

New York Employment Law Update 2022

by Marc B. Zimmerman, Kathryn T. Lundy and Katie L. Schwartz

A FREEBORN & PETERS LLP CLIENT ALERT

As the calendar flips to 2022 and employers look forward to COVID-19 having less and less of an impact on their business, it is important to be aware and mindful of changes to NYS labor and employment laws that will impact businesses. Below are examples of a few key changes for 2022, including to minimum wage and tip credits, paid family leave, anti-discrimination, whistleblower protection and employee privacy, that may require updates to policies and practices to ensure compliance.



A. Minimum Wage and Tip Credits

Effective **December 31, 2021**, employers in Nassau, Suffolk and Westchester counties must meet the same minimum wage threshold as required in New York City at \$15/hour. Employers in other regions in New York State are required to meet the minimum wage threshold of \$13.20/hour.

For hospitality employers in Nassau, Suffolk, and Westchester counties, an increased tip credit of \$5.00/hour for food service workers and \$2.50 for service employees can be applied. In the other regions of New York State, New York hospitality employers may apply a \$4.40 tip credit for food service employee and \$2.20 for service employees.



B. New York State Paid Family Leave

Employee rights and eligibility under New York State Paid Family Leave ("PFL") has continued to expand in 2022. Effective **January 1, 2022**, the following modifications apply:

- Eligible employees will receive 67% of their average weekly wage, or up to a maximum of \$1,068.36 a week. However, employee payroll contribution remains at 0.511% of their gross wages for the pay period, which is capped at an annual maximum of \$423.71 (up from \$385.34 in 2021).
- PFL is available to all eligible employees, regardless of their citizenship or immigration status.
- The prior cap of intermittent leave has been eliminated, allowing for additional days of intermittent PFL for employees who work an average of more than 5-days per week. Accordingly, employees who work 6-days per week will be entitled to 72-days of PFL to be used intermittently in a 52-week period, and employees who work 7-days per week will be entitled to 84-days of PFL to be used intermittently in a 52-week period.



C. Privacy and Surveillance

Effective **May 7, 2022**, all private sector New York employers must provide employees with written notice of electronic monitoring that may occur in the workplace, including but not limited to, interception or monitoring of telephone conversations, e-mail or internet usage.

Note, given limited guidance on what constitutes "written notice" of electronic monitoring, employers should require all existing employees, and all new hires, to sign an acknowledgment for their privacy and surveillance policies (separate and apart from the general Employee Handbook acknowledgment) and conspicuously post notice of the same in the workplace.

D. Joint Liability in the Construction Industry

Effective **January 4, 2022**, New York State mandates joint liability in the construction industry for unpaid wages owed to employees of subcontractors. The law, A.3350-A/S.2766-C, generally prohibits employees and subcontractors from waiving liability for unpaid wages, benefits, wage supplements and any other remedies (including attorneys' fees and costs incurred by the employee in pursuing such unpaid wages) pursuant to NYLL Section 198.



The law also contains some procedural safeguards that general contractors should consider when negotiating future, or amendments, to existing contracts:

- Requesting certified copies and inspecting subcontractors' payroll records;
- Withholding payments to a subcontractor if the subcontractor fails to comply with a contractor's request for certified payroll records containing all lawfully required payroll information, including information about any fringe benefits paid to the subcontractor's employees;
- Withholding payments if the subcontractor fails to provide the following upon request: the names of workers, including independent contractors; the name of the subcontractor's subcontractor, if applicable; the contract start date; the duration of the work; when applicable, local unions with whom such contractor is a signatory contractor; and the name, address and phone number of a contact for such subcontractor.

Finally, general contractors should review subcontractors existing pay and timekeeping policies to ensure compliance with applicable law.

E. Whistleblower Protection

Effective **January 26, 2022**, Section 740 of the New York Labor Law was modified to include protection of former employees and independent contractors from retaliation for disclosing or threatening to disclose, to a supervisor or public body, *any conduct* that they *reasonably believe* violates any law, rule, regulation, executive order, or any judicial or administrative decision, ruling, or order; or that they *reasonably believe* constitutes a substantial and specific danger to the public health or safety.



This amendment is a meaningful shift in the law as it now only requires a complainant to maintain a reasonable belief of unlawful conduct – they no longer have to be correct in the belief. Accordingly, employers should be mindful of (1) consistently following their complaint procedures by promptly and thoroughly investigating complaints; and (2) training supervisors about the employer's internal complaint procedure and anti-retaliation laws and policies.

F. Discrimination: Expansion of Protected Classifications under New York City Human Rights Law ("NYCHRL")

Effective **March 12, 2022**, the NYCHRL, which prohibits discrimination, harassment and retaliation, will now also apply to domestic workers, including nannies, home care workers, housecleaners, and any other worker who is employed in a home providing childcare, eldercare, companionship or housekeeping services in New York City.

G. Salary Transparency Under the NYCHRL

In a growing trend of pay transparency, effective **May 15, 2022**, it will be an "unlawful discriminatory practice" under NYCHRL for covered employers (employers with 4+ employees), and the agents, to *not* include salary ranges in any advertised job, promotion or transfer opportunity. Disclosure of the salary range may include the lowest and highest salaries the employer in good faith believes it would pay for the job, promotion or transfer at the time of posting. Notably, the law is silent on what constitutes "advertised" and "salary." Accordingly, until further guidance is provided, employers in New York City should apply the foregoing requirement for both internal and external job listings for both salaried and hourly positions.

If you have any questions about how any of the laws discussed above affect your business, please contact
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Marc advises clients on a wide range of labor relations and business issues, including wage and hour compliance, classification issues, restrictive covenants, discipline, management training, policy development, reductions in force and more. He is also a sought-after negotiator and routinely assists management and executives in structuring, drafting and reviewing employment contracts, contractor agreements, separation agreements, restrictive covenants and executive compensation issues.



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Kathryn is regularly called upon for advice and counsel regarding the gamut of complex employment issues including executive compensation or termination issues, wage and hour compliance, classification issues, restrictive covenants, discipline, management training, policy development, reductions in force, investigations, or guidance having to do with compliance with local, state, and federal employment laws, including workplace operations during COVID-19. Kathryn – for so many businesses – is a go-to attorney.



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Katie has commercial and business litigation experience, and has represented clients in state and federal courts. She has additionally defended and prosecuted actions involving contract disputes, partnership disputes, breach of fiduciary duty, business torts (including fraud, tortious interference and unfair competition), cooperative law and rights of shareholders and members of LLCs.

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