee's broader personnel file. Employers must keep each employee's Form I-9 on file for at least three years, or one year after employment ends, whichever is

longer. If employers photocopy the documents presented by employees, they must retain the photocopies with the relevant Form I-9.

Employers who fail to complete and/or retain their employees' I-9 forms are subject to penalties. Thus, employers should conduct regular internal audits to correct existing or ongoing errors in Form I-9 policies and procedures. This also enables employers to show good faith efforts for Form I-9 compliance if questions arise and can be used to mitigate possible penalties.

Many businesses use independent contractors or personnel leasing agencies to complement their work forces. However, employers may not use indirect hiring to avoid immigration law liability. Employers may not knowingly hire anyone unauthorized to work in the United States, whether the person is an employee or independent contractor. Employers that regularly use contractors or subcontractors may request copies of the Form I-9 and other documents for all workers brought on-site. Alternatively, employers can consult with counsel to ensure that their independent contractor agreements include terms that the contractors will comply with immigration regulations, including Form I-9 verification, and that the contractor will indemnify or reimburse the employer for any costs related to form I-9 noncompliance liability.

May I Sponsor an Employee's Visa?

Employers seeking to hire foreign workers may need to offer immigration sponsorship for the individuals to begin working for the employer or to remain authorized to work in the United States for a period of time. There are a number of different types of visas, and the appropriate visa for a given situation may depend on the applicant/employee's country of citizenship, intended duration/permanence of stay, type of skill/work, and other factors. For example, an H-1B visa allows an employer to temporarily employ a foreign worker with certain education/experiential qualifications in a specialty occupation for three years (extendable to six).



What Forms/Notices Must I Give New Hires?

Federal, state, and local laws require an employer to provide a new hire with certain forms/notices during the onboarding process, depending on the nature and size of the employer as well as the new hire's position. All employers should provide their new hires with the following:

Federal Forms/Notices:

- United States Citizenship and Immigration Services (USCIS) Form I-9 (Employment Eligibility Verification)
- United State Internal Revenue Service (IRS) Form W-4 (Employee's Withholding Allowance Certificate)
- Fair Credit Reporting Act (if performing background check)
- Children's Health Insurance Program (CHIP) (if employer maintains group health plan)
- EEO-1 Self-Identification Form (applicable to employers with 100 or more employees)

New York State Forms/Notices:

- New York State Department of Taxation and Finance Form IT-2104 (Employee's Withholding Allowance Certificate)
- New York State Notice and Acknowledgement of Pay Rate (LS 54, LS 55, or LS 57, depending on the nature of the new hire's position)
- New York State Sexual Harassment Prevention Policy
- New York State Paid Family Leave Notice
- New York Correction Law Article 23-A (if performing background check)

New York City Forms/Notices:

- New York City Earned Safe and Sick Time Act Notice of Employee Rights
- New York City Stop Sexual Harassment Act Fact Sheet
- New York City Pregnancy and Employment Rights Notice
- Commuter Benefits Participation Form (applicable to employers with 20 or more full-time non-union employees)
- New York City Fair Chance Act Notice and Procedures (if performing background check)

Miscellaneous (If Applicable to Employer/New Hire's Position):

- Employment Application
- Offer Letter
- Direct Deposit Form
- Employee Uniform Receipt
- Tip Policy/Credit Acknowledgment
- Diversity/Harassment Training Acknowledgment
- Alcohol Awareness Policy
- Confidentiality/Non-Disclosure Agreement
- Non-Compete and/or Non-Solicitation Agreement
- Arbitration Agreement

The above list is not exhaustive, and additional documents may be required depending on the nature of the employer and the new hire's position. For more information, and depending on your particular circumstances, Fox Rothschild has created a document titled, "Checklists and Compliance Tips for the New York City Hospitality Employers," which can be accessed [here](#). This document contains hyperlinks to the above documents that an employer can easily access.

An employer should retain copies of all forms in the employee's file for at least six years.

What Documents Should I Keep in a New Hire/Employee's Personnel File?

An employer should ensure that they properly maintain an employee's personnel file throughout the duration of their employment. Employers should keep the following documents in a new hire/employee's personnel file:

- Employment application
- Offer of employment letter/employee agreement (if given)
- New York State Notice and Acknowledgment of Pay Rate and Payday form
- Tip policy/credit acknowledgment (if applicable)
- Employee handbook acknowledgment of receipt
- Applicable job description
- IRS Form W-4
- New York State Department of Taxation and Finance Form IT-2104
- Performance evaluations
- Complaints from guests/co-workers
- Disciplinary forms/actions
- Awards or citations for excellent performance
- Notes on attendance
- Voluntary early departure forms
- Any restrictive covenant agreements
- Benefit enrollment documents (other than health insurance)
- Termination forms (including required termination letter)
- Garnishments

An employer should exclude the following documents from a new hire/employee's personnel file, and keep separately:

- I-9 forms and documentations (should be stored in one centralized file for all employees)
- Health insurance enrollment and related documents
- Any medical records or documents (all medical records must have limited access)
- Workers' compensation forms/documentation
- Family and Medical Leave Act forms/documentation
- New York State Paid Family Leave forms/documentation
- New York City Earned Safe and Sick Time Act forms/documentation
- New York State Paid Sick Leave forms/documentation

Must I Give New Hires an Initial Probationary Period?

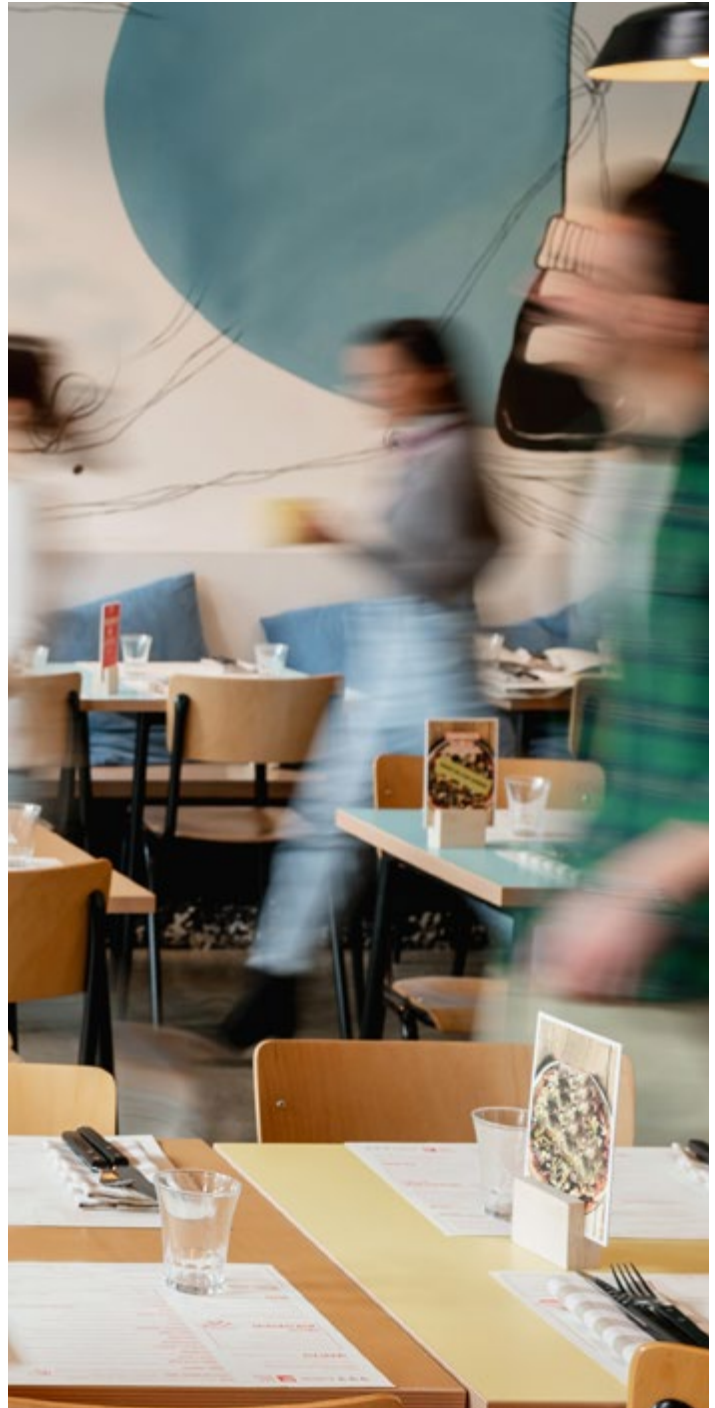
Probation is a name given by some employers to an initial employment period during which their internal threshold for terminating a new employee may be lower or that more oversight and review of performance is required. In other words, a new employee may be terminated during a probationary period for misconduct that the employer would excuse or treat differently in a longer-tenured employee. Employers are not required to give any probationary period except if agreed to in a collective bargaining agreement. Unless there is a collective bargaining agreement or an existing employment agreement between you and a specific employee, that employee is an at-will employee and you may terminate them at any time, for any lawful reason, with or without a notice period.

Instead of referring to it as a probationary period, an employer should instead refer to it as an “introductory period.” Referring to it as a probationary period can sometimes lead to confusion regarding whether the employment relationship is at-will because once an employee completes the probationary period, they may believe that they are no longer at risk for termination based upon their performance. This misunderstanding can lead to an increased risk of wrongful termination lawsuits.

If you require an employee to complete an introductory period, ensure that your introductory period policies and procedures are carefully worded and applied consistently to all new hires. Your policies should explicitly state that an employee’s employment status during the introductory period is at-will and that upon successful completion of the introductory period, the status of the employee’s employment will remain at-will.

One of the general pitfalls of an introductory period is that employees may believe that they are held to lower standards when past their probationary period and may act accordingly. In the case of a collective bargaining agreement, an employee who has passed their probationary period may no longer be employed at will and may be protected by grievance and disciplinary procedures/requirements.

As explained above, New York City fast food employers cannot require their employees to serve an introductory period of more than 30 days and, following completion of this introductory period, a fast food employer cannot terminate, constructively discharge, reduce hours by more than 15%, or indefinitely suspend employees who have completed their probationary period without having just cause to do so. Termination of fast food employees typically must also be preceded by progressive disciplinary measures.



Is Sexual Harassment Prevention Training Required for All New Hires?

Under both New York State and New York City law, every employer is required to provide employees with interactive sexual harassment prevention training. New hires must receive the training unless they received qualifying training through a prior employer within the year. Current employees must receive the training annually and employers must keep proof of completion of the trainings. At each training, employers must provide each employee with a copy of the employer's sexual harassment policy and a copy of the information presented at the training. In general, new hires should be trained as soon after hire as possible. Training must be provided in English or in an employee's primary language (if the State/City provides model training materials in that language).

The New York City law, which only applies to employers in New York City with at least fifteen (15) employees, has slightly different requirements than the state standards. New York City provides training materials, which can be accessed [here](#). The New York State Department of Labor has confirmed that the City's training materials also comply with the State's requirements, which are discussed below.

New York City employers may also choose to provide their own annual sexual harassment prevention training for employees in lieu of the published training materials, provided that it includes 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 Commission on Human Rights, the New York State Division of Human Rights, and the United States Equal Employment Opportunity Commission, including contact information;
- The prohibition of retaliation, including examples;
- 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.

New York City employers must maintain training certificates or signed employee acknowledgments of training for at least three years.

New York State also provides training materials for employers to use, which can be accessed [here](#). If an employer uses New York State's training materials (and not New York City's training materials), in order to remain in compliance with the law, the employer must also ensure that the training is interactive. Employers must ask questions of employees as part of the program, accommodate questions asked by employees, with answers provided in a timely manner, or require feedback from employees about the training and the materials presented.

If an employer chooses not to use New York State's training materials, then the employer must ensure that their training:

- Is interactive;
- Includes an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;
- Includes examples of conduct that would constitute unlawful sexual harassment;
- Includes information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment;
- Includes information concerning employee's rights of redress and all available forums for adjudicating complaints; and
- Includes information addressing conduct of supervisors and any additional responsibilities for such supervisors.

Do I Have to Report New Hires to Anyone?

In most cases, you must report new hires to the New York State Department of Taxation and Finance within twenty days of hiring, by either submitting a copy of the employee's completed Form IT-2014 or online via the New Hire Online Reporting Center.

CHAPTER 6

Health & Safety Requirements & Employment Terminations



Introduction

The Occupational Safety and Health Act of 1970 (the “Act”) created the Occupational Safety and Health Administration (“OSHA”), which sets and enforces the law that protects workplace safety and health standards and covers most private employers. It generally requires employers to keep their workplaces free of serious recognized hazards for employees. This chapter addresses workplace related health and safety standards as required by the Act and similar state safety laws to protect employees, but it does not address a business owner’s separate obligation to comply with applicable state and local laws, including food safety standards, and health or building codes.

Health and Safety – Federal Safety Requirements

What is OSHA and should I be concerned?

OSHA is the Occupational Safety and Health Administration, which is the government agency within the U.S. Department of Labor (“USDOL”) charged with enforcing the Occupational Safety and Health Act of 1970. The Act and related safety and health regulations impose obligations on most New York employers to keep their workplaces free of any recognized hazards that are likely to cause death or serious physical harm to their employees. All New York hospitality employers are subject to OSHA’s requirements, with the exception of public employers, who are covered by the New York State Public Employee Safety and Health Act of 1980.

What are my responsibilities under the Occupational Safety and Health Act of 1970?

Employers must report to OSHA all work-related fatalities within 8 hours of discovery, and in-patient hospitalizations, amputations or losses of an eye within 24 hours of discovery (OSHA 24 Hour Hotline: 1-800-321-OSHA). Employers must also post, in a conspicuous location, this workplace OSHA poster, informing employees of rights and responsibilities.

Employers with more than 10 employees must keep records of all work-related injuries that result in medical treatment, including a log of injuries, injury reports and an annual summary. Employers should implement safety training, and provide protective equipment and machine guarding. An employer can satisfy the obligations to keep workers safe by showing that employees who are exposed to hazards received safety trainings or were well-supervised during allegedly dangerous operations.

Does OSHA impose any requirements related to preventing the spread of COVID-19?

OSHA requirements apply to preventing occupational exposure to COVID-19. Employers must: instruct sick workers to stay home; provide workers with face coverings or surgical masks and respiratory protection when job hazards warrant it; provide workers places to wash hands and alcohol-based sanitizers; routinely disinfect surfaces and equipment; and encourage reporting of any safety and health concerns.

Do I need to record employee cases of COVID-19 to OSHA?

You may need to record cases of COVID-19 if a worker is infected as a result of performing their work-related duties. However, employers are only responsible for recording cases of COVID-19 if all of the following are true:

- (1) The case is a confirmed case of COVID-19;
- (2) The case is work-related (as defined by the regulations to the Act). An injury or illness is considered to be work-related if:
 - an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness; or

- it is resulting from exposure occurring in the work environment, which consists of “the establishment and other locations where one or more employees are working or are present as a condition of their employment. The work environment includes not only physical locations, but also the equipment or materials used by the employee during the course of his or her work,” **and**

(3) The case involves one or more of the following:

- death,
- medical treatment beyond first aid,
- days away from work,
- loss of consciousness,
- restricted work or transfer to another job, or
- a significant injury or illness diagnosed by a physician or other licensed health care professional.

What steps does OSHA take to ensure that employers comply with the Act?

OSHA conducts worksite inspections in order to ensure employers comply with the Act.

OSHA must have “administrative probable cause” to conduct an inspection of a private employer’s worksite. Probable cause can be established based on evidence of an existing violation or by showing that the standards for conducting an inspection are satisfied with respect to a particular workplace.

At the inspection, an inspector (also known as a compliance officer) should present their credentials including a photograph and serial number, should explain the scope of the inspection and walkaround procedures, and should allow time for the employer to select a representative to accompany the inspector.

OSHA is supposed to provide the employer reasonable time to contact a key employer representative (usually an hour).

What triggers an OSHA worksite inspection?

In general, inspections are triggered by employee complaints, or initiated by OSHA if the agency is targeting a specific industry or deems a particular industry to have particularly dangerous work practices.

An employer may wish to seek an attorney and should request to see a copy of the complaint that prompted the investigation (if it exists).

Any employer representative should shadow the inspector and provide facts only, not opinions.

If an OSHA inspector requests an interview with a supervisor, the supervisor (as an agent of the employer) should be represented by the employer’s attorney for the purposes of the interview.

What penalties/damages does an employer face for violations of the Act?

Employees cannot sue employers for injuries caused by violations of the Act or OSHA standards.

If OSHA finds hazardous conditions present at the workplace, it will issue a citation.

- The employer has 15 working days to contest the alleged violations.
- The notice of contest is simply a letter or other written communication to the Area Director of the OSHA office that issued the citations informing OSHA of the elements of the citation that the employer seeks to contest.
- Citations may carry penalties of \$14,502 per violation, or \$14,502 per day if the employer fails to abate the issue. If the violation is for willful or repeated violations, penalties of up to \$145,027 may be assessed.



Health and Safety – The New York HERO Act

Does New York State law impose workplace safety requirements similar to OSHA?

On May 5, 2021, the New York Health and Essential Rights Act (“HERO Act”) was signed into law, and it protects New York workers from airborne infectious disease outbreak.

The HERO Act requires New York employers to adopt a health and safety plan (also known as a HERO Act plan), which must be incorporated into an employer’s handbook and verbally reviewed with all newly hired employees.

The HERO Act plan does not need to be implemented until an airborne infectious disease is designated by the New York State Commissioner of Health as a highly contagious communicable disease that presents a serious risk of harm to the public health.

When designated, employers are required to provide a copy of the adopted airborne infectious disease exposure prevention plan and post the same in a visible and prominent location within each worksite.

What do employers need to include in their HERO Act plan?

New York State Department of Labor (“NYDOL”), with the New York Department of Health, developed regulations and sample plans, which can be found [here](#). The model plan for the food service industry can be found [here](#).

Employers can choose to adopt the sample plan provided by NYDOL or establish an alternative plan that meets or exceeds the statute’s minimum requirements.

Are there any other requirements for employers under the HERO Act?

The HERO Act also requires that employers with at least 10 employees employed in New York permit employees to establish and administer a workplace safety committee.

If employees request it, employers must recognize a committee at each worksite; otherwise, the employer need not recognize a committee.

- (1) A worksite is defined by the HERO Act as any physical space, including a vehicle, that has been designated as the location where work is performed over which an employer has the ability to exercise control.
- (2) Committees can be established by a written request for recognition of such a committee from two non-supervisory employees.
- (3) Employers are then required to respond “promptly.”
- (4) Within five days following the employer recognizing a committee, the employer must provide notice (written, posted or electronic notice reasonably calculated to provide actual notice) to all employees at the worksite of such recognition.
- (5) After a committee is formed, the employer must deny subsequent requests to form a committee and refer such requests to the existing committee for consideration.
- (6) Employers must also:
 - Respond in writing to each safety and health concern, hazard, complaint and other violations raised by the committee or one of its members within a reasonable time;
 - Respond to a request from the committee or one of its members for policies or reports that relate to the duties of the committee within a reasonable time;
 - Provide notice, where practicable and not in violation of the law, to the committee and its members ahead of any worksite visit by a governmental agency enforcing safety and health standards; and
 - Appoint an employer representative to the committee to act as co-chair.



Who can join a workplace safety committee?

A committee must be comprised of not less than two non-supervisory employees and not less than one employer representative and up to a maximum of 12 members.

The ratio of non-supervisory employees to employer representatives must be at least two-thirds of all committee members.

Committees must be co-chaired by a non-supervisory employee and an employer representative.

What is the function of a workplace safety committee?

Committees are empowered to establish operating rules and procedures, provided that such rules and procedures are consistent with the law.

In addition, committees may:

- (1) Conduct training for committee members on the function of the committee and an introduction to workplace health and safety up to a maximum of four hours per calendar year without loss of pay;
- (2) Schedule meetings at least once per quarter up to a maximum of two hours per quarter without loss of pay, so long as meetings do not unreasonably conflict with business operations; and
- (3) Schedule additional meetings, but they must be conducted outside of work hours and time spent on those meetings does not need to be paid.

What penalties/damages does an employer face for violations of the HERO Act?

If, after investigation, the NYDOL determines that an employer has violated any provision of the HERO Act, the NYDOL may assess a civil penalty of at least \$50 per day for failing to adopt a safety plan, and between \$1,000 – \$10,000 (or \$20,000, if the NYDOL finds that an employer has violated the HERO Act in the preceding six years) for failing to abide by a safety plan.

The NYDOL may also order “other appropriate relief,” such as an order enjoining the conduct of an employer.

Can employees sue employers for violations of the HERO Act?

Yes, but not without first providing the employer with notice of the alleged violation.

In addition to civil fines, the HERO Act also allows employees to bring civil actions against an employer alleged to have violated the safety plan “in a manner that creates a substantial probability that death or serious physical harm could result to the employee from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, by the employer at the worksite, unless the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation.”

An employee may not bring such an action “until thirty days after giving the employer notice of the alleged violation, except where an employee alleges with particularity that the employer has demonstrated an unwillingness to cure a violation in bad faith.”

Employees may not bring a civil action “if the employer corrects the alleged violation.”

Such claims must be brought “within six months from the date the employee had knowledge of the violation.”

Courts may issue injunctive relief and award costs and reasonable attorneys’ fees.

An employer may defend based on its “good faith” belief that the established health and safety measures were in compliance with the safety plan.

If an action brought by an employee is found to be frivolous, a court may award the employer’s costs and reasonable attorney’s fees, which may be assessed either against the employee, their attorney or both.



Health and Safety – Other New York Safety Requirements

Are there other health and safety requirements for New York employers?

Yes. All employers in New York State must provide workers' compensation coverage and disability benefits coverage for their employees. Employers must post notice of coverage in their place(s) of business.

When a business whose only locations are outside New York State has employees who reside in New York State, that business is not required to carry New York State workers' compensation insurance as long as its employees who live in New York State do not do any work in New York State for that business and the employees do not receive, in their homes, any direction and control from that employer.

New York State requires employers to provide disability benefits coverage to employees. These are for an off-the-job injury or illness. The law provides for the payment of cash benefits for employees who:

- (1) Have become disabled from injuries or illness away from work; and
- (2) Disabilities from pregnancies.

Employers can get coverage for disability benefits from private insurance companies, the New York State Insurance Fund or self-insurance.

For more information about short-term disability benefits, please see Chapter 3 on Employee Benefits and Pay.

What are the rules on smoking in the workplace?

New York State and New York City laws prohibit smoking in workplaces. New York State's Clean Indoor Air Act ("CIAA") requires that indoor workplaces to be completely smoke-free.

The CIAA prohibits smoking and the use of e-cigarettes: (1) within 100 feet of entrances, exits or outdoor areas of public libraries; (2) within 100 feet of entrances, exits or outdoor areas of public or private elementary or secondary schools.

The CIAA requires the posting of "No Smoking" or "Smoking signs, or "No Vaping" or "Vaping signs, or a sign with the international "No Smoking" symbol, to be clear and visible in these outdoor areas.

New York City Smoke Free Air Act prohibits smoking and the use of electronic cigarettes in nearly all workplaces and requires the posting of "No Smoking, Electronic Cigarette Use, and Smokeless Use" signs to be clear and visible in any indoor space where smoking, using e-cigarettes or using smokeless tobacco is not allowed.

OSHA regulates workplace exposure to chemical compounds found in tobacco smoke to exceed certain levels.

However, an employee may not be discharged, refused employment or discriminated against in terms of compensation or benefits because of lawful use of tobacco products offsite during non-work hours when not using the employer's equipment or property.

- It is not discrimination to offer insurance with different rates or coverage for smokers if the difference is based on cost to the employer, and employees are given a written statement of carriers' rates.

Can employees use marijuana with or without a doctor's note?

New York employees are not permitted to smoke or use marijuana in the workplace.

Employers may mandate that employees not be impaired by a controlled substance when performing work duties and may ban the use of controlled substances at work.

However, employers may be required to make accommodations for employees whose marijuana use is for medical purposes.

- (1) New York offers medical marijuana registration cards to certified patients with serious conditions.
- (2) Under New York law, a certified patient would be viewed as having a disability, and, as such, may be entitled to a reasonable accommodation.
- (3) Importantly, however, employers are not required to take any action that would violate federal law or cause the loss of a federal contract or funding.

New York has decriminalized the recreational use of marijuana, and an employee may not be discharged, refused employment or discriminated against in terms of compensation or benefits because of *lawful* use of products offsite during non-work hours when not using the employer's equipment or property.

Do kitchen and other restaurant employees need any Health Department certifications?

New York State requires that at least one food manager on staff has a Health Department certification, which should be renewed every five (5) or two (2) years depending on whether the manager took an exam to earn the certification. The timing for re-certification also may vary by county. A Food Protection Certificate is required by the New York City Health Code for supervisors of food service establishments in New York City. The New York City Health Code also requires food

service establishments to have at least one supervisor of food operations with a Food Protection Certificate on duty during all hours of operation to supervise food preparation and processing. Under New York State's Alcohol Beverage Control ("ABC") Law, certain individuals are not eligible for a liquor license, including:

- (1) a person convicted of a felony in NYS, including felony DWI;
- (2) a person convicted of a crime in another state or federal jurisdiction which would translate to a felony conviction if committed in NYS;
- (3) a person convicted of misdemeanors under sections 230.20 or 230.40 of the NYS Penal Law or 1146 of the former NYS Penal Law;
- (4) a revoked license will disqualify the licensee for a period of two years, and if the revoked licensee was a corporation, then any officer or director may also be disqualified.

In addition, the ABC Law prohibits establishments with on-premises retail licenses (taverns, restaurants, night clubs, etc.) from knowingly employing a person convicted of a New York State felony or other specified offenses, who has not subsequent to such conviction received an executive pardon therefore removing any civil disabilities incurred thereby, a certificate of good conduct or other relief from disabilities provided by law, or the written approval of the State Liquor Authority permitting such employment. (See Section 102.2 – ABC Law). There are no prohibitions against a person convicted of a New York State translated felony, or certain specified offenses to be employed on any retail premises licensed for off-premises consumption (i.e., grocery stores, drug stores or liquor stores).

What about requiring ServSafe?

As a requirement upon hiring, employers may include in the employee's job requirements that the candidate is ServSafe certified. Kitchen supervisors' job descriptions should include a ServSafe certification requirement. SafeServ is an approved Health Department certification and satisfies the New York State Health Department requirements. The ServSafe certification may also satisfy the New York City requirements, if taken through a New York City approved provider, such as New York City's Department of Health and Mental Hygiene.





Employee Terminations and Exiting

Am I required to do progressive discipline before a termination?

In general, New York employers are not required to provide progressive discipline before terminating an employee, except employers who are covered by New York City's Fair Workweek Law ("FWW"), which covers Fast Food employers.

Under FWW, Fast Food employers must have a progressive discipline policy that contain a series of escalating disciplinary responses when a Fast Food employee fails to perform job duties.

- (1) Fast Food employers can terminate employees for egregious violations of policy, such as theft, harassment or violence in the workplace.
- (2) FWW requires that the progressive discipline policy:
 - Let employees know what conduct will lead to discipline under the policy; and
 - Describe graduated steps or responses (e.g., accrual of points, strikes) and how the employer applies them to different types of conduct and subsequent infractions.
 - Information about best practices for drafting such a policy can be found [here](#).

All other New York employers are not *required* to have a progressive discipline policy.

- (1) However, failing to provide employees with ongoing feedback and failing to document such feedback increases the possibility of a potential lawsuit.
- (2) On the other hand, engaging in counseling and documenting any performance issues mitigates the likelihood that an employer will receive a lawsuit from the former employee post-termination.
- (3) Additionally, documenting an employee's performance issues before termination lays the foundation for a defense to any claim that an employee was terminated for unlawful reasons.

Do I have to give employees a written note when terminated?

New York law requires employers to provide written notice to employees whose employment has been terminated or separated for any reason. The written notice must provide “the exact date of such termination as well as the exact date of the cancellation of employee benefits connected with such termination.”

This written notice must be provided within five working days after the employment relationship has ended.

This notice requirement applies not only to those employees whose employment is terminated by the employer, but also to those employees who leave the employer because they resign, quit, retire or are laid off.

If an employer fails to provide the required notice, the employer can be subject to civil fines of up to \$5,000 per employee. In addition, aggrieved individuals may bring civil actions against employers that fail to provide the required notice of benefits.

New York employers must also provide a [Record of Employment](#) to every employee who quits, is laid off or discharged. This form is for unemployment insurance purposes and should be provided whether or not the employer believes the employee would be entitled to unemployment insurance benefits.

Additional notice requirements are triggered and discussed below if the termination is the result of a plant closing or mass layoff.

Are employees (current or former) entitled to review and/or receive a copy of their personnel file?

In general, New York hospitality employers are not required to provide employees with a copy of their personnel files, except Fast Food employers, who are required, upon the employee’s request, to provide a copy of any discipline issued to the employee within the previous 365 days.

No federal law gives employees or former employees of private employers a statutory right to access their personnel files.





Employee Terminations and Worker Adjustment and Retraining Notification

Are there any requirements before I do a layoff, reduction in force or close a business?

Apart from the notice of termination requirements, which are required in all instances of separation from employment, there may also be other notice requirements when conducting a layoff, reduction in force or closing a business. Whether additional notice is required depends on the size of the business and size of the layoff or reduction in force.

Employers who employ at least 50 full-time employees located in New York or 50 employees who perform a total of 2,000 hours per week of work in New York (including overtime) on a regular basis are subject to the New York Worker Adjustment and Retraining Notification (WARN) Act.

Employers who employ at least 100 full-time employees or 100 employees who perform a total of 4,000 hours per week (including overtime) on a regular basis are subject to the federal WARN Act.

When are notice requirements triggered?

There are different events triggering notice requirements.

- (1) If there is a closure that is expected to last six months or more impacting 25 or more employees, notice is required.
- (2) Relocation of an employer to a location at least 50 miles away, causing an employment loss for at least 25 employees, requires notice.
- (3) Either a mass layoff causing job loss or a reduction in hours by more than 50%, which either (i) impacts 250 employees or (ii) causes 25 or more employees to lose their jobs or reduce their hours by more than 50% (if the 25 or more workers make up at least 33% of all workers at the worksite), then notice is required.
 - The impact of the job loss or closure can occur over any 30-day period. For example, several small layoffs over a 30-day period could trigger WARN even though each small layoff does not impact the threshold number of employees.
 - In addition, if the initial event does not impact the number of employees necessary to trigger notice, employers must continue to monitor the situation for 90 days from each action because if the threshold number of employees are affected within any 90 day period, then notice is triggered.

Who does an employer need to notify if WARN notice requirements are triggered?

The New York WARN Acts, requires an employer to provide 90 days' notice to:

- (1) All affected employees and their collective bargaining representatives;
- (2) The New York Department of Labor;
- (3) The local Workforce Investment boards;
- (4) The chief elected official of the unit or units of local government where the site of employment is located;
- (5) The school district or districts where the site of employment is located; and
- (6) Each locality that provides police, firefighting, emergency medical or ambulance services, or other emergency services, to the locale where the site of employment is located.

Under the federal WARN Act, employers must provide employees 60 days' advance notice if the closing affects 50 or more workers. Under the federal WARN Act, an employer must notify:

- (1) All affected employees or their collective bargaining representatives;
- (2) The state dislocated worker unit; and
- (3) The chief elected local government official.

What are the penalties for failing to provide WARN notice?

Covered employers that do not comply with the federal or New York WARN requirements (and do not qualify for an exemption) may be liable to affected employees for back pay (of up to 60 days), benefits and attorneys' fees, or may be subject to a civil penalty of \$500 per day for each day of the employer's violation.

Both the federal and New York WARN Acts allow employers to avoid the civil penalty by paying each aggrieved employee the amount for which the employer is liable within a certain timeframe.

Are there any exemptions from providing the required WARN notice?

Exemption from notice period include:

- (1) Unforeseen business circumstances.
 - A *sudden, dramatic, and unexpected* action or condition outside the employer's control that directly prevents the employer from providing the required 90 days' notice.
- (2) A faltering business, provided that:
 - The employer was actively seeking business or capital that would allow the employer to avoid the employment losses;
 - There was realistic possibility of obtaining the necessary business or capital; and
 - The employer had a reasonable, good faith belief that giving the required notice would preclude it from successfully obtaining the sought-after business or capital.
- (3) The plant closing or mass layoff is due to any form of terrorism, war or natural disaster, such as a flood, earthquake or drought.
- (4) Special projects only if the employment losses are due to the completion of a particular project and the affected employees were hired with the understanding that their employment would be limited to the duration of the project.

These exemptions do not eliminate the notice obligation, but allow employers to give as much notice as is possible which, in some circumstances, may be notice after the fact.

Did COVID-19 qualify as an event that exempted employers from providing WARN notices?

New York has specifically recognized the COVID-19 pandemic as an *unexpected business circumstance* and the federal USDOL has also acknowledged that COVID-19 may fall within this exemption.

CHAPTER 7

New York City's Fair Workweek Law



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Overview

What is the New York City Fair Workweek Law?

The New York City Fair Workweek Law (“FWW”) is a New York City law applicable to certain employers who employ individuals in fast food or quick service establishments. There are three key components to FWW. First, covered employers must provide predictable schedules to their New York City employees who work in fast food or quick service establishments. This generally means that an employee’s schedule will not vary and will remain the same from week to week. Second, covered employers must offer available shifts to their current New York City workforce before they can hire new employees. Third, covered employers cannot terminate the employment of a fast food or quick service establishment employee unless the employer has just cause or a bona fide economic reason to do so.

Which employers are covered by FWW?

Only “fast food employers” are covered by FWW. A “fast food employer” is an entity that operates a “fast food establishment”. A “fast food establishment” is any establishment within the City of New York:

- That has as its primary purpose, the service of food and beverages;
- Where patrons order or select items and pay for them before eating such items whether on or off premises;
- That offers limited service;
- That is part of a chain, which is a set of establishments that operate under or share a common brand or that are characterized by standardized options for décor, marketing, packaging, products and/or services; and
- That is one of 30 or more establishments nationally, including an integrated enterprise that operates 30 or more establishments in the aggregate or an enterprise operates pursuant to a franchise agreement where the franchisor and the franchisees of such franchisor own or operate 30 or more of such establishments.



Which employees are covered by FWW?

Only “fast food employees” are covered by FWW. A “fast food employee” is any non-exempt employee (meaning they are entitled to overtime for all hours worked beyond 40 hours in a workweek) who works at a fast food establishment and who performs any of the following duties:

- Cleaning;
- Cooking;
- Customer service;
- Delivery;
- Food or drink preparation;
- Routine maintenance duties;
- Security; or
- Stocking supplies or equipment.

Managers and other exempt employees of fast food establishments are not covered by FWW.

Are subunits covered by FWW, such as a vendor at a stadium or a coffee shop in a bookstore?

Yes, if the subunit is a separate entity and that separate entity otherwise meets the definition of a fast food establishment, then the employees of the subunit would be covered by FWW.

If a business offers both quick service and full service as the same establishment, is it covered by FWW?

While it would depend on the specific facts of the business, as a general rule if an entity operates on the same premises a full-service restaurant with a quick service section, it is unlikely that the establishment would be deemed a fast food establishment under FWW. Therefore, FWW would not be applicable to the employees who work on that premises.

If a full service restaurant offers delivery or take out, is it covered by FWW?

No, full service restaurants are not covered by FWW if they offer delivery or take out because the restaurant does not satisfy the definition of a “fast food establishment” under FWW and therefore FWW is not applicable to that restaurant.

Predictable Scheduling under FWW

What is a predictable schedule?

A predictable schedule is a schedule for an employee that generally does not vary from week to week. That is, the employee knows well in advance what the employee's schedule will be going forward and therefore the employee can plan their life around that schedule.

How is a predictable schedule determined?

Under FWW, on or before the employee's hire date, the employer must provide the employee with the employee's regular schedule that the employee will work once employment begins. This regular schedule must be specific and must be provided to the employee in writing (electronic or hard copy). The regular schedule must include:

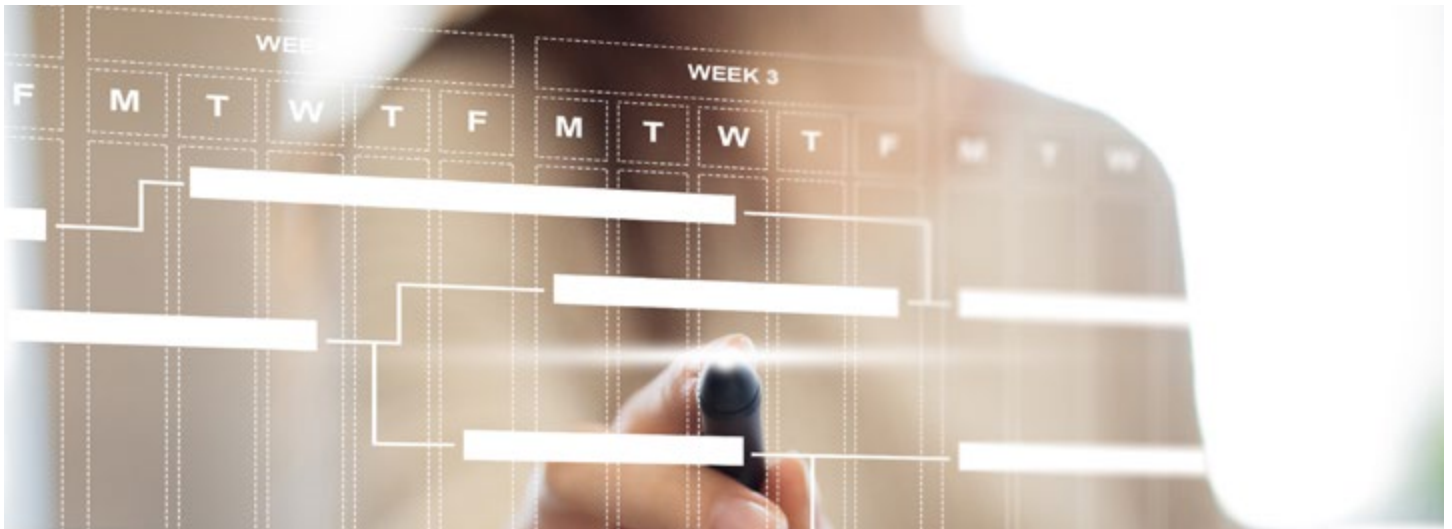
- The number of hours an employee can expect to work per week for the duration of the individual's employment;
- The days, hours, and locations of each shift the employee is expected to work; and
- The effective date of the schedule.

The regular schedule provided at the time of hire is the employee's baseline regular schedule. When scheduling employees, covered employers may not deviate by more than 15% from an employee's baseline schedule unless:

- The employee requested a reduction in the employee's weekly, regularly scheduled hours and the employer agrees to the request. In such case, the reduced schedule becomes the new baseline schedule and new regular schedule (with the reduced hours) must be provided to the employee in writing (either electronically, in hard copy, or both).
- The employer has just cause or a bona fide economic reason to reduce the employee's hours. In that case, the reduced schedule becomes the new baseline schedule and new regular schedule (with the reduced hours) must be provided to the employee in writing (either electronically, in hard copy, or both).

When must an employer update the employee's regular schedule?

The employer must provide an updated regular schedule to the employee whenever there is a change in the employee's baseline, regular schedule. The update must be provided to the employee in writing (either electronically, in hard copy, or both).



What are good faith estimates?

The concept of good faith estimates no longer exists under FWW. Prior to July 4, 2021, instead of providing regular schedules to employees, covered employers had to provide good faith estimates. Amendments to FWW in 2021 eliminated the requirement to provide good faith estimates and instead revised FWW to require the more rigid regular schedules discussed above.

What is the difference between a regular schedule and a work schedule?

The regular schedule is the employee's recurring weekly shifts on a long-term and indefinite basis and does not correspond to any particular workweek. The work schedule is the employee's schedule for a specific workweek and can vary slightly from the regular schedule.

What differences are permitted between a regular schedule and a work schedule?

An employer may give an employee a work schedule that is different from the regular schedule provided the difference between the regular schedule and the work schedule differs by no more than 15% for the entire workweek. A difference between a regular schedule and work schedule occurs when:

- The start time of a shift on the regular schedule is before or after the start time of a shift on the work schedule;
- The end time of a shift on the regular schedule is before or after the end time of a shift on the work schedule;
- A shift is placed on the employee's weekly schedule that is not on the regular schedule; and/or
- A shift is on the employee's regular schedule, but is not on the weekly schedule.

Can an employer unilaterally change the employee's regular schedule?

An employer cannot change the employee's regular schedule by more than 15% from the employee's baseline, regular schedule unless the employer has just cause (defined below, see Section VI(e)) or a bona fide economic reason (defined below, see Section VI(l)) to do so. If an



employee requests a change to the regular schedule and the employer consents to the change, then the employer can revise the employee's regular schedule.

Can an employer unilaterally reduce the hours of an employee's regular schedule?

The employer can reduce the employee's hours by up to 15%. If the employer wants to reduce the employee's hours by more than 15%, the employer must have just cause or a bona fide economic reason to do so. However, if the employee voluntarily consents (without any input from the employer) to reduce the employee's hours beyond 15%, the employer can thereafter reduce the employee's hours.

Are there any exceptions to the 15% rule?

Yes. If the establishment is closed for a holiday, the loss of hours due to the holiday closure will not be deemed a reduction of hours. Further, if the establishment is closed due to any of the below reasons, a reduction of hours will not be deemed to have occurred:

- Threats to employees or employer's property;
- Failure of a public utility or shutdown of public transportation;
- Fire, flood, or other natural disaster;
- Government declared state of emergency; or
- Severe weather that poses a threat to employee safety.

If any of these exceptions are applicable, the employer must keep a written record of the event causing the establishment to close (or not open).

If the employee requests a change from the employee's regular schedule, must the employer honor that request?

No. If an employee informs the employer in writing that the employee is no longer available to work certain shifts (or otherwise wants changes to the employee's regular schedule), the employee has voluntarily consented to a

reduction in hours. The employer may grant the employee's request to the schedule changes but is under no obligation to do so.

When must the employer post the employee's work schedule?

Employers must publish the employee's schedule at least 14-days before the first day of each workweek schedule. New hires must receive the work schedule on or before the first day of work. The work schedule must cover at least seven (7) calendar days. For each shift, the work schedule must contain a date, location, start time, and end time.

How must employers notify employees about their work schedule?

Employers must publish the employee's schedule in two ways, both of which are required. The employer must physically post the schedule in the workplace in a location where employees will see them. Second, the employer must give the work schedule to the employee in writing. This can be done by physically giving a hard copy of the schedule to the employee or electronically submitting the schedule to the employee.

What information must be in the work schedule?

A work schedule must include dates, times, and locations of shifts and cover a seven-day period.

What must an employer do if the work schedule changes?

Employers must update a schedule change within 24 hours. The schedule change must be published to the employees in the same manner as providing the original schedule. If there are any changes to the schedule, premium payments may be owed. Further, an employer cannot change an individual employee's schedule without their written consent (and they must pay the premium payment if applicable).

Changes to Work Schedules and Premium Payments

What happens if an employer changes an employee's schedule without giving proper, timely notice?

If the change occurs within 14-days of the start of the workweek in which the schedule change is to occur, the employee will be entitled to a premium payment as follows:

Schedule Change Premium Payments

	Rate for Change with No Impact on Hours	Rate for Increase in Hours	Rate for Reduction in Hours
Less than 14 days' notice	\$10 per change	\$10 per change	\$20 per change
Less than 7 days' notice	\$15 per change	\$15 per change	\$45 per change
Less than 24 hours' notice	\$15 per change	\$15 per change	\$75 per change

Employers must be mindful that the 14/7/24 time periods are measured from the start of the workweek. For example, for the workweek of April 1-6, if, on March 26, the employer makes a change to the April 5 schedule, the change has been made on less than 7 days' notice because the change was made less than 4 days prior to the start of the workweek, which is April 1.

Are there any exceptions to paying premiums?

Yes, exceptions fall into two categories. There are employer-initiated exceptions and employee-initiated exceptions.

Employer Initiated Exceptions to Premium Payments

If the establishment is closed due to any of the below reasons, premium payments are not required:

- Threats to employees or employer's property;
- Failure of a public utility or shutdown of public transportation;
- Fire, flood, or other natural disaster;
- Government declared state of emergency; or
- Severe weather that poses a threat to employee safety.

In addition, if an employee works additional hours and therefore will be entitled to overtime, then no premium payments are required as a result of the increase in hours.

If any of these exceptions are applicable, the employer must keep a written record of the event causing the establishment to close (or not open).

Employee Initiated Exceptions to Premium Payments

Premium payments are not required if the employee changes the employee's schedule due to the employee:

- Asking for time off;
- Asking the employer for a change of shift/hours – the request must be in writing;
- Calling out;
- Using Safe & Sick Leave or other legally mandated leave;
- Voluntarily swapping shifts with another employee;
- Arriving late; or
- Leaving early due to sickness or personal reasons.

If any of these exceptions are applicable, the employer must keep a written record of why the employee changed the employee's schedule.

Employers should note that if an employee's work schedule changes due to any of the following reasons, premium payments are required to be paid:

- Manager makes changes to the written schedule that the employee did not request;
- Manager asks the employee to arrive early or to work late (for any reason, including to cover for another employee who is sick);
- Employee works more than 15 minutes past their scheduled shift end time (even if the employee arrived late);
- Employee leaves early at the Manager's request;
- Manager asks the employee to swap or trade shifts;
- Employee picks up an available shift; and/or
- Employee is fired (regardless of the reason) or laid off.

Can the employer change the employee's schedule with the employee's consent?

After the schedule has been published, if the schedule is to be changed on less than 14 days' notice prior to the start of the workweek in which the change is to occur, and the employer increases the employee's hours, the employee must consent to the schedule change in writing. If the employee declines the schedule change (which does not have to be in writing), the employee can suffer no adverse consequences for doing so. If the schedule change reduces an employee's hours, the employer need not obtain the employee's written consent.



What does employee consent mean?

Whenever it is used in the FWW, “employee consent” means that the employee voluntarily agrees to the action item (e.g., schedule change). An employee “voluntarily agrees” when the employee has a meaningful opportunity to say no to the request without pressure from the employer or negative ramifications should the employee decline the employer’s request.

Does the written consent need to be in hard copy or can it be electronic?

An electronic written consent satisfies the requirements under the law. There is no requirement that written consent be in hard copy nor is a “wet” signature required.

Can the employer change the employee’s shift location?

Yes, the employer can change the location of the employee’s shift without obtaining consent and without having to make any premium payments provided the only change to the shift is the location and the employee’s hours and shift start/end times are not impacted.

What is the 15-minute Rule?

If the employee starts within 15 minutes of the employee’s scheduled shift or stops working within 15 minutes of the end of the shift, there has not been a change in the employee’s shift times and the employer does not have to pay any premiums. For example, if Employee A is scheduled to work from 6 AM to 11 AM, commences work at 5:56 AM, the Employee A did not suffer an increase in hours even though Employee A started 4 minutes early. Similarly, if on the same shift, Employee A works until 11:13 AM (or is asked to stop working at 10:49 AM), the employee has not suffered an increase in hours (or decrease in hours if clocking out early) because the changes occurred within 15 minutes of the scheduled shift times. However, if Employee A works until 11:21 AM, the employee has worked over the 15-minute grace period. As such, the employer must have obtained written consent to work beyond the scheduled shift time, and Employee A is entitled to a premium payment of \$15 for an increase in hours on less than 24 hours’ notice.

If it is busy and the employee is supposed to clock out, what should I do?

If you believe the employee will end up working more than 15 minutes beyond the scheduled end time of the employee’s shift, the employer must ask the employee if the employee voluntarily agrees to work the extra time before the end of the employee’s scheduled shift. The employee may consent to work the additional time, but the consent must be in writing. The employee has the option of rejecting the request without any adverse consequences. If the employee works the additional time, the employee is entitled to a premium payment of \$15 (unless the additional time triggers an employee’s entitlement to overtime compensation).

If the change occurs within 14-days of the start of the workweek in which the schedule change is to occur, the employee will be entitled to a premium payment.

Can employees trade or swap shifts?

The employer can permit employees to trade or swap shifts. If the trading/swapping of shifts results in a schedule change, no premium is required to be paid. The employer, however, must keep a written record that the employee’s swapped shifts, even if the employees swapped shifts on their own without informing the employer beforehand.

Can a change in schedule create multiple premium payments?

Yes. Every time there is a change in schedule, it will trigger premium payments. For example, if an employer adds hours to an employee’s schedule on 5 days’ notice, a \$15 premium payment would be owed. If the employer then adds additional

hours on less than 24 hours' notice, another \$15 premium would be owed. If the employer then cancels the additional hours on less than 24 hours' notice, a \$75 premium would be owed. In this example, the employee would be owed \$105 in premium payments due to the numerous schedule changes.

If an employee is fired and therefore their shifts are cancelled, is the employee entitled to premium payments for the cancelled shifts?

Yes. Employees are entitled to premium payments if their shifts are cancelled because their employment is terminated. It does not matter the reason for the employee's termination. The employee can be terminated for the most egregious actions and the employee would still be entitled to premium payments for the cancelled shifts.

When must the employer pay any premium payments that are owed?

Premium payments are to be paid in the same pay period that covers the schedule change. For example, if there is a schedule change that impacts the week starting February 3rd, the premium payments triggered by that schedule change must be paid the same week that the wages for the week of February 3rd are paid.

How should premium payments be listed on an employee's wage statement (paystub)?

Premium payments should be listed as a separate line item on the employee's wage statement.

Do premium payments get included in the calculation of overtime?

No. Premium payments are not payments for "time worked" or "worked performed" and therefore are excluded from the calculation of overtime.

If an employer cancels an employee's shift (or reduces their hours) but pays the employee all wages the employee earns had the employee worked the cancelled shift (or the reduced hours) are premium payments owed?

No. If an employer pays the employee what the employee would have received had the employee's shift not been cancelled or hours reduced, then no premium payments are owed. For example, an employee is paid \$20.00 per hour and is scheduled to work from 4 PM. to 11 PM. Business is very slow and the employer asks the employee to leave at 9:30 PM. Had the employee worked the full shift, the employee would have earned an additional \$30.00. If the employer pays the additional \$30.00, then the employer does not have to pay the premium payment of \$75 for a reduction in hours on less than 24 hours' notice.

Clopenings

What is a clopening?

A clopening occurs, when an employee is required to start work on Day 2 less than 11 hours after they finished work on Day 1. For example, if an employee is scheduled to work on Day 1 from 4 PM to 11 PM and then is scheduled to work on Day 2 from 8 AM to 2 PM, the employee has been scheduled to work a clopening because there are less than 11 hours between the end of the shift on Day 1 and the start of the shift on Day 2.

Can employer require an employee to work a clopening?

No. The employer must obtain the employee's written consent before the employee can be scheduled to work a clopening.

Are employees entitled to premium payments for working a clopening?

Yes. An employee is entitled to receive a \$100 premium payment for working a clopening.

Do employees receive a premium payment if they consent in writing to work the clopening (and they work the clopening)?

Yes. Employees are entitled to a clopening premium payment of \$100 whenever they work a clopening.

If an employee works past their scheduled shift on Day 1 thereby causing a clopening are clopening premium payments required?

Yes. If the employee works past their shift on Day 1 thereby resulting in less than 11 hours between the end of the shift on day 1 and the start of the shift on Day 2, a clopening payment is required. Further, the employer must obtain the employee's voluntary written consent to work the extended shift on Day 1 and the clopening shift that results from such shift extension. If the employee declines to work the clopening, the employee must be allowed to start their shift on Day 2 at least 11 hours after the employee ended the shift on Day 1 and the employee would be entitled to a \$75 premium payment due to a reduction in hours on less than 24 hours' notice.

For example, Employee A is scheduled to work on Day 1 from 2 PM to 8 PM and on Day 2 from 7:30 AM to 2 PM. As scheduled, there is no clopening because there is more than 11 hours between the end of the shift on Day 1 and the start of the shift on Day 2. However, business is busy on the evening of Day 1 and the manager asks Employee A to work an additional hour, until 9 PM on Day 1. Employee A voluntarily agreed to this in writing and is entitled to a premium payment of \$15 for the additional hours. However, now there are less than 11 hours between the end of Employee A's shift on Day 1 and the start of the shift on Day 2 (9 PM to 7:30 AM is 10.5 hours). If the employer wants Employee A to work their scheduled shift on Day 2 as is, the employer must obtain voluntary written consent from Employee A for the clopening shift and pay the employee a clopening premium of \$100. As an alternative, the employer could revise the employee's schedule so that the employee starts at 8:30 rather than at 7:30 on Day 2; this would result in a loss of hours on less than 24 hours' notice triggering a \$75 premium payment. Another alternative is to revise the employee's shift from 7:30 AM/2 PM to 8:30 AM starting time and an ending time of 3 PM. This would trigger a \$15 premium payment because there is a change in schedule on less than 24 hours' notice, but not loss of hours.

What happens if an employer requires an employee to work a clopening without first obtaining the employee's voluntary written consent?

In addition to owing the employee a \$100 premium payment for working a clopening, the employer would also be subject to an additional fine of \$500 for requiring an employee to work a clopening without obtaining the employee's voluntary written consent.

Access to Hours

What is access to hours?

FWW requires an employer to offer open shifts to current employees before the employer can hire new employees. For example, if Employee B quits and their shifts thereby become open and available, the employer must offer such shifts to its current employees before the employer can fill the shifts with a new hire.

What is a temporary open shift?

A temporary open shift is a shift that becomes open and will be open for a short period. For example, an employee who goes on vacation for a week or one who calls out sick for a day. If the employer wants to fill those shifts, they are considered to be temporary open shifts.

What is a recurring open shift?

A recurring open shift is a shift that becomes open and will be open for an indefinite period. For example, Employee A was scheduled to work Monday through Friday from 6 AM to 2 PM. Employee A quits. Employee A's open shifts are deemed to be recurring open shifts.

What are an employer's scheduling obligations after awarding an open shift to a current employee?

If the shift is a recurring shift, the employer must update the employee's regular schedule. If the shift is a temporary shift, the employer must add it to the employee's work schedule for the week(s) at issue.

How does an employer notify employees about open shifts?

When a shift becomes available, the employer must notify all current employees who have worked at least 8 hours within the past 30 days. They must do this in two ways:

- Post a notice for 3 consecutive days at a location where the workers will see it; AND
- Provide each worker with the information electronically, whether via text, email, intranet or some other electronic means.



Can an employer give preference to employees who generally work at the location as where the open shift occurs?

Yes. But if no employees assigned to that location accept the open shift, the employer must offer the open shift to employees who generally work at other locations before it can hire a new employee.

If the employer does not intend on hiring a new employee to fill the shift, must the employer comply with the access to hours procedures?

No. An employer is only required to offer available shifts to current employees before it hires a new employee. If there is no intent to hire a new employee, then the employer does not need to follow the access to hours procedure.

When offering a new shift, what information must the employer include to current employees?

The notice to employees about an open shift must include the following information:

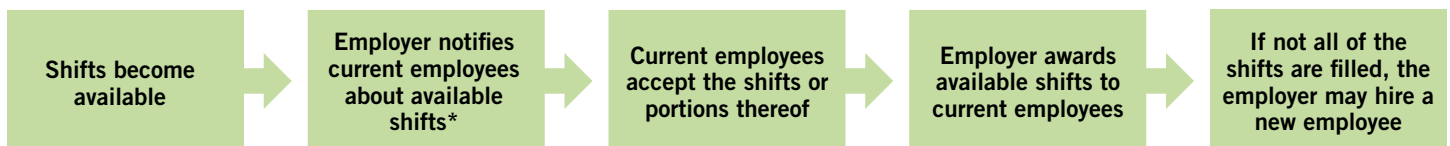
- Location of the shift(s).
- Start time(s).
- End time(s).
- Whether the shift is permanent (i.e., recurring) or temporary and if temporary the length of time the employer will need the employee to fill the temporary shift.
- The number of workers needed to cover the open shift(s).
- The manner in which employees can accept the open shift.
- The employer's procedure for awarding open shift(s) including:
 - The criteria the employer will use to award the open shift(s) should more than one employee be interested in taking the open shift(s).
 - Whether or not the employer will give preference to those employees who are already assigned to the location at which the open shift(s) occurs.

The open shift requires kitchen experience, what if the employee who accepts the open shift does not have any kitchen experience, can I hire a new employee?

No. While you can give preference to your current employees who have kitchen (or some other) experience, if no one with such experience accepts the open shift, the employer must offer the open shift to a current employee who does not meet the required criteria before the employer can hire a new employee.

What is the process for awarding available shifts before hiring a new employee?

The process is as follows:



**Posted for at least 3 consecutive days and submitted electronically to each current employee*

Does an employer have to award an open shift to an employee who, by accepting the open shift, will be scheduled to work more than 40 weekly hours and thus entitled to overtime?

No. Employers do not have to award available shifts to employees who would be entitled to overtime should such employees accept the available shifts. However, if the employee is scheduled to work 35 hours, and an open shift is 6 hours long, the employer would have to allow the employee to accept 5 hours of the shift, leaving one hour open to be filled by another employee.

Does an employer have to award an open shift to an employee who, by accepting the open shift, will be entitled to a spread-of-hours payment?

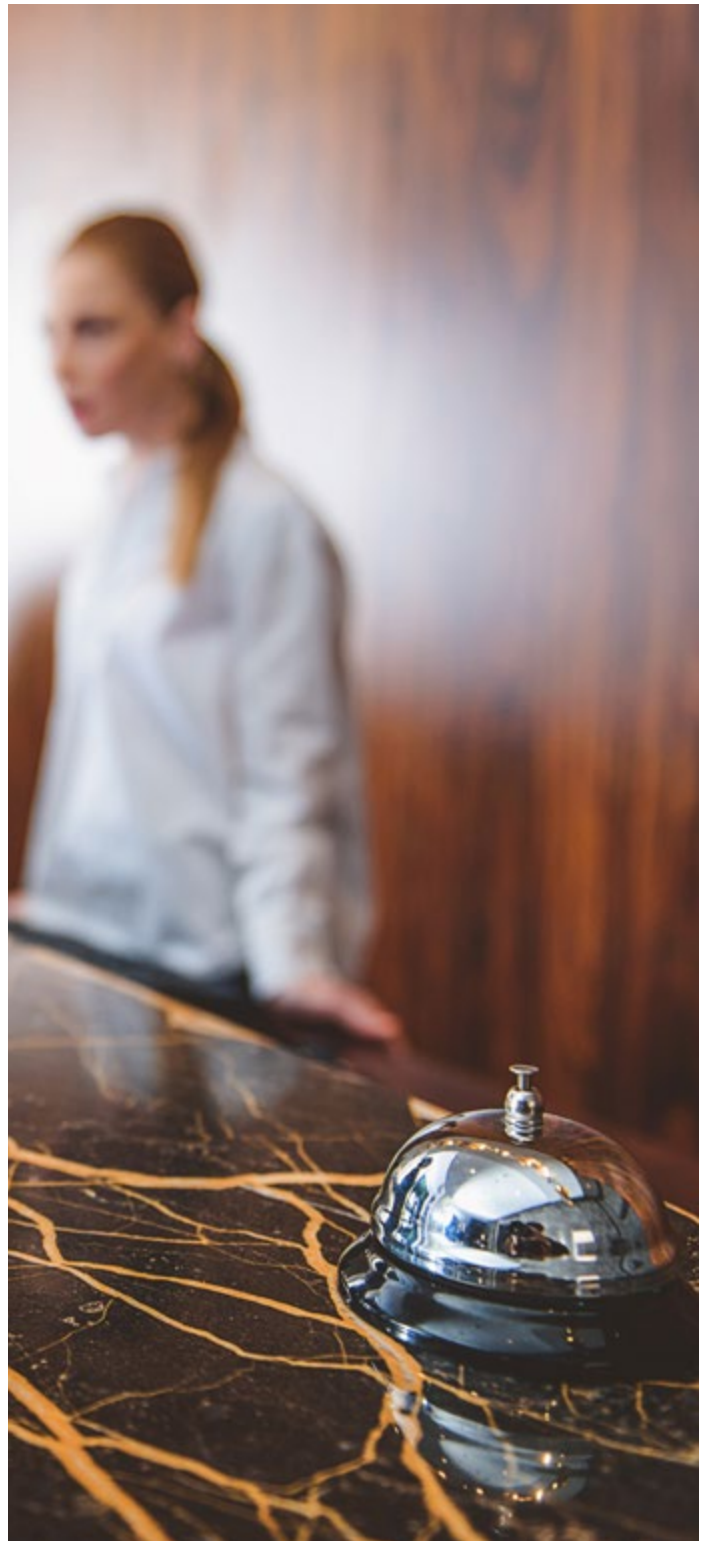
Yes.

Can an employee accept only a part of an open shift. For example, if an open shift is from 6 AM to 2 PM, can the employee only accept the shift from 8 AM to 2 PM?

Yes, the employer must award the shift to the employee. However, the employer can set a criteria that gives preferences to those employees who accept the entire open shift rather than only part of the open shift.

Are there exceptions to the requirement to post an open shift for three (3) consecutive days?

No. If the open shift that becomes available is to occur in less than 3 days, the employer must post the open shift as soon as possible, but no less than 24 hours after learning of the opening. However, the employer can offer the open shift to a current employee to work the shift during the 3 day notice period paying all required premiums as a result thereof.



Can an employer transfer employees to cover open shifts?

Yes. Employers can transfer employees between locations to cover open shifts. Further, if the employee's scheduled hours do not change, no premiums are required to be paid as a change in location without a change in schedule does not trigger premium payments.

For example, Employee A is scheduled to work on Wednesday from 2 PM to 8 PM at the Company's Penn Station restaurant. An open shift becomes available at the Company's location in Park Slope, Brooklyn. The open shift is Wednesday from 2 PM to 8 PM. The Company can require Employee A to work Wednesday from 2 PM to 8 PM at the Park Slope location without having to obtain the employee's written consent or pay premiums.

If no current employees accept the open shift, can the employer hire a new employee?

Yes.

If no current employees accept the open shift, can the employer reconfigure the shift or change the criteria for a newly hired employee?

No. If no current employee accepts the open shift, the employer may hire a new employee to work that open shift, but cannot change the shift to accommodate the new employee.

For example, a recurring open shift becomes available. The shift is Thursdays, Fridays, Saturdays, and Sundays from 6 AM to 11 AM. No current employee accepts this open shift so the Company hires a new employee. The new employee informs the employer that they cannot start at 6 AM but could start at 7 AM and would work to Noon on the four days in question. The Company cannot agree to this without violating FWW because current employees were informed that the shift was 6 AM to 11 AM and not 7 AM to Noon.

What are the ramifications if an employer does not offer an open shift to current employees?

If the employer does not offer an available shift to current employees and instead hires a new employee to take the open shift, the employer would owe \$300 to every current employee for each shift that was not offered to them. Accordingly, if an employer has 200 current employees, the failure to offer one open shift to their current employees could result in having to pay \$60,000 to the employees impacted by the violation. In addition, the employer would be subject to a civil fine of \$500 to \$1,000 for each such violation.

Just Cause

What is a discharge under FWW?

Under FWW, an employee is discharged whenever:

- The employer ends their employment for any reason, including termination (with or without cause), layoff, or suspension.
- An employee's hours are reduced by more than 15% compared to their regular baseline schedule, unless the employee voluntarily consents to the reduction or requests it.
- When an employee's working conditions become so intolerable that a reasonable person would be compelled to quit.

When can an employer discharge an employee?

Under FWW, an employer can discharge an employee when:

- The employer has just cause to do so (defined below, see Section VI(e)); or
- The employer has a bona fide economic reason (defined below, see Section VI(l)) to reduce an employee's hours or lay off the employee.

Are there any exceptions that allow an employer to discharge an employee without just cause or without a bona fide economic reason?

Yes, if an employee has been employed for less than 30 calendar days, the employer can discharge the employee without just cause and/or without a bona fide economic reason.

When an employee is discharged, does the employer have to provide a reason?

Yes, when an employee is discharged (e.g., fired or laid off), the employer must give the employee a written notice that contains the following information:

- The date the employer gave the notice to the employee and the date of discharge.
- Whether the discharge was for just cause or a bona fide economic reason.
- The precise reason for the discharge.
- Each instance of progressive discipline issued, if any, and the dates of the progressive discipline.
- If the discharge was for a bona fide economic reason, the notice must contain a statement of the employee's right to reinstatement or restoration of hours; the employee's last known phone number and email address that the employer can use to notify the employee of any open shifts; and contact information that the employee can use to update their phone number and/or email address.

This notice must be issued within 5 days of the employee's discharge. If there is subsequent litigation over the employee's discharge, the employer can rely only on the information set forth in the notice. For example, if the employer omits various instances of progressive discipline from the notice, the employer cannot use such other instances to support the reason it discharged the employee.

What is just cause under FWW?

Just cause exists when the employee repeatedly fails to perform job duties or follow policies or procedures, or the employee engages in egregious misconduct. In other words, absent egregious misconduct, the employer must give the employee an opportunity to improve their performance or actions before the employer will have just cause to terminate the employee's employment. In determining whether just cause exists, the employer can only rely on disciplinary warnings issued within the prior 12 months.

In determining whether the employer has just cause, the following factors are considered:

- Whether the employee engaged in egregious misconduct.
- The employee knew or should have known the employer's policy, rule, or practice that is the basis of the discipline; AND
- The employer provided relevant and adequate training to the employee; AND
- The employer's policy, rule, or practice, including its progressive discipline policy, was reasonable and applied consistently; AND
- The employer undertook a fair and objective investigation into the employee's job performance or misconduct; AND
- The employee violated the employer's policy, rule, or practice that is the basis of the discipline.

What is egregious misconduct under FWW?

An employee engages in egregious misconduct when:

- The employee willfully refuses to perform work for the majority of time on a shift (provided the employee is not engaging in protected activity under the National Labor Relations Act).
- The employee's conduct is extremely outrageous, dangerous or illegal that an employer cannot reasonably expect to correct it through progressive discipline. Depending on the circumstances, examples may include:
 - Violence or threats of violence.
 - Theft.
 - Unlawful harassment.
 - Unlawful discrimination.
 - Willful destruction of property.

If an employee is a no call/no show, the employee has not engaged in egregious misconduct and the employer must commence its progressive discipline policy if the employer wants to hold the employee accountable for being a no call/no show.

If an employee is a no call/no show, what can I do to hold the employee accountable?

If an employee is a no call/no show, you can start the progressive discipline process by issuing the employee discipline that increases in severity every time the employee is a no call/no show, which may ultimately give the employer just cause to terminate the employee's employment.



What is a progressive discipline?

Progressive discipline is the concept of applying increasingly severe disciplinary action to an employee who repeatedly fails to perform their job or violates policies and procedures. For example, if an employee is late, the employer might issue a verbal warning the first time it occurs. The second time the employee is late, the employee might receive a first written warning. The third time the employee is late, the employee might receive a second written warning. The fourth time the employee is late, a final warning may be issued. When the employee is late a fifth time, the employer may now have just cause to terminate the employee because the employer has engaged in progressive discipline to try to address the employee's tardiness.

Under FWW, employers must have a written progressive discipline policy that must be distributed to the employees and that includes:

- Letting the employees know what conduct will lead to discipline under the policy.
- Describing graduated steps or responses (accrual of points, strikes, etc...) and how the employer applies them to different types of conduct and subsequent infractions.

Whenever an employer issues disciplinary action under their progressive discipline policy, the employer must explain to the employee in writing why the employee is being disciplined and the consequences, if any, and provide the employee with an opportunity to respond. Further, the employer must explain to the employee how the employee can change their behavior to avoid future disciplinary actions. In other words, the employer has to inform the employee about the policy that was violated and/or how the employee should perform their job duties if the failure to properly do so is the reason for the disciplinary action. In some cases, the employer may need to retrain the employee.

When applying progressive discipline can an employer be more lenient with some employees than others?

No. Employers must issue the same progressive discipline to all employees who violate the same policy. In other words, progressive discipline must be issued consistently to all employees. For example, if the employer starts the progressive discipline process when an employee is more than 10 minutes late, if a 10-year employee who has never been late is late by 15 minutes one day, the employer must start the progressive discipline process for that long-term employee.

If I terminate an employee for just cause and cancel all of their scheduled shifts, do I have to pay the employee premium payments? What if the employee was terminated for egregious misconduct?

The employer is required to pay premiums to a discharged employee as a result of the cancellation of the employee's shifts due to the discharge. This requirement exists even if the employee is terminated for egregious misconduct.

What is relevant and adequate training?

The initial and ongoing instruction provided by the employer to the employee about the employer's expectations concerning the employee's behavior and performance of the employee's job duties and responsibilities. It may include training on:

- Preparing and serving food;
- Cleaning;
- Using tools and equipment;
- Handling payments;
- Interacting with customers;
- Workplace policies and procedures regarding attendance, punctuality, cooperation, and other standards of conduct;
- Specific job duties or conduct where the employee fails to meet expectations.

What is a bona fide economic reason that permits an employer to layoff or reduce an employee's hours under FWW?

Under FWW, an employer can lay off or reduce an employee's hours by more than 15% when:

- The employer is closing all or part of its business;
- The employer is experiencing a downturn in business such as:
 - Reduction in business volume.
 - Reduction in production.
 - Decline in sales.
 - Decline in profit.

How does an employer prove that there is a bona fide economic reason to lay off employees?

Employers must rely on business records to prove that it has a bona fide economic reason to lay off employees. Such records can include:

- Financial records, such as tax returns, income statements, profit/loss statements, monthly gross revenue schedules, and balance sheets.
- Government mandates, orders, or health and safety guidelines
- Showing that operations could not continue due to violence, threats, failure of public utilities or public transportation, fire, flood, other natural disasters, or severe weather that poses a threat to employee safety.

Can an employer rely on forecasts to support a bona fide economic reason to lay off employees?

No. The employer cannot rely on what they anticipate happening, but instead must rely on the actual decline in business to support a bona fide economic reason to lay off employees.

When determining whether the employer has a bona fide economic reason to lay off employees, do you review the business as a whole or the specific restaurant at issue?

The employer can review either to determine whether it has a bona fide economic reason to lay off employee. Therefore, if the business as a whole has a downturn, the employer can rely on the Company's financial downturn to support lay-offs City-wide. However, if the issue is limited to an underperforming store, the employer can rely on the downturn at that one store to support lay-offs.

If a Company's lease expires at one location, does the employer have a bona fide economic reason to lay off employees?

Yes. If the Company is closing a location due to the loss or expiration of a lease, the employer has a bona fide economic reason to lay off employees.

Are there exceptions for seasonal businesses?

No. A seasonal business must still prove a decline in business before it can lay off employees under FWW. An employer may not lay off employees during the off-season unless it can show an actual downturn in business.

If an employer has a bona fide economic reason to lay off employees or reduce their hours are there certain rules that the employer must follow?

Yes. Reductions in hours and layoffs must occur in reverse order of seniority. That is, regardless of skill or experience, the employer must reduce the hours or lay off the most junior employees before laying off or reducing the hours of more senior employees. These rules apply to the employer's employees' city-wide, not for the location(s) that may be closing due to the downturn.

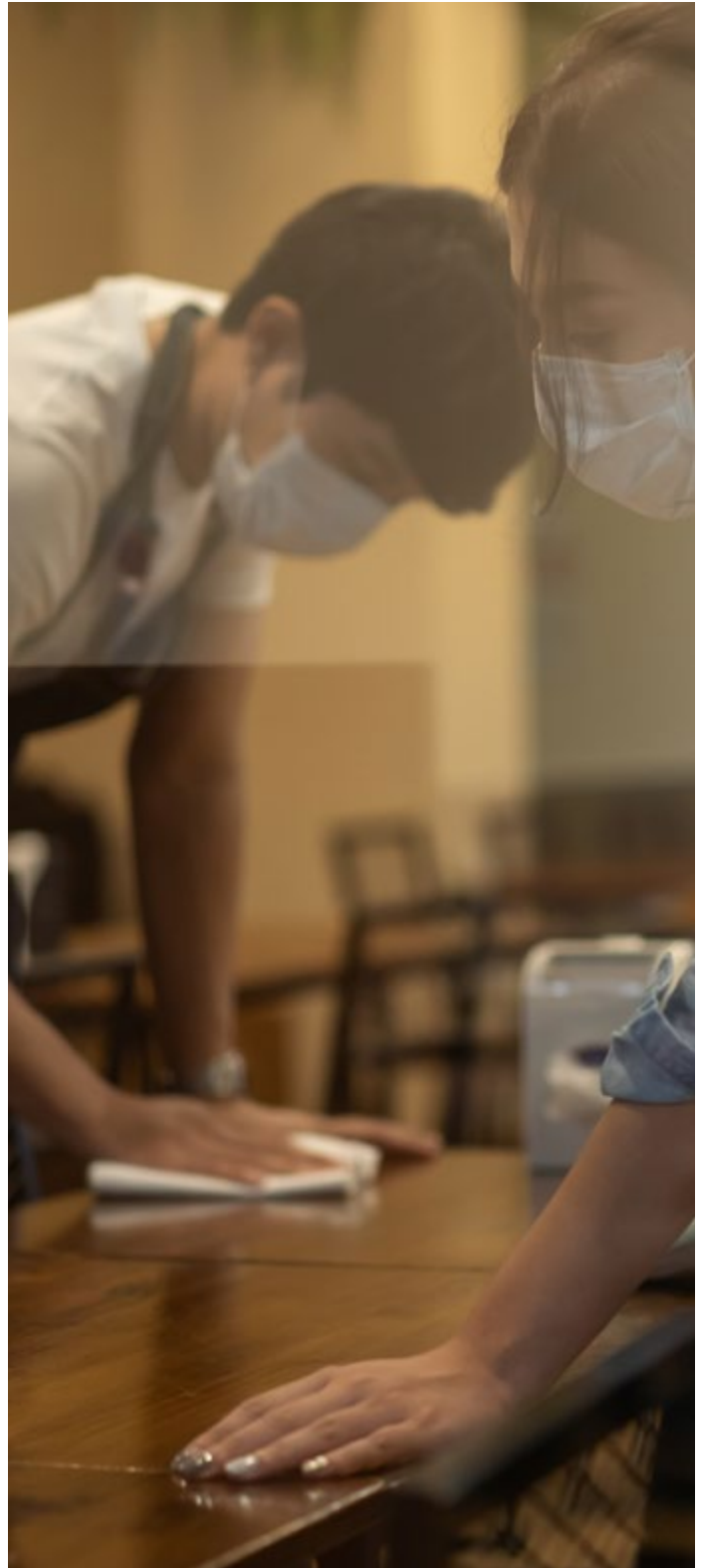
For example, if the employer has two stores in New York City. Store 1 opened in 2010 and all of its employees were hired between 2010 and 2020. Store 2 opened in 2022 and all of its employees were hired for the opening of the store. Store 1's lease expires and the landlord will not renew it; therefore, Store 1 will close. Before any of the hours of the Store 1 employees can be reduced (or before any Store 1 employee is laid off), the employer must first reduce the hours and/or lay off all of the Store 2 employees because Store 1 employees have more seniority than Store 2 employees.

What is seniority?

Seniority is the ranking of employees by their length of service with the employer within the City of New York, including any probationary period.

If the employee's employment is interrupted by more than six months, the calculation of seniority restarts when the worker resumes work. However, the following interruptions do not restart the calculation:

- Military leave.
- FMLA leave.
- Illness.
- Educational leave.
- Leave protected by law.
- Layoff due to a bona fide economic reason.
- Unlawful discharge.



Does the employer who reduces an employee's hours or lays off an employee for bona fide economic reasons have certain obligations to the employee?

Yes. If the employer has any open shifts, it must offer those recurring shifts (not temporary open shifts) to employees who had their hours reduced or who were laid off due to bona fide economic reasons within the past 12 months. The offers of open shifts must be made to these employees before offering them to all current employees. The offers of open shifts must be made in order of seniority (i.e., the most senior employees who had their hours reduced or who were laid off have the first opportunity to accept the recurring open shifts that become available).

However, the employer does not need to offer recurring open shifts to those employees who were laid off if:

- Their discharge occurred more than 1 year ago.
- The employee notified the employer in writing that the employee does not want to be considered for recurring open shifts that become available, or the employee has indicated that the employee cannot work certain days/times and the recurring open shift is during such days/times.
- The employee does not provide the employer with updated employee's contact information.
- The employee refused reinstatement or restoration of hours at their previous location.

How much time does a laid off employee have to accept an offer of reinstatement or restoration of hours?

Seven days after which the employer can offer the open shift to current employees.

How much time do laid off employees have to return to work after they accept reinstatement or a restoration of hours?

An employer may not condition reinstatement or restoration of hours on an employee's ability to return to work less than 14 days from the date of the offer.

What information must be provided to laid off employees about an offer of reinstatement or a restoration of hours?

The notification to laid off employees must include the following:

- Days, times, and locations of the shifts.
- How the worker can accept the shifts.
- That the worker has 7 days to accept the shifts.
- That the shifts will be awarded to the worker with the most seniority who accepts the shifts.

Can an employee challenge the employee's discharge?

Yes. If the employee challenges the employee's discharge, the burden is on the employer to prove that the employer had just cause to discharge the employee or the employer had a bona fide economic reason to lay off or reduce the employee's hours. In meeting its burden, the employer can rely only on the information set forth in the notice provided to the employee at this time of discharge.

Notice of Rights & Records

Must employers inform employees about their rights under FWW?

Yes. At the commencement of employment, the employer must issue the employee a NYC Fast Food Workers Rights notice. The employer must be able to prove that it gave each employee such notice at the commencement of employment.

Are employers required to post the NYC Fast Food Workers Rights notice?

Yes. The employer must post the notice in the workplace in a location where it is likely to be seen by employees. The notice must be posted in English and in any other language that is the primary language if at least 5% of the workers at a workplace, provided the City has created a notice in such language.

What records must the employer keep under FWW?

The employer must keep electronic records evidencing its compliance with each and every requirement under Fair Workweek. This includes electronic records of every schedule that is published, written consents, premium payments made, hours worked, progressive discipline issued, notices provided to employees at time of hire, and written policies, rules, and procedures.

What happens if the employer does not have the required records?

The employer can be subject to a civil fine of \$500 - \$1,000 for every record it is missing and there is a presumption that the employer violated the law if it cannot produce the record at issue.



Enforcement

How is the law enforced?

The law has three enforcement mechanisms:

- Any person (not just an aggrieved employee) can file a complaint with the City's Department of Consumer and Worker Protection.
- Aggrieved individuals can file a complaint in court.
- The City can initiate an investigation or file a complaint in court on its own initiative.

What damages can individuals recover for FWW violations?

The City or a Court can award the following damages for violations of FWW:

- Unpaid premium payments.
- Civil fines to employees for FWW violations ranging from \$200 to \$2,500 for each violation, depending on the violation proven.
- Back pay for loss of any pay or benefits.
- Compensatory damages and other monetary relief to make the employee whole.
- Reinstatement and the rescission of any unlawful discipline issued.
- Order directing employer compliance.
- Injunctive and declaratory relief.
- Civil fines to the City ranging from \$500 to \$1,000 for each violation of the law (only if complaint is filed with the Department of Consumer and Worker Protection).
- Civil fines to the City of up to \$15,000 (only if the City files a claim in court).
- Reasonable attorneys' fees and costs.

What is the statute of limitations for violations of FWW?

If a complaint is filed with the Department of Consumer and Worker Protection, the statute of limitations is three years. If a complaint is filed in court, the statute of limitations is two years.

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