

SHRM-LI Last Fridays “Lunch and Learn” Webinar:

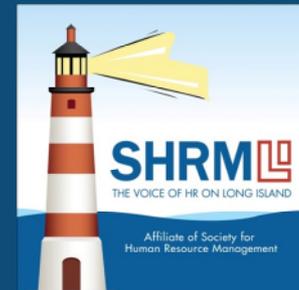
A Summary of the Recent Updates to the Wide World of New York Employment Law

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Introductory Statement

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Weekly Pay for Manual Workers

- ◆ Manual workers must be paid weekly.
 - Those who spend more than 25% of their time engaged in physical labor.
- ◆ Recently, the Appellate Division (First Department) held a private right of action exists for the untimely payment of wages.
- ◆ The employee could recover liquidated damages: **the full amount of the wages that were late.**
- ◆ So if a manual worker was paid \$2,000 for the bi-weekly period, the employee could recover, presumably, \$1,000 (the amount of wages which were earned in the first week).
- ◆ This is true even though the manual worker received his or her full wages!
- ◆ Expect a ton of litigation on this issue.

Final Overtime Rule

The Final Rule increases the salary level for the white collar exemptions (executive, administrative, and professional), but at a level less than proposed by the Obama administration.

- ◆ New salary level for white collar exemptions will be **\$684 per week (\$35,568)**. Currently, the required federal salary is \$455 per week (\$23,660).
 - The proposed rule had been \$679 (\$35,308), and the Obama proposal was \$913 (\$47,476).
- ◆ The new salary level for highly compensated employees will be **\$107,432**. Currently, the required salary level is \$100,000.
 - The proposed rule was \$147,414, and the Obama proposal was \$134,004.

Overtime Rule Continued

- ◆ There is no change to the duties test.
- ◆ The Final Rule will not provide for automatic increases (as Obama proposed).
- ◆ The Final Rule will permit employees to use nondiscretionary bonuses and incentive payments (including commissions) that are paid at least annually to satisfy up to 10% of the standard salary level.
- ◆ **The Final Rule is effective January 1, 2020.**

Salary Threshold

- ◆ Employers with exempt workers who currently earn more than \$455, but less than \$684, per week, and who satisfy the duties requirements, may comply with the new rule by:
 - increasing employee salaries to the new level;
 - limiting hours to preclude overtime work; and/or by
 - reclassifying employees as non-exempt.
- ◆ Employers also must consider how the new rule interacts with the corresponding exemptions under the myriad of state laws.
- ◆ For example, under New York law, the federal threshold is still lower than the New York threshold for executives and administrative, but professionals in New York may need a salary increase.

Third-Party Harassment Discrimination: A New Wave of Discrimination

- ◆ As fiscal year 2019 ends for the Equal Employment Opportunity Commission (EEOC), it has announced it is pursuing several new discrimination suits, including one alleging a **casino failed to protect female staffers from sexual harassment by patrons.**
- ◆ While employers do not have the ability to control their customers' or vendors' actions, Title VII of the Civil Rights Act requires employers to provide their employees with nondiscriminatory working conditions. Further, employers are liable for third-party harassment if they “unreasonably fail to take appropriate corrective action reasonably likely to prevent the misconduct from recurring.” *Lapka v. Chertoff*, 517 F.3d 974, 984 (7th Cir. 2008).
- ◆ Such misconduct need not be sexual to be actionable. In *EEOC v. Costco*, a customer was stalking an employee, but the employer's investigation concluded the customer's actions toward the employee were not offensively sexual, so the employer was slow to act to protect its employee. The Seventh Circuit held the employer unreasonably failed to separate the employee and the stalker, who was causing her to feel fearful and intimidated.

Newly Released NYC Enforcement Guidance

- ◆ The NYC Commission on Human Rights released guidance reiterating the obligations of most employers in NYC to avoid discrimination based on national origin and immigration status.
- ◆ The guidance reiterates the following primary points to New York City employers:
 - ◆ Discrimination or harassment in favor of U.S. citizens over other work-authorized individuals is generally prohibited.
 - ◆ Questions about work authorization must be made in a non-discriminatory manner.
 - ◆ All hired employees must be treated in a non-discriminatory manner.
 - ◆ Employers must not engage in document abuse and ask for verification or reverification documentation beyond the documents authorized by federal law.
 - ◆ Implementing an adverse action based solely on a “no match” letter from the Social Security Administration is problematic.
 - ◆ Threatening investigations by U.S. Immigration and Customs Enforcement (ICE) for harassing purposes violates the New York City Human Rights Law (NYCHRL).
 - ◆ Undocumented employees, if hired, are fully covered by the NYCHRL.
 - ◆ Retaliation is prohibited if an individual opposes discrimination based on his or her national origin or perceived immigration status.

NYC Independent Contractor Coverage

- ◆ While courts have generally interpreted the New York City Human Rights Law (NYCHRL) as providing anti-discrimination protections to individuals performing services as independent contractors, effective in January 2020, amendments to the NYCHRL clarify such protections.
- ◆ These amendments also clarify that while the NYCHRL's coverage of a business is limited to those businesses with at least four persons in their "employ" at all times during the period beginning 12 months before the start of an unlawful discriminatory practice and continuing through the end of such unlawful discriminatory practice:
 - ◆ This four-person threshold does not apply to claims of gender-based harassment;
 - ◆ Natural persons working as contractors in furtherance of the business's enterprise count toward this threshold, as well as the employer's parent, spouse, domestic partner or child (however, the employer's parents, spouse, domestic partner, or children are not protected by the NYCHRL).

Thank You

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