FEDERAL AND NEW YORK STATE WAGE AND HOURS LAW: A BRIEF SUMMARY

by
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Fair Labor Standards Act of 1938

The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § *201 et seq.* is a potent and effective federal statute designed to remedy the failure of employers to pay the federal minimum wage and overtime pay to non-supervisory level employees . The FLSA is a strict liability law; the employer's intent or lack of knowledge is generally irrelevant. The law imposes stringent recordkeeping requirements on an employer, including maintaining daily, "precise" employee time records and detailed payroll records. It allows employees to initiate "opt-in" collective actions seeking redress under the law for multiple plaintiffs. The statutory limitations ("look back") period for damage calculations is two years, but in alleged cases of willful violations, the "look back" period is three years.

In addition to the recovery of any underpayment of wages, where the violation is found to be willful, the FLSA authorizes the court to assess liquidated (compensatory) damages in an amount equal to the underpayment. The FLSA mandates the employer to pay reasonable attorney's fees and costs to counsel of prevailing plaintiffs. The law also imposes personal liability on owners and officers of corporate entities responsible for the failure to comply with the law.

The current federal minimum wage is $7.25. A premium wage equal to one and one-half times the employee's regular rate of hourly pay must be paid for all hours worked in excess of forty in a given workweek. The workweek is a fixed and regular recurring period of 168 hours. Each week stands on its own; an employee cannot average the wages over multiple weeks to make up for a shortage in a given week.

Some occupations are exempt from the overtime provisions of the FLSA. "White collar' occupations such as professional, executive, and administrative employees are exempt if the employees exceed a certain salary level ("salary test") and their work meets the enumerated duties ("duties test") of the particular exemption. Other exemptions include certain computer employees, outside salespeople, and highly compensated employees. Drivers engaged in interstate commerce are exempt under the Motor Coach Act and the Motor Carrier Act. Maritime seamen, air transportation, and interstate railroad employees are also exempt from the overtime provisions.

Casual babysitters, employees at amusement and recreation establishments, organized camps, religious and non-profit educational conferences are exempt from both minimum wage and overtime requirements. Independent contractors are totally excluded from FLSA coverage.

New York Labor Law

The FLSA, however, pales in comparison to employee protection under New York State law. While there is substantial overlap with the FLSA, New York law is considerably broader. Aggrieved employees filing wage and hour lawsuits in federal court invariably assert supplemental jurisdiction to bring in claims under the state law. Here is a non-exhaustive list of the enhanced protections afforded under New York Law:

> The New York Labor Law protects not only wages and overtime, but it also protects wage supplements *(e.g.*, vacation or holiday pay, sick leave, fringe benefits, *etc*.) for all employees including both exempt and non-exempt FLSA employees (NYLL §§190 [1] and 198[c]).
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> New York bars the kickback of wages (NYLL §198-B), charge backs, misappropriation of tips, and the withholding of non-authorized payroll deductions (NYLL §193).
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> Eight hours constitutes a day's work, but workers may agree to work longer at an increased compensation (NYLL §160[3]).
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> The law mandates employees are allowed time off for meals from twenty minutes to one hour depending on the nature of the work and the duration of a shift (NYLL §162).
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> For most wage claims, New York has a six-year statute of limitations (NYLL §663[3]).
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> Rule 23 ("opt-out") class actions are permitted to enforce New York wage and hour laws in contrast to the FLSA collective actions ("opt-in") that requires a non-party employee to file with the court a consent to join a pending lawsuit.
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> Effective January 4, 2022, the State Legislature passed the Construction Industry Wage Theft Law (NYLL §198-e) holding general contractors jointly and severally liable for a subcontractor's failure to pay wages, benefits, and wage supplements to their workers. An employee must give the general contractor ten days' notice to cure before commencing the lawsuit and the general contractor shall only be liable for underpayments incurred in the previous three years. A subcontractor is still liable under the six-year statute of limitations.
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> There are special contract requirements for sales representatives (NYLL §191-B) and requirements on the prompt payment of earned sales commissions upon termination of employment (NYLL §191-C).
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> New York Law recognizes the FLSA "white collar" exemptions. It generally follows the FLSA "duties test" but imposes a much higher salary threshold than the FLSA to qualify

for the exemption. As of January 1, 2026, an employee must first make at least $66,300.00 annually in New York City, Long Island, and Westchester County before determining if they meet the "duties test" to qualify for the exemption.

Every employer shall establish, maintain, and preserve for not less than six years contemporaneous, true, and accurate payroll records showing for each week worked the hours worked, the rate or rates of pay, whether paid by the hour, shift, day, week, salary, piece, commission, or other basis; gross wages; deductions; allowances, if any, claimed as part of the minimum wage; and net wages for each employee, plus such other information as the commissioner deems material and necessary. For all employees who are not exempt from overtime compensation as established in the commissioner's minimum wage orders or otherwise provided by New York state law or regulation (NYLL § 661).

Articles 19 and 19-A (NYLL §§ 652-674) empowers the State Commissioner of Labor to establish minimum regulations and wage orders for specific industries. Three wage orders are of particular importance:

The Wage Order for Miscellaneous Industries and Occupations (12 NYCRR 142) covers any individual employed, suffered or permitted to work by an employer except federal, state, or municipal employees, baby-sitter, in-home companions who do not perform housekeeping, farm laborers, outside salespersons, taxicab drivers, staff counselors at children's camps, and executive, administrative, and professional employees who satisfy the duties and salary tests. The wage order establishes the current minimum hourly rate of $17.00 in N.Y.C., Long Island, and Westchester County and $16.00 in the rest of the state. The Wage orders specifies what records employers must keep for at least six years, including the number of hours worked daily and weekly together with the time of arrival and departure of each employee. It also covers overtime rate, call-in pay, spread of hours pay,[1] allowances for meals, lodging and utilities, the requirements for tip credits against the minimum wage, and required uniforms.

The Hospitality Industry Wage Order (12 NYCRR 146) includes any restaurant or hotel as broadly defined in the order and covers any individual employed in the industry except federal, state, or municipal employees, and executive, administrative, and professional employees. The Wage Order covers the basic minimum hourly wage, tip credits, overtime hourly rates, call-in pay, spread of hours pay, uniform maintenance pay, cost of purchasing required uniforms, and credits for meals and lodging. It regulates what records are required to be maintained by the employer, and mandates in detail the regulations related to tip credits, tip sharing, and tip pooling and what records must be preserved. One major departure from the Miscellaneous Wage Order is that hospitality workers are required to be paid on an hourly basis. If a worker is incorrectly paid on a flat salary or per diem basis for all hours worked, then the total weekly wage must be divided by 40 hours to arrive at the employee's hourly rate (§ 146-2.5).

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[1] An employee is entitled to one additional hour of pay at the basic minimum wage rate if the interval between the beginning and end of an employee's workday, including working time plus off duty time, exceeds 10 hours, or if an employee is required to work a split shift where the hours are not required are not consecutive excluding a one hour meal break.

The Minimum Wage Order for the Building Service Industry covers every person, corporation, or establishment engaged in whole or in part in renting, servicing, cleaning, maintaining m selling or managing buildings or building space. The industry includes, but is not limited to, real estate owners, building owners, operators, lessors, managing agents and independent contractors. It does not include building trades contractors engaged exclusively in construction or buildings owned, operated, and used solely for religious, charitable, or educational purposes by a non-profitable organization organized exclusively for religious, charitable, or educational purposes. A major provision of this wage order is that a janitor who works in a residential building can be paid on a unit basis in lieu of a minimum hourly wage. The current rate for N.Y.C., Long Island, and Westchester County is $11.35 per unit and for the rest of the state it is $10.70 per unit. The FLSA does not have a comparable provision and requires janitors to be paid the federal minimum wage. For buildings with relatively few units, a janitor might do better suing for the federal minimum wage and overtime rate than relying on the per unit rate.

An employee may recover in a civil action the amount of wage underpayments, together with costs, all reasonable attorney's fees, prejudgment interest (9%), and unless the employer proves a good faith basis to believe that its underpayment was in compliance with the law, an additional amount as liquidated damages equal to 100% of the total of such underpayment found to be due. Any agreement between an employer and employee to work for less than the law mandates is no defense to such action (NYLL §663[(1]).

Any judgment or court order awarding remedies shall provide that if any amounts remain unpaid upon the expiration of 90 days following issuance of judgment or 90 days after expiration of the time to appeal and no appeal is then pending, whichever is later, the total amount of the judgment shall automatically increase by fifteen percent (NYLL §198[4]).

NYLL §191(1) requires manual workers to be paid on a weekly basis not later than seven calendar days after the end of the week in the wages were earned. The Appellate Division, First Department held in *Vega v. CM & Associates Construction Management, LLC*, 175 A.D.3d 1144, 1146 (1st Dept. 2019), that a manual employee who was paid every two weeks was entitled to recover liquidated damages equal to 100% of the underpayment of wages that were not timely paid. In addition, the employee was entitled to recover prejudgment interest and attorney's fees under the remedies enumerated in NYLL §198(1-a). A subsequent Second Department decision, *Grant v Global Aircraft Dispatch, Inc.*, 223 A.D.d3d 712, 715-716 (2d Dept. 2024) held that there was no private right of action for a manual employee to sue its employer for failing to pay on a weekly basis. Federal courts tended to follow the *Vega* decision, and before the N.Y. Court of Appeals had the opportunity to resolve the split between the two appellate divisions, the State Legislature intervened and amended NYLL § 198(1-a) to expressly incorporate a private right of action for a delay in payment, but limited the damages to daily interest for each late payment in situations where the employer is a first time offender and it paid its employees' wages on a regular payday not less frequently than semi-monthly. However, the amendment retains an employee's right to recover liquidated damages equal to 100% of the late payment of wages in situations where employers 1) failed to pay weekly wages less frequently than semi-monthly; or 2) have been adjudicated in violation of NYLL §191(1) in any case commenced after the effective date of the amendment.

Under the New York Wage Theft Protection Act, an employee is required to give a newly hired employee within 10 days of the initial start date, a wage notice in the employee's primary language specifying, *inter alia*, the rate or rates of pay, and whether it is paid by the hour, shift, day, week, salary, piece, commission, or other; any tip, meal or lodging allowances taken by the employer; the regular payday; and the name, address and contact information of the employer (NYLL § 195[1][a-e]). The employee may recover in a civil action damages of $50 for each day the notice is not provided up to a maximum of $5,000, together with costs and attorney's fees. An employer may assert as an affirmative defense that it made complete and timely payment of wages, notwithstanding its failure to provide the wage notice (NYLL §198[1-b]).

The New York Wage Theft Protection Act also requires an employer to furnish each employee a payroll statement with every wage payment including, *inter alia*, the dates of work covered for the payment; the name, address and phone number of the employer; the rate or rates of pay, and whether it is paid by the hour, shift, day, work week, salary, piece, commission, or other; the number of hours of overtime and the overtime rate of pay; the gross wages; and any itemized deductions and other allowances deducted from the gross wages (NYLL §195[3]). The employer may recover in a civil action damages of $250 for each workday the violation occurred up to a maximum of $5,000, together with costs and attorney's fees. An employer may assert as an affirmative defense that it made complete and timely payment of wages, notwithstanding its failure to provide the wage notice (NYLL §198[1-d]).

In *Guthrie v. Rainbow Fencing Inc*., 113 F. 4th 300 (2d Cir. 2024), the Second Circuit held that employees suing in federal court for violations of the New York Wage Theft Protection Act (NYLL §§ 195[1][a] and 195[3]) for the failure of an employer to provide the statutory required wage notice upon hire and the payroll statements with each wage payment do not have Article III standing to recover the associated statutory penalties unless they allege and prove a "concrete injury" which is a direct tangible "downstream harm" such as a loss of wages or delay in payment resulting from the technical violation. Mere "informational injury" of not receiving the required paperwork is not sufficient to satisfy federal standing requirements. Lower federal courts are divided on whether employees have met their threshold burden to establish Article III standing. In situations where an employee is deemed not to have standing in federal court, the employee can commence an action in state court to recover the statutory penalties and attorney's fees.

The Penal Law was recently amended to include "wage theft" as a larceny offense which is defined as the failure to pay wages "at the minimum wage rate and overtime, or promised wage, if greater than the minimum wage rate and overtime, to said person for work performed." (NY Penal Law §155.05(f). *See also* the criminal penalties under NYLL §198-A).

This summary is intended to illustrate the complexity of the FLSA and the NYLL. It scratches only the surface of the myriad wage and hour situations that can arise in the workplace. Most disputes involve mixed questions of law and fact that preclude complete resolution on a summary judgment motion. Below are links to primary source material and representative cases.

Wage and Hour Resources

i. Ellen C. Kearns, *et al*, The Fair Labor Standards Act, 4th ed. (BNA 2020) with 2025 cumulative supplement [2 vols./2248 pp.]

The FLSA Bible; it has answers and cited cases by circuits for virtually every conceivable situation. (There is a copy in the EDNY Library.) .

ii. U.S. Code, Title 29, Chapter 8 - Fair Labor Standards (§§ 201 to 219)

Free online access: https://www.law.cornell.edu/uscode/text/29/chapter-8

U.S. Code, Title 29, Chapter 9 - Portal to Portal Pay (§§ 251 to 262)

Free online access: https://www.law.cornell.edu/uscode/text/29/chapter-9

iii. Code of Fed. Reg. (CFR), Title 29, Subtitle B, Chapter V - Wage and Hour Division (Parts 500 to 871)

Free online access: https://www.law.cornell.edu/cfr/text/29/chapter-V

iv. U.S. Department of Labor, Handy Reference Guide to the Fair Labor Standards Act

Free online access: https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa

v. NY Labor Law, Articles 6, 19, and 19-A (§§ 191 to 199-a; 652-674)

Free online access: http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO:

vi. NY Codes, Rules and Regulations (NYCRR), Title 12, Chapter II, Division of Labor Standards, Subchapter B, Minimum Wage Orders

Part 141: Building Service Industry
Part 142: Miscellaneous Industries and Occupations
Part 146: Hospitality Industry

Free online access: https://forms.labor.ny.gov/WP/CR141.pdf

https://forms.labor.ny.gov/WP/CR142.pdf
http://forms.labor.ny.gov/WP/CR146.pdf

vii. NYS Department of Labor, The Wage Theft Prevention Act

Free online access: https://dol.ny.gov/wage-theft-and-labor-standards-law

viii. U.S. Department of Labor, Wage and Hour Division, Fact Sheet #56A: Overview of the Regular Rate of Pay Under the Fair Labor Standards Act (FLSA)

Free online access: https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate

ix. U.S. Department of Labor, Wage and Hour Division, Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA)

Free online access: Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA) | U.S. Department of Labor

Representative Cases

A selective sample of important wage and hour cases:

Anderson v Mt. Clemons Pottery, 328 U.S. 680 (1948) (where there are no or inaccurate time records "we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result may be only approximate. *See* Note, 43 Col.L.Rev. 355.

"The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of § 11(c) of the Act.")

Kuebel v. Black & Decker (U.S.) Inc., 643 F.3d 352 (2d Cir. 2011)("where the employee's falsification [of time records] were carried out at the instruction of the employer or the employer's agents, the employer cannot be exonerated by the fact that the employee physically entered the erroneous hours into the timesheets. As the district court emphasized, Kuebel admits that it was he who falsified his timesheets, notwithstanding B&D's official policy requiring accurate recordkeeping. But his testimony-- which must be credited to summary judgment stage-- was that he did so because his managers instructed him not to record more than forty hours per week. He specifically testified that at company meetings and during discussions with one of the supervisors, it was conveyed to him that he was not to record overtime no matter how many hours he actually worked. In other words, Kuebel has testified that it was B&D, through its managers, that caused the inaccuracies in his timesheets. While ultimately a factfinder that might or might not credit this testimony, this is a determination for trial not summary judgment.")

Barfield v. New York City Health and Hospitals Corp., 537 F.3d 132 (2d Cir. 2008)(A nurse employed through a temporary staffing agency was able to establish joint liability against both the hospital and the employment agency. The circuit further reaffirmed the principle that liquidated damages were the norm and not the exception in wage and hour cases.)

Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d. Cir. 2015) (A court is required to hold a hearing and approve any stipulation of settlement and dismissal of an FLSA claim to ensure that the agreement is fair and reasonable under the circumstances.)

Yu v. Hasaki Restaurant, Inc., 944 F.3d 395 (2d Cir. 2019) (No *Cheeks* judicial review is required if the parties elect to settle with a Rule 68 offer and acceptance.)

Herrera v. Commes Des Garcons, 84 F.4th 110, 116 (2d Cir. 2023)("[t]he District Court's holding reflects too crabbed a reading of the Complaint, which is fairly read to allege that the Plaintiffs were regularly required to work during lunch. Lunch breaks count towards the forty-hour total unless employees enjoy a daily "[b]ona fide meal period" during which they are "completely relieved from duty," and an employee "is not relieved if he is required to perform any duties, whether active or inactive, while eating." 29 C.F.R. § 785.19(a). That standard is not met if the employee is required to be on-call to handle whatever work arises during the lunch break.")

Guthrie v. Rainbow Fencing Inc., 113 F. 4th 300 (2d Cir. 2024)(employees suing in federal court for violations of the New York Wage Theft Protection Act (NYLL §§ 195[1][a] and 195[3]) for the failure of an employer to provide the statutory required wage notice upon hire and the payroll statements with each wage payment do not have Article III standing to recover the associated statutory penalties unless they allege and prove a "concrete injury" which is a direct tangible "downstream harm" such as a loss of wages or delay in payment resulting from the technical violation. Mere "informational injury" of not receiving the required paperwork is not sufficient to satisfy federal standing requirements).

Andryeyeva v. New York Health Care, Inc., 33 N.Y.3d 152 (2019)(Court of Appeals upheld the"13 hour rule" for live-in home health aides which allows employers to pay for only 13 hours of a 24 hour shift provided the aide gets 8 hours of sleep, with 5 of those hours uninterrupted, and an additional 3 hours of meal breaks.. If the aide does not get the required sleep and meal breaks, then employers are liable to pay the aide for the full 24-hour shift.)

Rubin v. HSBC Bank USA,[2] 20-cv-04566, Dkt No. 154 (E.D.N.Y. 2025) (Senior District Judge Block granted Plaintiff's attorneys' fees of $550,506.50 in a FCRA case, holding: "arriving at the right calculus for fixing attorneys' fees has bedeviled courts for years." (*Id*. at*5; citation omitted). . . .

"Historically, the Eastern District courts have been making reasonability determinations for decades out of whole cloth Predictably, the rates found to be reasonable 30 or 40 years ago were lower than the current

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[2] Although the ***Rubin*** case is not a wage and hour case, the opinion makes clear that the hourly rates enunciated are intended to be applied in all attorney fee shifting cases.

ranges. They tended to climb upward in fits and starts, rather than evolving in a systematic, discernible fashion correlated to that nebulous “reasonable paying client” standard. (*Id*. at*7; citation omitted). . . .

“Adjusted for inflation and market conditions, I have rounded out the forum rates in the Eastern District to now be $450-$650 for partners, $300-$450 for senior associates, $150-$300 for junior associates, and $100-$150 for paralegals. Moreover, some stability is sensible in order to avoid having to establish new rates every year; accordingly, barring major inflationary deviations, I would not revisit them for five years.” (*Id*. at*17-18; footnotes omitted.)