



# SECTIONS LABOR AND EMPLOYMENT LAW

## What is Labor and Employment Law?

This pamphlet is intended to provide Employers and Employees with general information about their employment rights and responsibilities in New York State. This pamphlet does not address all applicable employment laws or all employment situations, and is not meant to provide legal advice. Employers and Employees should consult with counsel regarding any questions they may have. In addition, laws change frequently, particularly with labor and employment law. Both employers and employees should keep up to date on these changes.

Employment is a two-way street. Employees are entitled to lawful pay for the work performed, to a safe work environment and to be treated in a non-discriminatory manner. Employers are entitled to their Employees' full performance of legally assigned duties, timely attendance, and compliance with employment policies and procedures. Employees can be disciplined or terminated for not keeping up their side of the bargain; Employers can be held legally accountable for failing in their legal duties to Employees. All Employers – whether large or small businesses or governmental agencies – are expected to know and comply with employment laws.

## Employment Status

### Who is an Employee?

The law distinguishes between “employees” and “independent contractors,” for the purposes of employee benefits, payroll taxes and other factors. It is important to recognize that a worker is not an “employee” or a “contractor” simply based on the worker’s or the Employer’s say-so. Rather, the determination will depend on the economic realities of the situation, especially factors indicating whether the worker is in business for him/herself or is under the control of the Employer. Employers who misclassify their workers could face penalties. Employers and workers with questions about their status should consult with counsel.

### Full Time or Part Time

Employees’ rights and benefits may depend on whether they are employed full time or part time. Generally, Employers define full-time Employees as those who work at least 35-40 hours during a seven-day workweek. Employers may choose to provide benefits, such as paid time off, only to full time Employees. It is important to note, however, that some laws determine what is considered full time employment. For example, the Affordable Care Act defines full time employment as 30 hours a week or more. In other cases, benefit plans will define what number of hours makes an Employee eligible for the benefit.

## Employment “at Will”

New York State is an “Employment-at-Will” state. That means that an Employer may terminate an Employee at any time and for any legal reason or no reason at all. Likewise, an Employee may terminate his or her employment at any time. However, if an Employee has an employment contract (whether actual or inferred) or is protected by a collective bargaining agreement, termination will be subject to the terms of such agreements. For this reason, Employers often make clear in their offer letters, employee handbooks or other writings when Employees are “employees at will” and not subject to contracts.

## Best Practices and Employment Laws

### Employee Handbook

To best protect themselves and their Employees, Employers should establish personnel policies that cover all key areas of hiring, employment, discipline and termination and ensure that their policies comply with applicable federal, state and local laws. Such personnel policies, often set forth in an Employee Handbook, should be distributed, electronically or in hard copy, to all Employees.

Employee Handbooks do not have to list all the rights and obligations of the Employer and Employees, but should include (i) policies and complaint procedures regarding discrimination, sexual harassment and retaliation, (ii) policies and procedures regarding disabilities and reasonable accommodations; (iii) rules on attendance, time records, vacation, sick leave and other leaves, (iv) information on employee classifications, wages, payroll and benefits, (v) policies on workplace health and safety, and (vi) policies on employee performance and conduct, evaluations, records, discipline and termination. In a unionized business, the Handbook may refer Employees to the parties’ collective bargaining agreement.

Many Employers require that Employees confirm in writing that they have received the Employee Handbook. Some Employers require that Employees attend annual benefit and review programs (and sign-in to confirm their attendance), so there is a record that the Employee has been kept current on Employer rules and Employee rights.

## Compensation And Benefits

Many federal, state and local laws govern employment compensation and benefits, including minimum wage, deductions from wages, overtime pay, commissions, meal breaks, health insurance, medical leave, and other leaves of absence.

Employers are required to post in the workplace notices of certain employment rights, such as the applicable minimum wage and workers' compensation laws. Employers are also required to keep accurate employment records, payroll records, and records of hours worked, and to provide Employees with information about how their wages are calculated. There may be different requirements under federal, New York State and local laws, but covered employers must comply with each requirement. Employers must also keep records to demonstrate compliance with these requirements.

Currently, the minimum wage differs under federal and state law, and may depend on the category of employees. Employers should be aware of the minimum wage applicable to their workers and to the federal and other laws on equal pay. New York State law requires Employers to notify Employees of their wages when hired, using a mandatory form.

Employers must pay their Employees for hours worked. The law prohibits most deductions from wages, with designated exceptions such as taxes, insurance premiums, union dues and court-ordered garnishments.

Employers should be familiar with the laws and regulations governing which Employees are exempt from overtime pay and which are non-exempt (and may be entitled to time and a half for time worked in excess of 40 hours per week).

Employers may also be required by law to provide health insurance coverage, public transportation benefits, meal breaks, sick leave, family leave, voting leave, jury duty leave, military leave, and other benefits.

Employers should ensure that their policies and procedures comply with federal, local and state laws, including but not limited to the federal Fair Labor Standards Act (FLSA), the Family Medical Leave Act (FMLA), New York State Labor Laws, New York State Paid Family Leave Law and New York City's Earned Safe and Sick Time Act, and with any collective bargaining agreement or other applicable contract.

## Discrimination And Protected Categories

Employees are not entitled to a perfect workplace but they are entitled to protection from discrimination. Under Federal law, the following are protected categories: age, race, creed, color, religion, gender, sex, pregnancy, national origin, citizen status, mental or physical disability, military status and genetic information. Under New York State law, the following are included as protected categories: age, race, creed, color, religion, gender, gender identity or expression, sex, national origin, citizen status, status as a victim of domestic violence, sexual orientation, genetic characteristics or predisposition, marital status, familial status, pregnancy, mental or physical disability, military status, reproductive health decisions and prior arrest or conviction record. Under New York City law, partnership status is an additional protected category. Other laws may also apply, including laws applicable only to government employees and vendors.

The laws also protect from retaliation Employees who complained or filed a charge of discrimination or harassment, or who participated in an investigation or lawsuit regarding discrimination or harassment.

Employers should include policies in their Employee Handbook regarding discrimination, harassment, retaliation and complaints, and should consistently apply those policies, provide training to supervisors and employees, document all disciplinary actions, document performance reviews, investigate complaints and take prompt remedial action if discrimination or harassment occurs. Likewise, Employees who experiences discrimination or harassment should document all instances carefully and should promptly report the matter to the Employer under the terms of its announced policy and applicable laws.

Potential remedies for proven violations of the laws on discrimination, harassment and retaliation can include reinstatement, compensatory and punitive damages, and attorneys' fees.

## Federal Employment Laws

Federal laws that govern employment matters include the following:

### **Immigration Reform And Control Act**

Employees are required to produce documentation proving that he or she is authorized to be employed in the United States. Upon hire, each employee must complete and sign the employee identification and verification section of the Employment Eligibility Verification Form ("I-9"); and within three business days of commencing employment, each employee must present documentation proving his or her identity and right to work in the United States. An employee with temporary employment authorization will be required to submit updated or new authorization documents prior to the date the authorization expires. Employers may terminate the employment of employees who do not submit the required proof of authorization to work in the United States.

## Federal Employment Laws (continued)

### **Title VII Of The Civil Rights Act Of 1964 (Title VII)**

Title VII covers Employers with 15 or more Employees, and protects those Employees from discrimination based upon race, creed, color, religion, national origin, gender sex and pregnancy (added in 1978), with regard to hiring, termination, promotion, compensation, job training or any other term, condition, or privilege of employment. In addition, it protects Employees from retaliation in employment for filing a charge of discrimination with the Equal Employment Opportunity Commission or state agency, for complaining to the Employer about purported discrimination or for acting as a witness in connection with a discrimination investigation.

Employers may be liable for a “hostile work environment” or for quid pro quo harassment by the Employer, a supervisor, a co-worker or possibly by a vendor or other service provider.

### **Age Discrimination in Employment Act (ADEA)**

The ADEA protects Employees and job applicants over the age of 40 against discrimination or adverse employment actions based on age.

### **Americans with Disabilities Act (ADA)**

The ADA protects Employees and job applicants with mental and physical disabilities against discrimination by Employers with 15 or more Employees. Those disabilities include a physical or mental impairment that substantially limits a major life activity, a perception that an individual has such impairment or a record of such impairment. The law requires Employers, upon request of a disabled person, to provide “reasonable accommodation,” which is a modification that would allow a person to perform the job’s essential functions but does not cause “undue hardship” for the Employer.

### **Family Medical and Leave Act (FMLA)**

The FMLA obligates an Employer with 50 or more Employees to provide “eligible individuals” (those employed at least 12 months and who worked at least 1,250 hours in the previous 12 months) with unpaid leave to care for the Employee’s or a close relative’s serious health condition or to care for a child born to or placed with the Employee within the preceding 12 months. Employees are permitted to take up to 12 workweeks of unpaid leave in a designated 12 month period.

### **Consolidated Omnibus Budget Reconciliation Act (COBRA)**

COBRA obligates Employers with 20 or more Employees to guarantee continued health coverage to Employees, former Employees and qualified beneficiaries after the loss of previous coverage as a result of “qualifying events” such as termination, job hour reduction, disability, death, divorce, or if a dependent child loses their dependent status. Coverage is to continue for 18 months for termination and/or reduction in hours, for 29 months for cases involving disability and for 36 months for death of a covered Employee or divorce. The Employer must give the Employee notice of this eligibility within a defined time and the Employee/participant also has a defined time to make the coverage election. The Employee/participant may have to pay the health insurance premium plus an administrative fee.

## Federal Employment Laws (continued)

### **Employee Retirement Income Security Act (ERISA)**

ERISA provides certain minimum standards for “employee benefit plans” regarding employee and beneficiary participation, funding, administration, benefit accrual, disclosure, survivor benefits and plan termination. It obligates Employers that offer qualified “employee benefit plans” to their Employees to comply with notice and reporting requirements.

### **Health Insurance Portability and Accountability Act (HIPAA)**

HIPAA protects the privacy of medical records and personal health information. The restrictions of this law may impact an Employer when it needs to obtain and use protected information, such as if it administers its own health care plan, when it undergoes review for health benefit decisions, for FMLA purposes (to determine whether Employee has a serious medical condition and/or whether an Employee is able to return to work) and for ADA purposes (when trying to determine parameters of “reasonable accommodation” or when trying to determine appropriate modified work schedule for return to work after work-related injury). Employer may obtain such protected information with a valid authorization.

### **NATIONAL LABOR RELATIONS ACT (NLRA)**

The NLRA protects Employees – not just at unionized workplaces – who engage in various forms of concerted activity related to workplace rights. It established the National Labor Relations Board to investigate charges of unfair labor practices, oversee union elections, and regulate collective bargaining.

### **Occupational Safety & Health Act (OSHA)**

OSHA is intended to ensure a safe and healthy workplace by imposing obligations on Employers and giving rights to Employees. Aside from specific requirements, there is a general duty for an employer to provide a safe work place. In addition, the law forbids Employers from retaliating against Employees who file complaints, assist in OSHA investigations, report work-related injuries, or follow orders or treatment plans of treating physician (including being absent from work while recovering). Under the law, Employers must keep logs and summaries of workplace injuries and illnesses and must notify OSHA upon learning of a workplace accident that results in the death of at least one Employee or hospitalization of 3 or more Employees.

### **Other Benefits and Protections**

Vested retirement programs: Some Employers provide Employees with retirement benefits or enable Employees to set aside part of their wages before taxes in a 401k account (called a defined contribution account). When the Employee has met all requirements to receive these benefits upon retirement, the benefits have “vested.”

## New York State Employment Laws

New York State has its own labor and anti-discrimination laws, and its own agencies for enforcing these laws.

### **New York State Labor Laws**

New York State has different minimum wage laws than those applicable at the federal level. Employers must meet this requirement, which currently varies based on geographic location and size of Employer. New York also requires that all new Employees sign a Notice and Acknowledgment of Wage Rate in English as well as in the Employees' primary language, and that they receive wage statements in accord with the law. New York law also has several rules that do not exist under federal law, such as rules on how often Employees must be paid, rules on payment of certain Employee expenses, laws applicable to minors, and laws prohibiting most deductions from wages.

### **New York State Anti-Discrimination Laws**

New York prohibits discrimination based upon some of the same categories as under federal law, but they are not always defined the same. For example, while the federal Age Discrimination in Employment Act covers employees who are 40 years of age or older, New York State protects employees who are 18 years of age or older. It is therefore important to review the specific State law definitions, as well as the coverage rules.

New York has expanded its anti-discrimination and anti-harassment laws. All Employers in New York State are required to provide their Employees with written policies and procedures for preventing and reporting sexual harassment, written forms to report sexual harassment, and provide annual sexual harassment prevention training. Effective October 11, 2019, protection under the State anti-discrimination and anti-harassment laws has been extended to certain non-employees, such as contractors, subcontractors, vendors, consultants or other persons providing services as part of a contract. Effective February 8, 2020, the definition of a covered employer under the New York State Human Rights Law will be expanded to include all employers within the state, regardless of size. Presently, the law only applies to employers with four or more employees, except with regard to protections against sexual harassment, which applied to employers of all sizes. And effective August 12, 2020, individuals will have three years to report claims of sexual harassment to the NY State Division of Human Rights, rather than the current one year limitation on reporting. Employers must provide newly hired Employees with their anti-discrimination policies both in English as well as in the Employees' primary language.

New York also prohibits discrimination based on certain lawful outside activities, such as the lawful use of consumable products, some political activities, and some recreational activities.

## New York State Employment Laws (continued)

### **New York State Leave Laws and Benefits Protection**

**New York State Paid Family Leave Law:** New York State law provides for leave time and partial wage replacement for Employees who must take time off from work for certain child or family related issues. New York's Paid Family Leave benefits are administered similarly to its Disability programs.

**Workers' Compensation:** Where there is a workplace injury, the Employee may receive benefits through Workers' Compensation, including weekly payments and an award if any debilitating injury is permanent. In exchange, Employees may not bring a suit against the Employer for their injuries. Employers may not retaliate against Employees for bringing a Workers' Compensation claim.

**New York State Disability:** Individuals who are unable to work because of a non-work related disability may be eligible to receive weekly payments through the New York State disability program. This program provides insurance to partially replace lost wages for short term disabilities.

**Unemployment Insurance:** When Employees lose their jobs for certain reasons, they may be eligible to receive partial wage replacement in the form of unemployment benefits. Certain actions by the Employee may disqualify them from receiving unemployment benefits, including voluntarily resigning from employment or committing disqualifying misconduct.

There are other laws that protect an Employee's right to take leave for certain purposes, including jury duty, for court appearances as a witness or victim to a crime, in relation to domestic violence, to vote, to donate blood, to express breast milk and to provide emergency responder services, among other laws.

## New York City Employment Laws

New York City has additional employment laws applying to persons who work in any of the five boroughs of the City (Manhattan, the Bronx, Queens, Brooklyn or Staten Island) and its own agencies for enforcing these laws.

### **New York City Human Rights Law**

The New York City Human Rights Law prohibits discrimination and harassment in New York City. An Employee may file a complaint with the New York City Commission on Human Rights within one year of the last alleged act of discrimination or harassment, or three years from the last act of gender-based harassment.



## New York City Employment Laws (continued)

### **Reasonable Accommodations**

If an Employee requests a reasonable accommodation for a disability or other legally-protected reason, such as religious practices or beliefs, or the Employer has notice that an employee may require an accommodation, the Employer must engage in a cooperative dialogue with the employee to determine what is needed or can be provided. The Employer may ask for information about how the disability or other issue affects the Employee's ability to do his or her job. The Employee may suggest specific accommodations. The Employer must consider the Employee's suggestions and determine, on a case-by-case basis, which accommodation, if any, may be provided. After engaging in the cooperative dialogue with an Employee, the Employer must provide the Employee with a written final determination identifying any accommodation granted or denied.

### **Safe/Sick Leave**

Under the New York City Earned Safe and Sick Time Act ("ESSTA"), Employees who work over 80 hours per year in NYC are entitled to accrue one (1) hour of paid safe/sick leave for every thirty (30) hours worked in NYC, up to forty (40) hours (or five (5) 8-hour days) of paid safe/sick leave, per calendar year.

Safe/sick leave may be taken under ESSTA after the Employee completes 120 days of employment, may only be used to take time off from work scheduled to take place in NYC and may only be used for the reasons permitted under ESSTA. Employees who need to use leave time under ESSTA must provide written notice to the Employer. If an Employee is absent for more than three (3) consecutive days for sick time or safe time, the Employer may require reasonable documentation as allowed by law.

Employers may not retaliate against Employees who use their safe/sick leave time.

### **Temporary Changes To Work Schedules**

Eligible Employees who, after 120 days of continuous employment, have a "personal event" may be entitled to a temporary change to their work schedule on up to two occasions per calendar year. A "personal event" includes any reason for which the Employee may use leave under the New York City Earned Safe and Sick Time Act. Employees seeking a temporary schedule change must submit a written request to the Employer.

Employers may not retaliate against eligible Employees who in good faith request temporary changes to their work schedules.

## Alternative Dispute Resolution (“Adr”)

As litigation becomes more complex and costly, alternatives have been developed which are often grouped under the caption “alternative dispute resolution”. Typically, these include mediation and arbitration.

Mediation occurs when a neutral helps to facilitate a resolution satisfactory to the parties. Arbitration occurs when there is a neutral appointed to act as a judge in the case.

Sometimes, contracts or employment plans require that Employees participate in a mediation and/or arbitration program, rather than taking their cases to court. The contracts or plans often establish the rules that govern the mediation or arbitration. There are various organizations that offer ADR services, including the American Arbitration Association, JAMS or independent mediators or arbitrators.

## There is More

This information is only part of the many rights and obligations of Employers and Employees under federal, state and local laws. Employers and Employees should direct any questions to a labor and employment attorney or other qualified professional.

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