

# Wage & Hour Laws

## Refresher and Update

### Lumsden McCormick

## 2025 Exempt Organizations Conference

**Michael E. Hickey, Esq.**

Bond, Schoeneck & King, PLLC

Avant Building, Suite 900

200 Delaware Avenue

Buffalo, New York 14202

Telephone: (716) 416-7024

[mhickey@bsk.com](mailto:mhickey@bsk.com)



# Topics to be covered

1. Overview of wage & hour laws, including exemptions
2. Volunteers
3. Recordkeeping requirements
4. New York Laws – new this year
5. OBBB – overtime deduction

# What Wage & Hour Laws Apply?

## Fair Labor Standards Act

- Applies to nearly all employers
  - Private employers – must be engaged in interstate commerce (not a high threshold these days)

# What Wage & Hour Laws Apply?

- New York Minimum Wage Act & Minimum Wage Orders
  - Apply to Non-Profits, possibly in a substantially reduced manner
    - “The provisions of any wage order issued under this article shall not apply, however, to any non-profitmaking institution which pays and continues to pay to each of its employees in every occupation a wage, exclusive of allowances, of not less than the minimum wage provided in subdivision one of this section”...provided the institution filed a certification to that effect on January 1, 1960 or within 6 months of it first organizing or first employing any employees
  - Do not apply to Public Employers
    - Definition of “employer” in NY Minimum Wage Act specifically excludes employees of “a federal, state or municipal government or political subdivision thereof”

# What Wage & Hour Laws Apply?

- Non-profits – check if a certification was filed!
  - Many benefits:
    - No “call-in” pay
    - No “spread of hours” or “split shift” pay
  - Certification can be revoked if:
    - It contained misrepresentations
    - Non-profit violates remaining legal requirements still applicable to it

# Fair Labor Standards Act

- Basic requirements
  - Must pay the federal minimum wage (\$7.25 – hasn't changed since 2009)
  - Must pay time and one-half for hours worked over 40 in a workweek
- Certain employees are Exempt from these requirements
  - Most common exemptions: Executive, Administrative, Professional
  - Note that teachers are automatically exempt:
    - “The term ‘employee employed in a bona fide professional capacity’ in section 13(a)(1) of the Act also means any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed.” 29 CFR 541.303

# Who Is Exempt?

- Three tests must be applied and satisfied before an employee is considered exempt –
  - (1) Duties test
  - (2) Salary Basis Test
  - (3) Salary Level Test

# Duties Tests – In a Nutshell

- Executive
  - Is their primary duty managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise?
  - Do they customarily and regularly direct the work of two or more full-time employees?
  - Do they have the authority to hire or fire other employees, or their recommendations regarding hiring, firing promotion, etc. are given particular weight?

(cont'd)

# Duties Tests – In a Nutshell

- Administrative
  - Is their primary duty office or non-manual work directly related to the management or general business operations?
  - Does this work require the exercise of discretion and independent judgment with respect to matters of significance?

(cont'd)

# Duties Tests – In a Nutshell

- Professional – Learned or Creative
  - Does their primary duty involve work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction?
  - Or, does their primary duty involve the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor?
    - Note: The “creative professional” requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations.

# Salary Basis Test

- Salary Basis - Employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis
  - If the employee is ready, willing, and able to work, his/her salary may not be reduced except in limited circumstances.

# Permissible Deductions

- Full-day absences
  - Absences for sickness or injury or other personal reasons - employer may **deduct for full-day** absences (without violating the salary basis test) if:
    - the absence is for personal reasons other than sickness or injury; or
    - the absence is because of sickness or injury, as long as the employer has a bona fide plan, policy or practice providing for such a deduction

(cont'd)

# Permissible Deductions

- Full-day absences
  - Disciplinary suspensions - employer may make deductions for unpaid disciplinary suspensions of **one or more full days** imposed in good faith for infractions of workplace conduct rules
    - Suspensions must be imposed pursuant to a written policy applicable to all employees
    - Must be for a violation of a serious “workplace conduct” rule (e.g., workplace violence, sexual harassment)

# Permissible Deductions

- Partial-day absences
  - FMLA - deductions from an exempt employee's salary for partial day absences are permitted if
    - employer is covered by the FMLA;
    - employee is eligible for FMLA leave; and
    - deduction is pursuant to an intermittent or reduced leave arrangement under the FMLA
- Charging accrued time - an exempt employee's accrued time may be charged for partial-day absences, but (unless FMLA) no deductions may be made from the employee's salary when accrued time is exhausted

# Is The Salary Level Test Satisfied?

- FLSA Minimum Salary Level
  - Currently: \$684 per week (\$35,568 per year)
  
- BUT, don't forget about New York...

# New York Minimum Wage Act

- Minimum salary threshold for Administrative and Executive exemptions is currently \$1,161.65
  - Increasing to \$ 1,199.10 per week effective January 1, 2026
  - Note: higher thresholds and minimum wage in downstate NY and NYC
- Minimum wage is currently \$15.50
  - Increasing to \$16.00 effective January 1, 2026
- Administrative and Executive exemptions apply in near identical fashion as federal law
- No salary requirement for Professional Exemption under New York Law (so, only need to meet lower federal salary requirement)

# Volunteers

- No such thing as unpaid volunteers in a for-profit business
- Not-for-profit organizations and public employers can have unpaid volunteers, subject to certain restrictions federal and state law

# Volunteers – Federal

- USDOL has taken the position that individuals who volunteer (usually on a part-time basis) for public service, religious, or humanitarian objectives are not considered employees

(cont'd)

# Volunteers – Federal

- Can volunteer for public sector employers
  - However...
    - Employees of public sector agencies may not volunteer time without compensation to do the same work for which they are employed
    - Intended to avoid manipulation of overtime requirements

# Volunteers – New York

- An individual may perform volunteer work in a not-for-profit organization if the organization operates strictly for charitable, educational or religious purposes
- Other organizations may not use unpaid volunteers

(cont'd)

# Volunteers – New York

- Unpaid volunteers may not:
  - Replace or augment paid staff
  - Do anything but tasks traditionally reserved for volunteers
  - Be required to work certain hours
  - Be required to perform duties involuntarily
  - Be under any contract to hire
  - Be paid for their services (except reimbursement of expenses)

(cont'd)

# Volunteers – New York

- An individual who is a paid employee of a qualified organization may also volunteer for that organization
- However...
  - The type of work they do as a volunteer must be completely different from the type of work they do as an employee

## *Brown v. NYC Dep't of Ed. (2014)*

- Plaintiff sought minimum and overtime wages for the three years he worked for a high school
- School created a “volunteer internship” for plaintiff to mentor students
  - One of plaintiff’s goals in working at the school was to help high schools students by showing them that people cared about them
  - Plaintiff worked at least 40 hours per week for more than three years

(cont'd)

## *Brown v. NYC Dep't of Ed. (2014)*

- School created a “volunteer internship” for plaintiff to mentor students (cont'd)
  - Plaintiff was told from the start that he would work as a “volunteer” and would “help out, but receive no pay”
  - Supervisors gave plaintiff cash from \$40-60 over 20 times, and occasionally paid for his meals and transportation
    - Economic reality: these payments are “nominal” over his three-year relationship with the school – NOT compensation
- Determination: Volunteer

# RECORDKEEPING



# Recordkeeping Obligations


- An employer's time and payroll records are at the center of any DOL audit or wage and hour litigation
- FLSA does not specify the form in which records must be kept (e.g., paper, computer data), but an employer must be able to convert the data into a form that can be viewed and inspected within 72 hours

# Accurate Recordkeeping Is Not Only Required, It's A Good Idea...

- Employers must be able to demonstrate that time records are accurate and reliable
- Time records might be found unreliable where:
  - Supervisors direct employees to falsify time records
  - Supervisors alter time records without defensible, legitimate business reason
  - Employer knows or has reason to know time records are inaccurate

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DOL-Timesheet



FREE

Category: Utilities  
Released: May 09, 2011  
Version: 1.0  
Size: 0.6 MB  
Languages: English, Spanish  
Seller: U.S. Department of La...  
© U.S. Department of Labor

Rated 4+

Requirements:  
Compatible with iPhone, iPod touch, and iPad.  
Requires iOS 3.0 or later

App Support

## U.S. Department of Labor

### DOL-Timesheet

[Developer Page >](#)  
[Tell a Friend >](#)

**Description**

This is a timesheet to record the hours that you work and calculate the amount you may be owed by your employer. It also includes overtime pay calculations at a rate of one and one-half times (1.5) the regular rate of pay for all hours you work over 40 in a workweek.

This DOL-Timesheet does not handle items such as tips, commissions, bonuses, deductions, holiday pay, pay for weekends, shift differentials, or pay for regular days of rest.

**Disclaimer:** DOL is providing this App as a public service. The regulations and related materials reflected in this App are intended to enhance public access to information on DOL programs. This App is a service that is continually under development and it does not include every possible situation encountered in the workplace. The user should be aware that, while we try to keep the information timely and accurate, there will often be a delay between official publication of the materials and their appearance in or modification of this App. Further, the conclusions reached by this App rely on the accuracy of the data provided by the user. Therefore, we make no express or implied guarantees. The Federal Register and the Code of Federal Regulations remain the official sources for regulatory information published by DOL. We will make every effort to correct errors brought to our attention.

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Éste es un horario para registrar las horas que usted trabaja y para calcular la cantidad que su empleador puede deberle. También incluye los cálculos del pago de sobretiempo a base de la tasa de tiempo y medio (1.5) de la tasa regular de pago por todas las horas que usted trabaje en exceso de 40 en una semana laboral.

Este Horario-de-DOL no calcula cuestiones de, por ejemplo, propinas, comisiones, bonos, deducciones, pago por día feriado, pago por fin de semana, turnos diferenciales, o pago por días regulares de descanso.

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# Recordkeeping - Non-Exempt Employees

- Name
- SSN
- Address
- Birth date (<19)
- Sex
- Occupation
- Time/day workweek starts
- Hours worked / day
- Hours worked / week
- Regular hours
- Overtime hours
- Basis of pay
- Rate of pay
- Daily / weekly straight time earnings
- Overtime earnings
- Additions to wages
- Deductions
- Allowances
- Total wages
- Net wages
- Date of payment
- Pay period covered by payment

# Recordkeeping – Administrative, Executive & Professional Exemptions

- Name
- SSN
- Address
- Birth date (<19)
- Sex
- Occupation
- Time/day workweek starts
- Basis of pay
- Rate of pay
- Deductions
- Allowances
- Total wages
- Net wages
- Date of payment
- Pay period covered by payment
- Documentation of basis for wages

# Recordkeeping Compliance

- Ensure your handbook requires employees to accurately record working time
- Educate supervisors:
  - Do not instruct or permit employees to work off-the-clock (including remotely)
  - Do not instruct or permit employees to work through meal breaks
  - Do not instruct, direct or ratify falsification of time records
  - Do not alter time records without explanation or documentation
  - Do not fail to pay overtime because it was not approved
- Ensure time and payroll records are preserved in compliance with state and federal time periods

## New N.Y.S. laws:

- Penalties for failing to pay manual labor weekly
- Unemployment benefits skyrocket
- Jury Duty pay



# Manual Labor Pay Frequency

- The requirement to pay manual workers on a weekly basis has been the law in New York for a century
- However, for most of that period, courts held that employees could not sue their employers if they were paid all wages due, even if the wrong pay interval was biweekly or monthly basis

## Frequency Cont'd.

- That changed in 2019 when the Appellate Division, First Department, held that manual workers who were not paid on a weekly basis could sue to recover liquidated damages equal to 100% of the late-paid wages
- Essentially, the court held that if a manual worker was paid \$2,000 biweekly, but was meant to receive \$1,000 weekly, they would receive an extra \$1,000 for the first week period because of the employer's violation

## Frequency Cont'd.

- Following the 2019 decision, employers who failed to pay manual workers on a weekly basis faced an epidemic of lawsuits
- Most were filed as class actions, and with New York's six-year statute of limitations, the potential exposure was enormous
- Exacerbating the problem is that the definition of "manual worker" is amorphous, creating great uncertainty as to which positions should be classified as "manual"

## Frequency Cont'd.

- Effective May 9, 2025, section 198 of the N.Y. Labor Law was amended to provide that the first time an employer fails to pay a manual worker weekly, but pay pays bi-weekly, the damages due are:
  - Lost interest on the first week
  - At 16% per year
- For a second violation, the old 100% penalty will apply

## Some good news!

- Pay Frequency Law does not apply to governmental agencies (so, public employers are off the hook entirely)
- Non-profits must pay manual workers “in accordance with the agreed terms of employment, but not less frequently than semi-monthly”

# N.Y.S. Unemployment Insurance Benefits

- The U.I. Trust Fund
  - Since 2020, the maximum U.I. benefits per individual as been frozen at \$504/week
  - Because the U.I. Trust Fund was in significant debt
  - The 2025 N.Y.S. budget allocated almost \$7 billion dollars to pay off the debt, thereby freeing the State to increase benefits

# Unemployment Insurance Benefits Cont'd.

- Maximum U.I. benefits will increase to \$869/week in October 2025
- A whopping 72% increase
- Possible disincentives
  - seeking work
  - collecting U.I. benefits and working “off the books”
- Striking employees in N.Y. have only a 14-day waiting period to receive U.I. benefits
  - On February 6, 2020, the N.Y. Labor Law was changed, reducing the wait period from 7 weeks

# Jury Duty Pay

- For the first time since 2003 the N.Y. Judiciary Law is amended to increase the rate jurors are paid for serving
- The increase is from \$40/day to \$72/day, effective June 8, 2025
- A whopping 80% increase
- The rules: “Jury Information for Employers” (revised July 2025) at [www.nyjuror.gov](http://www.nyjuror.gov) (15 pages)

# Jury Duty Pay Cont'd.

- Jurors paid their salary during their entire jury service will not be paid by the state
- The employer of a juror, who employs more than 10 people, must pay at least \$72 per day for the first three days of jury service
- Jurors, whose employers have more than 10 employees and are not paid their salary or wages after the third day of jury service, will be paid by the state \$72 per day, for the days not paid by their employer
- Jurors, whose employers have 10 or less employees and are not paid their salary while they serve, will be paid by the state, \$72 for each day of attendance

# OBBB – Overtime Deduction

- Qualified overtime compensation will be reported on a Form W-2, Form 1099, or other specified statement
- Employers are required to file information returns and furnish statements to taxpayers showing the total amount of qualified overtime compensation during the year
  - Only FLSA-required overtime premium pay qualifies
- OBBB allows deduction for overtime pay of up to \$25,000 (joint) or \$12,500 (single) for qualified overtime compensation
- Excludes highly compensated employees by phasing out deduction for joint filers with AGI over \$300,000
- Applies to tax years 1/1/25-12/13/28

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