

New York

Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

Topics

I. Discrimination

A. Final Rule Prohibiting Association Discrimination

New York's Human Rights Law prohibits employment discrimination based on age, race, creed, color, national origin, sexual orientation, military status, sex (includes gender identity and transgender status), disability (including being a certified medical marijuana patient and gender dysphoria), predisposing genetic characteristics, familial status, marital status, arrest or conviction, genetic information, pregnancy-related conditions, or domestic violence victim status.

The new regulation makes it an unlawful discriminatory practice for an employer to discriminate against an individual because of that individual's known relationship or association with a member or members of one of the protected categories.

9 NYCRR § 466.14 (Effective Date 05/18/2016).

B. New York Discrimination on the Basis of Gender Identity, Adding Section 466.13 to the Human Rights Law

New York State enacted regulations and enforcement guidance designed to prohibit discrimination on the basis of gender identity, transgender status, gender expression and gender dysphoria.

The new regulations provide that:

- Discrimination on the basis of gender identity is sex discrimination, and the protections in the New York State Human Rights Law (NYSHRL) against gender discrimination also prohibit discrimination on the basis of gender identity or transgender status.
- Harassment on the basis of a person's gender identity or transgender status constitutes sexual harassment.
- Discrimination on the basis of gender dysphoria constitutes disability discrimination, and the prohibitions in the NYSHRL against disability discrimination prohibit discrimination on the basis of gender dysphoria.
- Refusal to provide reasonable accommodations for individuals with gender dysphoria, where requested and necessary, is disability discrimination.
- Harassment on the basis of a person's gender dysphoria is harassment on the basis of disability.

9 NYCRR § 466.13 (Effective Date 01/20/2016).

C. Discrimination Based on Familial Status

The New York Human Rights Law prohibits employment discrimination on the basis of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, and status as a victim of domestic violence. The amendment adds "familial status" to this list of protected classes. Familial status refers to:

- Any person who is pregnant or has a child or is in the process of securing legal custody of an individual who has not attained the age of 18 years, or
- One or more individuals who have not attained the age of 18 years domiciled with a parent or another person who has legal custody of the individual or individuals, or that parent or person's designee.

The Human Rights Law also requires an employer to provide reasonable accommodation for the known disability of an employee or applicant. The amendment provides that nothing in the Human Rights Law can be construed to alter, diminish, increase, or create new or additional requirements to accommodate protected classes.

NY CLS Exec § 296 (Effective Date 01/19/2016).

D. Breastfeeding Mothers' Bill of Rights

New York amended the Breastfeeding Mothers' Bill of Rights to expand protections for breastfeeding mothers.

This amendment gives employees the right to take reasonable unpaid breaks at work to pump breast milk for up to three years following childbirth. The employer must make reasonable efforts to provide a room or other location where a woman can express her breast milk in privacy. The employer cannot discriminate against a woman for her decision to express breast milk at work. The prior law did not contain requirements for employers.

NY CLS Pub Health § 2505-a (Effective Date 01/01/2016).

E. Reasonable Accommodation of Pregnancy-Related Condition

State human rights laws have been amended to require an employer to provide reasonable accommodation to an employee or applicant with a "pregnancy-related condition," which is defined as a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically-accepted clinical or laboratory diagnostic techniques. However, in the employment context, this is limited to conditions which, upon providing reasonable accommodation, do not prevent the individual from performing in a reasonable manner activities involved in the job or occupation sought or held. Moreover, for purposes of the human rights law, pregnancy-related conditions are treated as temporary disabilities.

The amended laws make it an unlawful discriminatory practice to refuse to provide reasonable accommodation to an employee's or applicant's known pregnancy-related conditions in connection with a job or occupation sought or held. An employee must cooperate by providing medical or other information that is necessary to verify the condition's existence or for consideration of the accommodation, but she has the right to have medical information kept confidential.

NY CLS Exec § 292 and NY CLS Exec § 296 (Effective Date 01/19/2016).

F. Sexual Harassment Employer Coverage

The New York Human Rights Law prohibits employers of four or more employees from engaging in unlawful discriminatory practices against employees and applicants. This amendment expands the employer coverage threshold in actions involving a claim for sexual harassment. For purposes of an action for sexual harassment only, the term “employer” means all employers in the state.

NY CLS Exec § 292(5) (Effective Date 01/19/2016).

II. Pre-Employment Inquiry Guidelines

No new laws or regulations enacted in 2015 or 2016.

III. Family and Medical Leave

No new laws or regulations enacted in 2015 or 2016.

IV. Wage and Hour Laws

A. Minimum Wage

New York has enacted legislation that will gradually raise the minimum wage to \$15.00 an hour under different schedules in three state regions: 1) New York City; 2) “downstate,” which includes Nassau, Suffolk and Westchester counties; and 3) the remainder of New York State (“upstate”). The legislation also sets a different schedule of increases for New York City businesses with 10 or fewer employees.

The schedule of minimum wage increases is as follows:

Effective Date	Workers Employed in New York City by Businesses with 11 or More Employees	Workers Employed in New York City by Businesses with 10 or Fewer Employees	Workers Employed in Nassau, Suffolk and Westchester Counties	Workers in the Remainder of New York State ("Upstate")
December 31, 2016	\$11.00 per hour	\$10.50	\$10.00	\$9.70
December 31, 2017	\$13.00 per hour	\$12.00	\$11.00	\$10.40
December 31, 2018	\$15.00 per hour	\$13.50	\$12.00	\$11.10
December 31, 2019	\$15.00 per hour	\$15.00	\$13.00	\$11.80
December 31,	\$15.00 per hour	\$15.00	\$14.00	\$12.50

Effective Date	Workers Employed in New York City by Businesses with 11 or More Employees	Workers Employed in New York City by Businesses with 10 or Fewer Employees	Workers Employed in Nassau, Suffolk and Westchester Counties	Workers in the Remainder of New York State ("Upstate")
2020				
December 31, 2021	\$15.00 per hour	\$15.00	\$15.00	To be determined

After the increase to \$12.50 per hour on December 31, 2020, the minimum wage for upstate workers will continue to increase according to an indexed schedule the Director of the Division of Budget will set, in consultation with the New York Department of Labor, until the minimum wage reaches \$15.00 per hour. Beginning in 2019, the Director of the Division of Budget will conduct an analysis of the economy and the effect the increased minimum wage will have in each of the state's three wage regions to determine whether a temporary suspension of the scheduled increases is necessary.

Under the new law, the minimum wage for tipped employees is two thirds of the applicable minimum wage rounded to the nearest five cents, or \$7.50, whichever is higher. In addition, a phased-in schedule of minimum wages for workers in fast food establishments took effect beginning on December 31, 2015, and remains unchanged by the new law.

NY CLS Labor § 652 (Effective Date 04/04/2016).

B. Foreign Corporation Shareholder Liability

The New York Business Corporation Law provides that the 10 largest shareholders of non-public corporations shall be jointly and severally liable for all debts, wages or salaries due to any of its laborers, servants or employees (other than contractors) for services performed for the corporation. The law requires a claimant to give notice in writing to the shareholder within 180 days after termination of services. The claimant may then file an action against a shareholder within 90 days after the return of an unsatisfied judgment against the corporation to enforce the judgment. This amendment makes the shareholder liability provisions applicable to shareholders of foreign corporations doing business in New York.

NY CLS Bus Corp § 1319 (Effective Date 01/19/2016).

C. Wage Deductions

The law amends the New York wage deduction law by extending the expiration date of the act from November 6, 2015 to November 6, 2018.

NY CLS Labor § 193 (Effective Date 10/26/2015).

D. Equal Pay Exceptions & Liquidated Damages and Wage Discussion & Disclosure Protections

Exceptions to the state's equal pay statute have been expanded, and the amount of liquidated damages that may potentially be awarded for equal pay violations has increased.

Additionally, new worker protections relating to asking about, discussing, or disclosing wages have been instituted.

Equal Pay Exceptions & Liquidated Damages

The state's equal pay statute prohibits paying an employee less than an employee of the opposite sex in the same establishment for equal work on a job requiring equal skill, effort, and responsibility that is performed under similar working conditions. However, the law permits wage differentials in limited situations.

An amendment to the statute permits a wage differential based on a bona fide factor other than sex, such as education, training, or experience. To be valid, the differential must not be based upon or derived from a sex-based differential in compensation, and must be job-related with respect to the position and consistent with business necessity. However, a differential will not be permitted if the employee demonstrates the employer uses a particular employment practice that causes a disparate impact based on sex, an alternative practice exists that would serve the same business purpose and not produce a differential, and the employer refused to adopt the alternative practice. Under the amendments, "business necessity" means a factor that bears a manifest relationship to the at-issue employment. Additionally, the amendments provide that employees will be deemed to work in the "same establishment" if they work in the same geographic region (no larger than the same county), taking into account population distribution, economic activity, and/or the presence of municipalities.

Under a separate statute, an employer can be required to pay liquidated damages for wage payment violations unless it demonstrates a good-faith basis for believing its underpayment of wages complied with the law. Generally, liquidated damages are capped at 100% of wages due. However, amendments to the statute allow liquidated damages up to 300% of wages due for willful equal pay violations.

Wage Disclosure Protections

The amendments to the equal pay statute also ban an employer from prohibiting an employee from asking about, discussing, or disclosing his or her wages or another employee's wages. But, the prohibition does not apply to employees with access to other employees' wage information because of their essential job functions who disclose the information to an employee who does not have such access unless disclosure was in response to a complaint or charge, or to further an investigation, proceeding, hearing, or action under the law, including an employer-conducted investigation.

However, if an employer creates a written policy and provides it to all employees, it can establish reasonable workplace and workday limitations on the time, place, and manner of inquiries, discussion, or disclosure if they are consistent with standards developed by the state labor commission and all other state and federal laws. These policies may include prohibiting an employee from discussing or disclosing another employee's wages without that employee's prior permission. An employee's failure to adhere to these limitations on disclosure provides an employer an affirmative defense to charges it violated the law if any adverse action taken against the employee related to his or her failure to adhere to the limitations set forth in the employment policy, and not because the employee merely asked, discussed, or disclosed wages.

The amendments provide that an employee is not required to disclose his or her wages. Additionally, the law does not limit the rights of employees provided under any other law or collective bargaining agreement.

NY CLS Labor § 194 and NY CLS Labor § 198 (Effective Date 01/19/2016).

E. Unpaid Wages

New York law provides that the 10 largest shareholders of a privately held corporation are personally liable for all debts, wages, or salaries due to any of the corporation's laborers, servants, or employees, other than contractors, in the event of an unsatisfied judgment against the corporation for unpaid services rendered by the laborers, servants or employees. The new amendment extends the law's application to shareholders of any foreign corporation when the unpaid services were performed in New York. Prior to the amendment, this provision applied to certain domestic corporations only. The laborer, servant, or employee must give written notice to the shareholder within 180 days after termination of his or her services that he or she intends to hold the shareholder liable.

NY CLS Bus Corp § 630 (Effective Date 01/19/2016).

F. New York Final Rule on Methods of Wage Payment (12 NYCRR 192)

The New York State Department of Labor (NYDOL) adopted a final regulation setting the conditions by which employers in New York State can pay wages by direct deposit or by debit card. The regulation applies to all employees who work in New York State except for any person employed in a bona fide executive, administrative, or professional capacity whose earnings exceed \$900 per week. The regulation also does not apply to employees who work on a farm that is not connected with a factory.

Requirements for Notice & Consent

All employers that remit their employees' wages by direct deposit or by debit card are now required to provide a highly specific notice form to those employees. The notice must:

- describe, in "plain language," all of the employee's options for receiving wages (i.e., by check, direct deposit, and/or debit card);
- expressly state that the employer cannot compel the employee to accept wages by direct deposit or debit card;
- expressly inform the employee that s/he may not be charged any fees for services that are necessary for the employee to access the wages in full; and
- provide a list of locations (that must be in "reasonable proximity" to the workplace or the employee's residence) where the employee can access and withdraw the wages at no charge, if the employer is offering the employee the option to receive wages by debit card.

The final regulation requires an employer to obtain an employee's written consent prior to issuing wages by direct deposit or debit card. The regulation further provides that an employee's consent may be withdrawn at any time. If an employee does withdraw his or her consent, the employer has a maximum of two weeks to stop payment by direct deposit or debit card and to provide wages to that employee by check.

In addition, the final regulation provides that consent is negated if an employer intimidates, coerces or threatens to take adverse employment action (e.g., suspension, termination, loss of shifts) to any employee who refuses to accept wages by direct deposit or debit card.

Similarly, an employer cannot make acceptance of wages by direct deposit or debit card a condition of hiring or of continued employment.

This notice and consent form must be presented to employees in English and in the employee's primary language (provided the NYDOL has issued a sample notice and consent form in that language). The notice and consent forms must inform the employee of his or her right to access and print the notice form. The NYDOL has also mandated that employers keep copies of the notice and consent form for six years following the last payment of wages by direct deposit or debit card. In addition, the NYDOL has stated that direct deposit authorizations executed before the effective date of the rule will remain valid only if the employees who executed those authorizations also receive notices that comply with the new regulation.

Requirements for Paying Wages by Direct Deposit

In order to pay employees by direct deposit, an employer must:

- provide notice to the employee in the manner discussed above;
- obtain written consent from the employee in manner discussed above;
- maintain a copy of the written consent for the duration of the employee's employment and for a period of six years following the cessation of the employment relationship;
- provide a copy of the written consent to the employee in the manner discussed above; and
- deposit the pay to the financial institution selected by the employee.

Requirements for Paying Wages by Debit Card

In order to pay employees by debit card, an employer must:

- provide notice to the employee in the manner discussed above;
- obtain written consent from the employee and provide a copy of the written consent to the employee in the manner discussed above;
- wait seven business days, even if the employer receives consent from the employee to issue wage payments by debit card, before allowing the consent to take effect;
- provide access to an automated teller machine that is located within a reasonable travel distance from the worksite or the employee's home and allows employees to make withdrawals at no cost;
- provide at least one method to withdraw up to the total amount of wages for each pay period, or the balance remaining on the payroll debit card, without the employee incurring a fee;
- ensure that the funds on the debit card never expire; and

- maintain a copy of the written consent for the duration of the employee's employment and for a period of six years following the cessation of the employment relationship.

The regulation also prohibits employers from directly or indirectly passing along to employees certain fees and costs associated with the use of debit cards. An employer also cannot use a payroll debit card to issue a loan or advance on wages, and also is prohibited from receiving any kickback or financial remuneration from the debit card issuer, card sponsor, or third party for delivering wages by payroll debit card.

Finally, if there is any change or modification in the terms and conditions of the use of the payroll debit card, including any changes in the itemized list of fees, the employer is obligated to provide a notice of the change at least 30 days before any change takes effect. This notice must be written in plain language, in the employee's primary language or in a language the employee understands, and in at least 12-point font. If the issuer charges the employee any new or increased fee within 30 days of the date the employer has provided the employee with written notice of the change, the employer must reimburse the employee for the amount of that fee.

12 NYCRR 192 (Effective Date 03/07/2017).

G. Wage Theft Notice & Penalties

New York has amended its wage theft notice and penalty provisions.

The most important change is that the effective date of a previously approved provision eliminating the Wage Theft Prevention Act's annual February notice requirement has been retroactively changed from February 27, 2015, to December 29, 2014. Moreover, the current bill pegs its effective date to the effective date in the previous bill: February 27, 2015.

A slight change was made to a penalty provision. As a result, employers will be required to post specific information on the state labor department's website after the department issues an order assessing a civil penalty against an employer for a repeated, willful, or egregious violation. Previously, the information contained in the report only had to be provided to the department.

Additionally, the requirement that the department investigate alleged violations during an entire six-year period (i.e., the statute of limitations for wage violations) unless it otherwise notifies all affected employees has been removed.

The wage theft notice provision is codified at NY CLS Labor § 195. The report and posting requirement will be moved from NY CLS Labor § 218 to NY CLS Labor § 219-c. The amended investigation-related provisions will be codified at NY CLS Labor § 198 and NY CLS Labor § 663 (Effective Date 02/23/2015).

V. Drug Testing

No new laws or regulations enacted in 2015 or 2016.

VI. Noncompete and Other Employment Agreements

No new laws or regulations enacted in 2015 or 2016.

VII. Workplace Safety

No new laws or regulations enacted in 2015 or 2016.

VIII. Workers' Compensation

Provisions governing assessments to be levied against a group self-insurer that defaults on its workers' compensation obligations have been slightly amended. First, the amendments provide that the initial assessment that must be levied within 120 days of default will be an interim assessment. Second, the assessment will be levied on members of a group self-insurer as they are known at the time of assessment. Finally, the 120-day time period does not apply to subsequent and further deficit assessments that exceed the interim assessment.

NY CLS Work Comp § 50 (Effective Date 07/02/2015).

IX. Miscellaneous