Got It Covered? Often Overlooked Wage and Hour Issues For New York Employers
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HYPOTHETICAL

CASE STUDY #1: Paul (non-exempt technician) normally works M-F, 8:30 – 5 (with a 1/2 hour unpaid lunch). ABC Corp. issues email that workers must keep to 40-hour workweek unless there are “extenuating circumstances.” Paul acknowledges receipt of email. On Thursday, another supervisor asks Paul to help on a project. He ends up working until 11 pm on Thursday and 10 pm on Friday. On Friday evening, the second shift manager asks Paul what he is working on. Paul tells him that he is working on a time-sensitive project for his supervisor and another supervisor. When reviewing payroll, Paul’s direct supervisor sees that he worked 11 hours of overtime that week and is upset by this.

1. Does ABC Corp. have to pay Paul?
   a. Yes. Paul was most likely “suffered or permitted to work.”
      i. He was assigned tasks by separate supervisors
      ii. He kept working on these tasks.
      iii. He informed the second-shift manager that he was working and was permitted to continue doing so.

2. Can ABC Corp. discipline Paul?
   a. Maybe…but probably should not.
      i. Language in email was ambiguous.
         1. What are “extenuating circumstances”?
         2. Who decides if OT is necessary?

CASE STUDY #2: Sue is a non-exempt “helper”, paid bi-weekly at a base hourly rate. She is also eligible for monthly production bonuses based solely on how many error-free items her team produces. The incentives are calculated and paid each bi-weekly pay period. During busy periods, Sue frequently works more than 40 hours in a workweek.

1. Is Sue’s regular rate (for OT purposes) the base hourly rate she receives?
   a. No. Sue’s bonus payments must also be factored into the regular rate.
   b. While true bonus payments left solely to an employer’s discretion are not “wages,” non-discretionary incentive payments tied to productivity must be factored into an employee’s “regular rate” for OT purposes.
   c. Under FLSA regulations, the total bonus for the two-week pay period must be allocated, if possible, between the weeks for which the commission is applicable.
      i. For example, if Sue received a $100 bonus for two weeks worth of work, the employer must determine which portion of the $100 was for the first week of work, and what portion was for the second week. Then, each allocated portion is added to the other forms of includible compensation for each workweek and divided by the total number of hours in Sue’s workweek to determine her “regular rate.”

2. Any other issues?
a. She’s appears to be a manual worker but is paid bi-weekly – more on this later…

CASE STUDY # 3: Bill is a salaried, exempt employee who earns $36,000 per year as a mid-level manager for a private, for-profit business in New York. Due to a payroll glitch, Bill erroneously receives what amounts to a double paycheck for six semi-monthly pay periods over the course of three months (a windfall of $9,000). Bill does not report the error. The employer wants to recoup the accidental payments and confronts Bill about the situation. Bill claims he thought that he received a raise because they had generally been implemented at around the same time. Bill offers to pay the money back, preferably by automatically deducting an agreed-upon amount from his paycheck each pay period.

1. Permissible?
   a. No, NYSDOL now prohibits deductions to recover overpayments and other monies owed unless they are “similar payments” to those expressly authorized under Section 193.

2. Other options?
   a. Employee can voluntarily pay the money back as a separate transaction (so long as company clearly states that no repercussion will follow if employee refuses to do so).
   b. If employee refuses to voluntarily pay the money back, company can institute a separate legal proceeding to recover the money (e.g., small claims court action).

CASE STUDY #4: Copywriter Peggy Olsen needs to catch the 5:00 train home, so she’d like to take her meal break at the end of the day. Permissible?

1. No. Meal breaks for employees working during the day should be taken between 11:00AM and 2:00PM, and may not be taken at the end of the day to shorten the workday.

CASE STUDY #4 (cont’d): New employee Don Draper wears great hats and suits, and smokes like a chimney. He’d like to split up his 30-minute lunch break into 3 10-minute smoke breaks. Permissible?

1. No. The meal break must be at least 30 continuous minutes in length, unless special approval for unusual circumstances is obtained from the Commissioner of Labor (in which case the meal break may not be less than 20 minutes).
I. PROPERLY COMPENSATING EMPLOYEES

A. Overview of Minimum Wage and Overtime Laws

1. Federal Law

   a. The Fair Labor Standards Act ("FLSA") requires employers to pay covered employees: (1) at a rate equal to the minimum hourly wage for their first 40 hours worked per week; and (2) at a rate of one and one-half times their regular rate for hours worked in excess of 40 in a workweek. 29 U.S.C. §§ 206 & 207. The federal minimum wage is currently $7.25 per hour.

   b. The FLSA generally applies to all public and private sector enterprises that are “engaged in commerce” or engaged “in the production of goods for commerce.” 29 U.S.C. §§ 206 & 207.

   c. Enterprises are covered if they:

      (1) Have individual employees whose job duties require them to “engage in commerce” or engage in the “production of goods for commerce,” or require them to handle, sell, or work on goods or materials that have been moved in or produced for commerce;

      (2) Have gross annual revenues of at least $500,000;

      (3) Are engaged in the operation of a school, hospital, or a residential facility primarily engaged in care of the sick, aged, or mentally ill; or

      (4) Are an activity of a public agency. 29 U.S.C. § 203(s).

   d. Not all workers are covered “employees” for purposes of the FLSA.

      (1) Individuals excluded from coverage include, by way of example: bona fide independent contractors, trainees, bona fide volunteers, prisoners, and certain homeworkers, shareholders in cooperative ventures, and partners in a business.

   e. In addition, certain types of employees may be exempt from the minimum wage and/or overtime provisions of the FLSA. The most common examples of exempt employees include so-called “white collar” employees, e.g., bona fide executive, administrative, professional and computer employees, and outside sales workers.
(1) To qualify for these exemptions, employees must generally meet certain tests regarding their job duties and must generally be paid at least $455 per week on a “salary basis” or, in certain limited circumstances, on a “fee basis.” These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. Exempt computer employees may be paid either at least $455 per week on a “salary basis” or on an hourly basis at a rate of at least $27.63 per hour.

(2) In order for executive and administrative employees to also be exempt from New York’s separate minimum wage and overtime requirements, they must earn at least $543.75 per week and satisfy certain “duties” tests.

(a) There is no minimum salary level under New York state law for the professional exemption.

f. Other categories of employees who are exempt under the FLSA include domestic workers, certain individuals employed by seasonal amusement or recreational establishments, certain agricultural workers, certain employees of motor carriers, and certain highly-compensated workers.

(1) USDOL has proposed regulations which would impact the FLSA exemption for certain domestic workers. They are currently pending.

2. New York Labor Law/Minimum Wage Orders


(1) The New York Labor Law (“NYLL”) also requires payment of a minimum hourly wage to covered “employees.” The current minimum wage in New York is $7.25 per hour (the same as the current federal minimum wage).

(2) Under the NYLL, the relevant definition of “employee” includes “any individual employed or permitted to work by an employer in any occupation.” N.Y. Lab. L. § 651(5). “Employee” also includes “any individual employed or permitted to work in any non-teaching capacity by a school district or board of cooperative educational services (except that Sections 653 through 659 of the NYLL do not apply to such employees).” Id.
(3) However, under the NYLL’s minimum wage provisions, “employee” does not include any individual who is employed or permitted to work:

(a) in service as a part time baby sitter in the home of the employer, or someone who lives in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping;

(b) in labor on a farm;

(c) in a bona fide executive, administrative, or professional capacity;

(d) as an outside salesman;

(e) as a driver engaged in operating a taxicab;

(f) as a volunteer, learner or apprentice by a corporation, unincorporated association, community chest, fund or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(g) as a member of a religious order, or as a duly ordained, commissioned or licensed minister, priest or rabbi, or as a sexton, or as a Christian science reader;

(h) in or for such a religious or charitable institution, which work is incidental to or in return for charitable aid conferred upon such individual and not under any express contract of hire;

(i) in or for such a religious, educational or charitable institution if such individual is a student;

(j) in or for such a religious, educational or charitable institution if the earning capacity of such individual is impaired by age or by physical or mental deficiency or injury;

(k) in or for a summer camp or conference of such a religious, educational or charitable institution for not more than three months annually;
(l) as a staff counselor in a children’s camp;

(m) in or for a college or university fraternity, sorority, student association or faculty association, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and which is recognized by such college or university, if such individual is a student;

(n) by a federal, state or municipal government or political subdivision thereof; or

(o) as a volunteer at a recreational or amusement event run by a business that operates such events, provided that no single such event lasts longer than eight consecutive days and no more than one such event concerning substantially the same subject matter occurs in any calendar year (any such volunteer shall be at least eighteen years of age). N.Y. Lab. L. § 651(5).

b. New York State Department of Labor Minimum Wage Orders

(1) The New York State Department of Labor (“NYSDOL”) has promulgated rules, known collectively as “Minimum Wage Orders,” covering workers in the following industries/occupations:

(a) Building Service Industry (12 N.Y.C.R.R. § 141);

(b) Miscellaneous Industries & Occupations (including provisions applicable to employees in non-profit making institutions which have not elected to be exempt from coverage under a minimum wage order) (12 N.Y.C.R.R. § 142);

(c) Non-Profitmaking Institutions (which have elected the option to pay the statutory wage exclusive of allowances in lieu of wage order coverage) (12 N.Y.C.R.R. § 143);

(d) Hospitality Industry (12 N.Y.C.R.R. § 146); and

(e) Farming (including occupations in agriculture particularly hazardous for the employment of children) (12 N.Y.C.R.R. § 190).
The applicable Minimum Wage Orders generally require payment to covered “employees” of a “basic minimum hourly wage” and additionally contain other wage-related requirements (including notice and record-keeping requirements). Some of the Minimum Wage Orders also impose state-law overtime requirements. These requirements are in addition to the FLSA’s mandates, and generally provide that covered “employees” must receive overtime pay at the rate of 1½ times their regular rate of pay for all hours worked over 40 in a workweek. Certain “residential employees” must receive overtime pay at the rate of 1½ times their regular rate of pay for all hours worked over 44 in a workweek.

The Minimum Wage Orders also each contain specific exemptions from the definition of “employee” to whom the respective requirements do not apply. Notably, some occupations are exempt from overtime under the FLSA, but are still entitled to overtime under state law, e.g., under the “Miscellaneous Industries & Occupations” Minimum Wage Order, at a rate of 1½ times the state minimum wage for their overtime hours, regardless of the amount of their “regular rate” of pay.

Examples:
1. Certain employees covered under the Amusement and Recreational Exemption (See 29 U.S.C. § 213(a)(3));
2. Certain employees covered under the Computer Employee Exemption (See 29 U.S.C. § 213(a)(17));
3. Certain employees covered under the Federal Motor Carrier Act (See 29 U.S.C § 213 (b)(1); NYSDOL Op. Ltr. RO-10-0025 (June 30, 2010));

B. “Suffered or Permitted to Work”

Under the FLSA and NYLL, non-exempt employees must be compensated for all “hours worked,” in other words, for all time that they are “suffered or permitted to work.” See 29
C.F.R. § 785.11; N.Y. Lab. L. § 2(7) (“employed” defined to include “permitted or suffered to work”).

1. Determining Whether an Employee Was “Suffered or Permitted to Work”
   a. Under the FLSA, the key test to the “suffer or permit to work” rule is whether the employer knew, or, through reasonable diligence, should have reason to know, that the employee was performing the work. See 29 C.F.R. § 785.11. As the FLSA regulations provide, “[w]ork not requested but suffered or permitted is work time.” Id.

   (1) The reason for the employee continuing to work is immaterial. For example, the FLSA regulations provide that an employee may be “suffered or permitted to work” where s/he voluntarily continues work at the end of the shift because the employee:

   (a) Is a pieceworker;
   (b) May desire to finish an assigned task;
   (c) Wishes to correct errors in work;
   (d) Pastes work tickets; or
   (e) Prepares time reports or other records. 29 C.F.R. § 785.11.

   (2) An employer may be liable for an employee’s work time if a supervisory employee has knowledge that the employee is working on the employer’s behalf. Courts have considered a variety of factors in deciding whether an employer had knowledge including whether:

   (a) The employer’s position allowed him/her to see the employee work;
   (b) There is too much work for the allotted regular working hours;
   (c) There is repeated and numerous occasions of extra work performed; or
   (d) The employer has a pattern or practice of accepting the work.

   (3) An employer may not be deemed liable for work performed by an employee that it has no knowledge or no reason to
know about. *(i.e., where an employee was purposely withholding working time information from the employer.)*

2. **Work Performed Away from the Job Site**
   
a. The “suffered and permitted” to work rule is applicable to work performed away from the job site and work performed at the employee’s home. 29 C.F.R. § 785.12. Again, the important test under the FLSA is whether the employer knows or has reason to believe that the work is being performed.

   b. For example, employers are required to pay employees who perform work at home, if management knows of this practice and allows this practice to continue. 29 C.F.R. § 785.12. Occasional, so-called “*de minimis*” work performed at home *(i.e., generally less than 10 minutes)* will usually be considered to be non-compensable. However, if the aggregate time spent working at home *(i.e., checking and sending e-mails, reviewing documents, etc.)* is more than a *de minimis* amount, the hours worked must generally be paid.

3. **Recommended Steps to Limit Unauthorized Work**
   
a. In order to minimize the potential liability for work performed without authorization, employers should consider promulgating a policy requiring non-exempt employees to obtain advance authorization from their supervisor to perform work at home, to work off normal hours, or to perform overtime work, and that discipline may result if work is performed without such authorization.

   b. Even if an employer has a specific policy against the performance of unauthorized work, the employer must compensate employees when it “suffers or permits” such unauthorized work to occur. The employer must not merely promulgate a rule against performing unauthorized work; it must also exercise control and make every effort to ensure that unauthorized work is not being performed, *i.e.*, it must enforce the policy. 29 C.F.R. § 785.13. If unauthorized work is performed, the employer should, at least initially, pay the employee but may consider imposing disciplinary measures against the employee for disobeying the employer’s policy.

**C. Timely Payment of Wages – N.Y. Lab. L. § 191**

New York law sets forth specific timing requirements for the payment of wages to covered employees. As a matter of law, covered employees cannot be required as a condition of employment to accept wages at periods other than as provided by Section 191 of the Labor Law. N.Y. Lab. Law § 191(2).
1. Who is Covered?
   a. All private sector employers are covered by NYLL § 191, including, according to NYSDOL, charter schools, private schools, and not-for-profit corporations.
      
   
   b. The protections of NYLL Section 191 apply to the following types of employees working for covered employers in New York: (1) manual workers; (2) railroad workers; (3) commissioned salespersons; and (4) clerical and other workers. Bona fide executive, administrative and professional employees who earn more than $900 per week are exempt from the protections of NYLL Section 191. N.Y. Lab. L. § 190(7).

2. Manual Workers
   a. Who is a Manual Worker?
      
      (1) “Manual Worker” means a mechanic, workingman or laborer. N.Y. Lab. L. § 190 (4).
      
      (2) NYSDOL follows a long-standing interpretation that individuals spending more than 25% of working time engaged in “physical labor” fit within the meaning of the term “manual worker.”
      
      (3) “Physical labor” has been interpreted broadly by NYSDOL to include numerous physical tasks performed by various types of employees including:

      (a) chauffeurs (see NYSDOL Op. Ltr. RO-07-0072 (July 11, 2007) (loaded and unloaded luggage; opened and closed doors, and spent 20 minutes per day washing and fueling vehicle));

      (b) pizzeria workers (see NYSDOL Op. Ltr. RO-08-0061 (Dec. 4, 2008) (duties include: physical preparation, packaging, and clean up in the making and sale of pizzas; lifting and carrying large/heavy items; cleaning
and operating equipment; and cleaning prep area, pots/pans, and food service area and floors); and

(c) hairdressers (see NYSDOL Op. Ltr. RO-08-0061 (Dec. 4, 2008) (duties include: cutting, coloring, washing and styling hair; cleaning work station; and cleaning/washing sinks, equipment, and other shared work spaces).

b. Time of Payment

(1) Manual workers **must** be paid at least once a week, and not later than **seven (7) calendar days** after the week in which the wages were earned. N.Y. Lab. L. § 191(1)(a)(i).

(2) Manual workers for **non-profit entities** must be paid in accordance with their agreed terms of employment but not less frequently than semi-monthly. N.Y. Lab. L. § 191(1)(a)(i).

c. NYSDOL Variance

(1) Certain large employers may receive permission from the New York Commissioner of Labor to pay manual workers less frequently than weekly, but not less than semi-monthly. N.Y. Lab. L. § 191(1)(a)(i).

(2) Eligible employers are those that have had:

   (a) An average of 1,000 employees in New York for the three years preceding the application; or

   (b) An average of 3,000 out-of-state employees for the three years preceding the application and an average of 1,000 employees in New York for the year preceding the application. N.Y. Lab. L. § 191(1)(a)(ii); Frequency of Pay FAQs at 4.

(3) In determining whether to grant a variance, NYSDOL will consider a number of factors including the employer’s:

   (a) financial stability; and

   (b) history of compliance under the Labor Law.

(4) **Note:** According to NYSDOL, if the manual workers are represented by a union, the union must consent to the variance. Frequency of Pay FAQs at 4.
3. Railroad Workers
   a. Who is a Railroad Worker?
      (1) “Railroad worker” is defined as any person employed by an employer who operates a steam, electric or diesel surface railroad or is engaged in the sleeping car business, but does not include a person employed in an executive capacity. N.Y. Lab. L. § 190(5).
   b. Time of Payment
      (1) Wages must be paid on or before Thursday of each week; and
      (2) Must include wages earned during the seven-day period ending on the Tuesday of the preceding week.

4. Commission Salespersons
   a. Who is a Commission Salesperson?
      (1) “Commission salesperson” means any employee whose principal activity is:
         (a) the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article, or thing; and
         (b) whose earnings are based in whole or in part on commissions. N.Y. Lab. L. § 190(6).
      (2) The term “commission salesperson” does not include an employee whose principal activity is of a supervisory, managerial, executive or administrative nature.
   b. Time of Payment
      (1) Wages must be paid in accordance with the agreed terms in the mandatory written commission agreement between the employer and the commissioned salesperson, but must be paid:
         (a) At least once a month; and
         (b) No later than the last day of the month following the month in which the wages are earned. N.Y. Lab. L. § 191(1)(c).
(2) However, if a commission salesperson’s regular wages, salary, drawing accounts or commissions are “substantial,” then additional compensation earned, including extra or incentive earnings, bonuses and special payments, may be paid less frequently than once per month, but in no event later than the time provided in the employment agreement or compensation plan.

(a) NYSDOL has opined that a commissioned salesperson’s “wages, salary, drawing accounts or commissions” may be considered “substantial” if they total over $900 per week. See NYSDOL Op. Ltr. RO-10-0010 (Oct. 15, 2010); Frequency of Pay FAQs at 4.

c. When is a commission earned?

(1) Once a commission is “earned,” it is considered “wages” under the New York Labor Law and will be subject to all other New York Labor Law provisions regarding the payment of wages.

(2) The commission will be considered “earned” at the time and under the conditions specified in the written agreement between the employer and the commission salesperson.

(a) According to NYSDOL and the New York Court of Appeals, if the agreement is silent on this topic, a commission may be considered to be earned in accordance with the past dealings between the employer and commission salesperson. See Pachter v. Bernard Hodes Group, Inc., 10 N.Y.3d 609, 618 (N.Y. 2008) (finding that extensive course of dealings over 11 years provided ample support for an implied contract that commissions were not considered earned until the making of adjustments for nonpayments by customers and the cost of an assistant, as well as miscellaneous work-related expenses); NYSDOL Op. Ltr. RO-08-0110 (Sept. 2, 2008).

(b) If there are no such past dealings, according to NYSDOL and state case law, then a commission will generally be considered “earned” when the commission salesperson produces a person/entity ready, willing, and able to enter into a contract upon the employer’s terms.
5. Clerical & Other Workers

a. Who are Clerical Workers or Other Workers?

(1) The term “clerical and other worker” includes all employees not falling within the definitions of manual workers, railroad workers or commissioned salespersons and also excludes any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of $900 per week. N.Y. Lab. L. § 190(7).

b. When is Payment Due?

(1) “Clerical and other workers” must be paid at least semi-monthly on regular, predetermined pay days. N.Y. Lab. L. § 191(1)(a)(i).

6. Bona Fide Executive, Administrative and Professional Employees

a. Section 191 does not require any specific frequency for paying individuals employed in a bona fide executive, administrative, or professional capacity earning more than $900 per week. See NYSDOL Op. Ltr. RO-09-0161 (June 18, 2010); N.Y. Lab. L. § 191.

(1) The USDOL has previously taken the position that employees who are not exempt under the FLSA must be paid wages due “on the regular payday for the workweek in question.” See USDOL Op. Ltr. WHM 99:5355 (BNA) (July 20, 1998); see also 29 C.F.R. § 778.106 (“The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends.”).

D. Wage Deductions – N.Y. Lab. L. § 193

Subject to specific, limited exceptions, New York employers are prohibited from making deductions from an employee’s wages, either directly or through a separate transaction. N.Y. Lab. L. § 193.

1. Who is Covered?

a. All private sector employers must comply with Section 193 of the Labor Law.

b. According to NYSDOL guidance, Section 193 does not cover federal, state and local government employers. Specifically, the NYLL excludes “a governmental agency” from the definition of employer for purposes of Section 193. See NYSDOL FAQs,

c. According to NYSDOL guidance and caselaw, Section 193 covers all employees of covered “employers,” including employees who are exempt from the FLSA’s and NYLL’s minimum wage and/or overtime requirements. *Id.; Pachter*, 10 N.Y.3d at 617.

2. Scope of Permissible Deductions

a. Although Section 193 of the New York Labor Law generally prohibits employers from making deductions from wages, the statute does contain limited exceptions for the following:

(1) Deductions which are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency. N.Y. Lab. L. § 193(1)(a).

  (a) According to the NYSDOL, these deductions are allowed where any law, rule or regulation authorizes or requires an employer to deduct wages from an employee’s pay (e.g., for taxes, social security, wage garnishments for child or spousal support, etc.). See Wage Deduction FAQs at 1.

(2) Deductions which are expressly authorized in writing by the employee and are for the benefit of the employee, provided that such authorization is kept on file on the employer’s premises.

  (a) According to the statute, these permissible deductions are expressly limited to:

  1. payments for insurance premiums (e.g., deductions made for medical, eye, and dental coverage and disability or life insurance);

  2. payments for pension or health and welfare benefits (e.g., deductions for 401K accounts, pension plans, “529” college savings accounts, and health and welfare funds, traditionally made in accordance with a collective bargaining agreement);

  3. contributions to charitable organizations (e.g., deductions for the United Way);
4. payments for United States bonds;
5. payments for dues or assessments to a labor organization; and
6. similar payments for the benefit of the employee. N.Y. Lab. L. § 193(1)(b).

(b) NYSDOL regulations limit the amount of permissible deductions which may be made for the “similar payments” described in Section 193 to no more than, in the aggregate, **10%** of the gross wages due to the employee for the particular pay period. 12 N.Y.C.R.R. § 195.1.

(3) “Separate Transactions”

Section 193 not only prohibits direct deductions from wages, but also prohibits employers from requiring employees to make the same payment by a “separate transaction.” N.Y. Lab. L. § 193(2). In other words, if the payment would not be permitted as a wage deduction, the employer cannot generally require the employee to make the payment by a separate transaction (e.g., writing a personal check to the employer).

3. NYSDOL’s Narrow Interpretation of “Similar Payments For the Benefit of the Employee”

a. In recent years, NYSDOL has narrowly construed the types of wage deductions that it considers to be permissible as “similar payments for the benefit of the employee.”

(1) For years, the NYSDOL’s interpretation of Section 193 had focused moreso on whether a particular deduction was “for the benefit of the employee”, rather than on whether it was “similar” to the other enumerated permissible deductions, e.g., for insurance, charitable contributions, etc.

(2) More recently, however, NYSDOL has shifted its focus on whether the payment is sufficiently “similar” to these permissible deductions. Consequently, NYSDOL now takes the position that all non-similar deductions are illegal even though the deductions are for the employee’s benefit and even if the employee consents in writing.

b. NYSDOL has issued guidance identifying the following permissible “similar payments”: 
(1) Wage deductions for an employee to purchase stocks, bonds, or securities (because they are “similar payments” to pension or health and welfare benefits and payments for United States Bonds);

(2) Wage deductions for pre-paid legal services (because they are a “similar payment” to that of an insurance premium).

c. Based upon its more recent narrow interpretation of the scope of permissible “similar payments,” the NYSDOL now considers the following to be impermissible deductions:

(1) To recover a wage overpayment, wage advances, and loans to employees (See Wage Deduction FAQs at 4-5; NYSDOL Op. Ltr. RO-09-0152 (Jan. 21, 2010) (overpayments); NYSDOL Op. Ltr. RO-09-0099 (Oct. 5, 2009) (loans to employee); NYSDOL Op. Ltr. RO-09-0006 (Aug. 3, 2009 (wage advances);

(2) To recover tuition payments/reimbursement made by an employer on behalf of an employee (See Wage Deduction FAQs at 5; NYSDOL Op. Ltr. RO-07-0003 (Oct. 23, 2008)(tuition reimbursement program); NYSDOL Op. Ltr. RO-08-0090 (July 31, 2008) (tuition assistance program));

(3) For employee purchases of shoes, clothing items, and personal protective equipment (See Wage Deduction FAQs at 5);

(4) For an employee’s use of a vehicle, including the use, purchase, repair, or maintenance of the vehicle, whether owned by the employer or owned by the employee and used for business (Id. at 6; NYSDOL Op. Ltr. RO-09-0038 (March 30, 2009));

(5) For parking expenses (NYSDOL Op. Ltr. RO-10-0170 (Dec. 9, 2010) (parking garage fees)), unless, according to NYSDOL guidance, the expenses are listed under Section 132 of the Internal Revenue Code (See Wage Deduction FAQs at 5));

(6) To recoup unearned or advanced leave benefits (Id. at 6);

(7) For purchases of food by an employee at an employer-subsidized cafeteria, e.g., where an employee uses her ID to “swipe” for the payment of the food items and the purchase amount is later deducted from the employee’s wages (NYSDOL Op. Ltr. RO-09-0171 (May 10, 2010)), or at an
employer’s gift shop, vending machines, pharmacies, etc. (See Wage Deduction FAQs at 5); and

(8) To recover expenses associated with an employee’s cell phone or PDA usage (NYSDOL Op. Ltrs. RO-09-0048 (April 15, 2009) and RO-09-0038 (March 30, 2009); Wage Deduction FAQs at 6)).

d. Additional Analysis of Specific Impermissible Deductions

(1) Overpayments/Loans/Advances:

(a) According to NYSDOL, as noted above, wage deductions for the repayment of loans, advances, and inadvertent overpayments are not “similar” to other deductions listed in Section 193 and are, therefore, impermissible.

(b) The prohibition on wage deductions through “separate transactions” also prohibits any action by an employer to recover a loan, advance, or overpayment that could result in disciplinary or retaliatory action by the employer. See Wage Deduction FAQs at 5.

(c) NYSDOL will consider any repayment that is the result of coercion or duress to be an illegal wage deduction through a “separate transaction.” For example, an employer may not threaten to demote or fire an employee if he or she refuses to repay a loan from the employer. Id.

(d) However, NYSDOL takes the position that voluntary repayments are not prohibited. According to NYSDOL guidance, employers may request that an employee separately repay a loan, advance, or overpayment, or enter into an agreement for repayment, so long as the employer clearly communicates that the employee’s refusal will not result in any disciplinary or retaliatory action.

(e) Employers are also free to pursue recovering the overpayment, loan, or advance through a separate proceeding, e.g., through an action in small claims court.
(2) Purchases of goods or services from the employer:

(a) NYSDOL takes the position that Section 193’s restriction on “separate transactions” does not prevent employees from buying goods or services from their employers, so long as:

1. The purchases are not paid for through wage deductions;
2. The purchases are not coerced or made under duress; and
3. Employees are free to make the purchases at the employer’s competitor(s). See Wage Deduction FAQs at 6.

(b) Additionally, according to NYSDOL, employee purchases may not be a condition of employment or in any way impact the employee’s job. Id. at 2-3. For example, a car salesman cannot be required to purchase a car from his or her employer, but may be offered an employee discount so long as the non-purchase of a car from the employer does not impact the employee’s job in any way.

E. Calculating the “Regular Rate” Under the FLSA & NYLL

1. A fundamental requirement of the FLSA is that non-exempt employees be paid at a rate equal to one and one-half times their “regular rate” for hours worked in excess of 40 in a workweek. 29 U.S.C. § 207. Unless specifically excluded by statute, all forms of compensation must generally be included in the “regular rate” calculation.

   a. Under the New York Labor Law, covered non-exempt employees must also be paid 1½ times their “regular rate” of pay for all overtime hours worked. The regular rate of pay cannot be less than the minimum wage.

   b. According to NYSDOL, an employee’s “regular rate” is the amount that the employee is regularly paid for each hour of work. When an employee is paid on a non-hourly basis (e.g., piece work, salary), the regular hourly wage rate is found by dividing the total hours worked during the week into the employee’s total earnings. See NYSDOL FAQs, Overtime, available at http://labor.ny.gov/legal/counsel/pdf/overtime-frequently-asked-
The NYSDOL has issued informal guidance, suggesting that it will look to the FLSA regulations governing the calculation of a non-exempt employee’s “regular rate” under the NYLL (e.g., as to what is not included when calculating an employee’s regular rate). See NYSDOL Overtime FAQs at 3; see also NYSDOL Op. Ltr. RO-10-0006 (Jan. 14, 2010) (finding vacation, sick and other leave time does not count as “time worked” for calculating overtime rate and noting “conclusion is consistent with rules and regulations of the [FLSA]”).

d. However, distinctions may arise between the FLSA and NYLL in this regard. See NYSDOL Opin. Ltr. RO-08-0059 (May 29, 2008) (noting that the following are not included in calculating an employee’s “regular rate” under the NYLL: extra payments required under New York’s Minimum Wage Orders, e.g., uniform maintenance, split shift and spread rates; and the value of meals and lodging provided to employees will).

2. The computation of an employee’s “regular rate” can be complex where it involves several forms of compensation besides the employee’s basic hourly or weekly rate.

3. Generally, the non-exempt employee’s “regular rate” must be calculated on a weekly basis. However, the FLSA allows employers and employees, under some circumstances, to enter into agreements setting a basic rate for overtime calculations to avoid the need for continuous recalculation. 29 U.S.C. § 207(g)(3); 29 C.F.R. § 548.2.

a. Compensation to be Generally Included in an Employee’s “Regular Rate” of Pay:

   (1) Wage/Salary

   (a) The hourly, weekly, monthly, or semi-monthly wage that an employee earns is includible in the regular rate.

   (2) Non-Cash Payments

   (a) If the employer compensates employees with non-cash payments, the reasonable cost to the employer or the fair value of the goods and/or facilities must be included in the regular rate. For example, if the employer provides lodging to his employees in addition to cash wages, the reasonable cost or the fair
value of the lodging per week must be added to the employees' cash wages to compute the regular rate. If the employee’s lodging is worth $400 per week, and the employee is paid a base hourly wage of $10.00 per hour, the employee’s regular rate is $20.00 per hour for the first 40 hours worked of the workweek ($800 in total weekly compensation/40 hours of work = $20.00 per hour). Therefore, if the employee works five extra hours in that same workweek, the employee is entitled to $30.00 per hour overtime pay for the extra five hours, or $150.00 extra, for a total paycheck of $550.00 for the workweek. 29 C.F.R. § 778.116.

1. **Note:** NYSDOL, as noted above, has taken the position that the cost or value of lodging and meals are not included in the calculation of the regular rate under the NYLL. See NYSDOL Op. Ltr. RO-08-0059 (May 29, 2008); 12 N.Y.C.R.R. § 142-2.16. Accordingly, this point should be considered with respect to any employees who are exempt from the FLSA’s overtime requirements, but who must still receive time-and-a-half their “regular rate” for overtime work under the NYLL.

(3) Commissions

(a) Commissions must be included in the “regular rate,” regardless of whether the commission is paid in addition to a guaranteed salary or is the employee’s sole source of income. 29 C.F.R. § 778.117. The commission must be apportioned over the workweeks for which the commission is applicable.

(b) If the commission is paid on a weekly basis, the weekly commission payment is added to the employee’s weekly wages and other includible forms of compensation, and the total is divided by the hours in the employee’s workweek to arrive at the “regular rate” for the week. 29 C.F.R. § 778.118. If the commission is paid every two weeks or in some other method besides weekly, the total commission for the period must be allocated, if possible, between the weeks for which the commission is applicable.

1. For example, if an employee receives a $100 commission for two weeks’ worth of work, the
employer must determine which portion of the $100 was for the first week of work, and what portion was for the second week. Then, each allocated portion is added to the other forms of includible compensation for each workweek and divided by the total number of hours in the employee’s workweek.

(c) If it is impossible to apportion the commission based on the amount earned each week, the employer is permitted to allocate the commission equally over the weeks for which the commission is applicable. 29 C.F.R. § 778.120.

1. For example, a $100 commission earned each month would be multiplied by 12, then divided by 52 to determine the weekly commission, which is $23.08. This amount is added to the employee’s other includible compensation for the workweek, and divided by the number of hours in the workweek to arrive at the employee’s “regular rate.”

(d) An employee who is paid on a commission basis, or partly on a commission basis, may reach an agreement with his employer that overtime pay will be computed on an established “basic rate,” instead of the allocation method. 29 C.F.R. § 778.122.

(4) Non-Discretionary Bonuses

(a) Non-discretionary bonuses are those paid pursuant to some contract, agreement, plan, or promise. Examples of non-discretionary bonuses include: attendance bonuses, bonuses for improved efficiency, bonuses for improved accuracy or work quality, and bonuses based upon production.

(b) If a non-discretionary bonus is paid for a period covering more than a workweek, the amount of the bonus must be apportioned over all of the workweeks in that period. This may require the recalculation of the employee’s overtime compensation in some cases. If the non-discretionary bonus cannot be apportioned accurately over particular workweeks, the employer may allocate the bonus equally over the weeks for which the bonus is applicable. It may also
be permissible for the employer to allocate the bonus equally over the hours that the employee worked during the bonus period. 29 C.F.R. § 778.209.

b. Compensation Generally to be Excluded from an Employee’s Regular Rate of Pay:

(1) Premium Pay

Certain types of so-called “premium pay” may be excluded from an employee’s “regular rate” under the FLSA. Further, such premium pay may be credited towards an employer’s overtime liability for the workweek.

(a) Overtime Premiums

1. Employers may exclude from the computation of the regular rate any premium pay for hours worked by an employee in excess of 8 in a day, in excess of 40 in a week, or in excess of the employee’s normal or regular working hours. 29 U.S.C. § 207(e)(5). This premium pay may also be credited toward the amount of overtime compensation that the employer owes to that employee for that particular workweek. 29 U.S.C. § 207(h).

2. Example:

a) Suppose the employer pays its employees 50 cents extra for every hour worked in excess of 8 in a day. If an employee works 8 hours per day for 4 working days, then works 10 hours on the fifth working day, the employee has worked 42 hours in the workweek, entitling the employee to overtime compensation for 2 hours.

b) However, if the employer already paid the employee $1.00 extra for the 2 hours worked in excess of 8 in one day, this $1.00 is excluded from the computation of the regular rate and may be credited toward the employer’s overtime obligation.
3. Similarly, if the employee’s normal or regular workweek is 35 hours, and the employer obligates itself to provide premium pay for hours worked in excess of 35 hours, this premium pay is not included in the employee’s regular rate, and may be credited toward the employer’s overtime obligations. 29 C.F.R. § 778.202.

4. Employers may not artificially divide the workday or workweek into a “straight time” period and a “premium pay period” in order to contravene the purposes of the FLSA. 29 C.F.R. § 778.501.

5. Example:

   a) Pursuant to a contract an employee is paid a straight time rate of $8 per hour and receives overtime for hours in excess of 4. In a normal 8 hour day, the employee would receive $36 for the first 4 hours and $48 for the remaining four 4 hours for a total of $84 for 8 hours. This is the same amount the employee would receive at the straight time rate of $10.50 per hour.

   b) On the sixth 8-hour day, the employer cannot simply pay employee $84 and then claim to owe no additional overtime pay under the FLSA because the employee has been compensated at “overtime” rates for 20 hours of the workweek. The division of the 8-hour workday into 4 straight time hours and 4 overtime hours is purely fictitious. Thus, the employer must pay the employee $126 for the 8 hours worked (i.e., $8/hour x 1.5 x 8 hours). See 29 C.F.R. § 778.501(b).

(b) Premium for “Special Days”

1. Employers may exclude from the regular rate premium pay for work performed by the employee on a Saturday, Sunday, holiday,
regular day of rest or on the sixth or seventh day of the workweek, as long as this premium pay is at least one and a half times the rate established in good faith for the same type of work performed on non-special days. 29 U.S.C. § 207(e)(6); 29 C.F.R. § 778.203. This type of premium pay may also be credited toward overtime compensation. 29 U.S.C. § 207(h).

2. If, however, the premium pay for any of these purposes is less than one and a half times the rate for non-special days, the premium pay must be included in the employee’s regular rate, and may not be credited toward overtime compensation. 29 C.F.R. § 778.203.

(c) Premium Established Pursuant to Agreement

1. An employer may exclude from the regular rate premium pay for hours worked outside of those established by an employment contract or a collective bargaining agreement as the basic workday (not exceeding 8 hours) or workweek (not exceeding 40 hours), as long as the premium is at least one and a half times the rate established by the agreement or contract for similar work performed during the established workday or workweek. 29 U.S.C. § 207(e)(7).

   a) This premium pay may also be credited toward the employer’s overtime obligations. 29 U.S.C. § 207(h).

   b) In order to qualify for exclusion, the premium pay must be for work outside of an established workday or workweek; a premium established only for particular undesirable hours (such as for second or third shift work) must be included when computing the regular rate of pay. 29 C.F.R. § 778.204(b).
(2) Discretionary Bonuses

(a) While non-discretionary bonuses are includible in calculating a non-exempt employee’s “regular rate” under the FLSA, discretionary bonus payments may be excluded.

(b) Discretionary bonuses are those where both the amount of the payment and the fact that a payment will be made at all are left to the sole discretion of the employer. 29 U.S.C. § 207(e)(3); 29 C.F.R. § 778.211.

(3) Gifts

(a) Gifts, Christmas bonuses, and other special occasion bonuses may be excluded from the regular rate. 29 U.S.C. § 207(e)(1).

(b) However, to be excluded, the amounts of such gifts or bonuses may not depend upon hours worked, production, or efficiency. Special occasion bonuses, such as Christmas bonuses, are excludible even if the employer pays it with such regularity that employees come to expect it. Also, the employer is permitted to vary the amount of the bonuses based on such factors as salary grades or length of service, as long as the amount is not directly tied to hours worked, production, or efficiency. 29 C.F.R. § 778.212.

(4) Absence Pay

(a) The regular rate does not include payments made for times when no work is performed by the employee, such as during vacations, holidays, illness, or failure of the employer to provide sufficient work. 29 U.S.C. § 207(e)(2). The exclusion also applies to payments made for other occasions on which no work is performed, such as absences due to jury duty, attendance at a funeral, and inability to come to work due to inclement weather. 29 C.F.R. § 778.218.

(5) Show-Up, Reporting, and Call-Back Pay

(a) If an employer is obligated, under an employment agreement, to pay the employee for a specified number of hours in a day in the event that: (i) the employee reports to work, but is not provided with the
expected amount of work; or (ii) is called in to perform extra work, but does not receive the expected amount of extra work, the extra compensation beyond what is paid for the hours actually worked is not includible in the employee’s “regular rate” for purposes of the FLSA. 29 C.F.R. § 778.220.

(b) For example, suppose the employer is obligated to pay employees $10.00 per hour for a minimum of a four hour shift. One day, the employer sends an employee home after working only two hours because of a lack of work. The employer must pay the employee $40.00, but only $20.00 is includible in the employee’s regular rate. See id.

(c) Similarly, if the employer calls an employee in to work and is obligated under an agreement to pay a minimum of a four hour shift when an employee is called in, the employer need only include $20.00 in the regular rate if the employee is sent home after performing only two hours of extra work. 29 C.F.R. §§ 778.220 - 778.221.

(d) Note: As discussed below, the NYLL imposes certain “call in” pay requirements for employers.

(6) Reimbursement

(a) When an employer makes payments to employees as reimbursement for expenses incurred on the employer’s behalf, such payments are not includible in the regular rate. 29 U.S.C. § 207(e)(2).

(7) Bona Fide Profit-Sharing Plans

(a) So long as seven specific conditions established by the USDOL are satisfied, bona fide profit-sharing plans may be excluded from regular rate calculations. See 29 C.F.R. § 549.1. However, plans or trusts containing certain characteristics must be included in the regular rate of pay. See 29 C.F.R. § 549.2.

1. Conditions for Exclusion

a) Payments made pursuant to a bona fide profit-sharing plan or trust may be excluded from the regular rate if the following conditions are met: (1) the plan
is in writing; (2) wages are not influenced by the existence of the plan or the amount of payments from the plan; (3) payments are derived solely from the profits of the business or enterprise; (4) contributions to the plan are made periodically; (5) eligibility under the plan extends to all employees subject to the minimum wage and overtime provisions of the FLSA (however, eligibility may be conditioned on length of service) or the plan is extended to such classifications of employees that the employer designates with the approval of the Administrator of the U.S. Department of Labor’s Wage and Hour Division; (6) the amounts of the payments are determined in accordance with a definite formula specified in the plan or trust; and (7) payments are distributed within a reasonable period after the determination of the amount of profits to be distributed. 29 C.F.R. § 549.1.

2. Provisions Mandating Inclusion

a) If the plan or trust contains any one of the following characteristics, the payments made pursuant to the plan or trust must be included in the regular rate: (1) the payment to each individual is based on attendance, quality or quantity of work, rate of production, or efficiency; (2) the amount the employer pays into the fund is a fixed sum per period; (3) employees are guaranteed periodic payments of minimum amounts; (4) any employee’s share is set by the plan or trust to be so invariable that it is essentially a fixed sum; or (5) the employer’s contributions to the fund or trust are based on a factor or factors other than profits (i.e., hours of work, production, efficiency, sales or savings in cost) 29 C.F.R. § 549.2.
(8) Thrift or Savings Plan

(a) Like *bona fide* profit sharing plans, thrift or savings plan may be excluded from the regular rate if certain conditions are met, but must be included under other circumstances. See 29 C.F.R. §§ 547.1, 547.2.

(b) Conditions for Exclusion

1. An employer may exclude payments made pursuant to a *bona fide* thrift or savings plan as long as the thrift or savings plan meets the following conditions: (1) it is in writing; (2) it is maintained for the purpose of encouraging voluntary thrift or savings by employees; (3) eligibility in the plan is not dependent upon hours of work, production, or efficiency (except that hours of work may determine eligibility of part-time or casual employees); (4) the amount any employee may save is set forth in the plan or determined in accordance with a definite formula specified in the plan; (5) the employer’s contribution to the plan in any year is not greater than 15 percent of the participating employees’ total earnings and is not greater than the total amount saved or invested by the participating employees during that year (an employer may make a greater contribution if it receives the permission of the Administrator); and (6) each employee receives from the plan an amount based on the amount the employee saved or the length of time the individual retains his savings or investment in the plan, and the payment is not diminished based on other remuneration received. 29 C.F.R. § 547.1.

(c) Provisions Mandating Inclusion

1. An employer must include in the regular rate computation payments made pursuant to a thrift or savings plan if the plan contains any one of the following characteristics: (1) employees’ participation is non-voluntary; (2) employees’ wages or salary is dependent on the existence of the plan or the employer’s contributions to the plan; or (3) the amounts
that any employee may save under the plan or the amounts contributed by the employer to the plan are based on the employee's hours of work, production or efficiency. 29 C.F.R. § 547.2.

(9) Other Benefit Plans

(a) Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life insurance, accident insurance, health insurance, or other similar benefits are excludible from the regular rate, if several conditions are satisfied. See 29 U.S.C. § 207(e)(4); 29 C.F.R. § 778.215.

(10) Stock Option Plans

(a) Any value or income derived by the employee from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program is excludible if certain conditions are met. 29 U.S.C. § 207(e)(8); see also Fact Sheet # 56: Stock Options under the Fair Labor Standards Act (FLSA).

c. Employees Paid Different Rates for Different Work

(1) Weighted Average

(a) Where an employee, in a single workweek, is paid at two or more different straight-time rates, the employee's regular rate for that week is the weighted average of such rates. That is, the earnings from all such rates are added together, and this total is then divided by the total number of hours worked at all jobs. 29 C.F.R. § 778.115.

(2) By Agreement

(a) The FLSA allows the computation of overtime pay on the basis of the bona fide hourly rate in effect when the overtime work is performed. 29 U.S.C. §207(g)(2). Under this provision, an employee who performs two or more different kinds of work, for which different straight time hourly rates are established, may agree with her/his employer in advance of the performance of the work that she/he
will be paid during overtime hours at a rate not less than one and one-half times the hourly non-overtime rate established for the type of work she/he is performing during such overtime hours. 29 C.F.R. § 778.419(a).

(b) Additionally, the following requirements must be met:

1. The hourly rate upon which the overtime rate is based on a *bona fide* rate;

2. The overtime hours for which the overtime rate is paid qualify as overtime hours under FLSA section 7(e) (5), (6), or (7); and

3. The number of overtime hours for which the overtime rate is paid equals or exceeds the number of hours worked in excess of the applicable maximum hours standard. 29 C.F.R. § 778.419(a)(1) – (3).

(3) What about exempt employees?

(a) Under the FLSA, an employer may provide an exempt employee with additional compensation without losing the exemption or violating an applicable “salary basis” requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis, currently $455 per week under the FLSA. The exemption is not lost if an exempt employee who is guaranteed at least $455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off. 29 C.F.R. § 541.604.

(b) **Note:** The minimum salary level for applicable executive and administrative exempt employees under New York state law is $543.75 per week.

d. Fluctuating workweek model

(1) USDOL regulations permit payment of a fixed salary for fluctuating hours of work under the following conditions:
(a) The salary must be paid pursuant to an understanding with an employee that the employee will receive the fixed salary at straight time pay for whatever hours he is called upon to work in a workweek, whether few or many;

(b) There must be a clear mutual understanding that the fixed salary is not in exchange for working 40 hours or some other fixed period;

(c) The salary is sufficient to provide compensation at minimum wage in those weeks where the greatest number of hours is worked; and

(d) The employee receives extra compensation for overtime at one and one-half times the regular rate. 29 C.F.R. § 778.114.

(2) Fluctuating workweek method regular rate calculation

(a) If the fluctuating workweek method is used, the employee is guaranteed his/her salary for each workweek regardless of the actual number of hours worked. However, that salary is deemed to compensate the individual for all straight time hours worked and overtime is therefore due only at half time the regular rate for each overtime hour worked. This may create a savings for the employer, depending on the number of “hours worked” by the employee and the employee’s applicable “regular rate” in a given workweek.

(b) Illustration:

1. Assume an employee’s hours of work do not customarily follow a regular schedule, but vary from week to week. The total weekly hours of work never exceed 50 hours in a workweek, and the employee has a weekly salary of $600, which is paid with the understanding that it constitutes the employee’s compensation, except for overtime premiums, for whatever hours are worked in the workweek.

2. If during the course of 4 weeks this employee works 40, 37.5, 50, and 48 hours, the regular hourly rate of pay in each of these weeks is $15.00 ($600/40 hours), $16.00 ($600/37.5
hours), $12.00 ($600/50 hours), and $12.50 ($600/48 hours), respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only half-time pay of the applicable “regular rate” is due for hours worked over 40 in that workweek.

3. For the first week, the employee is entitled to be paid $600 (no overtime); for the second week, $600.00 (no overtime); for the third week, $660 ($600 plus 10 hours at $ 6.00); for the fourth week $650 ($600 plus 8 hours at $6.25). 29 C.F.R. § 778.114.

(3) NYSDOL Interpretation on Fluctuating Workweek Method

(a) The NYSDOL has previously taken the position that it follows the USDOL regulation (i.e., section 778.114) in interpreting the provisions of the State Minimum Wage Orders. An employee may work for a fixed salary for a fluctuating number of hours provided:

1. the salary is “sufficiently large” to insure the regular rate would not fall below the minimum wage, and

2. there is clear mutual understanding that the salary is intended to compensate the employee for the hours worked at the employee’s regular rate. NYSDOL Op. Ltr. RO-10-0136 (Feb. 1, 2011).

(b) An employee working under a fluctuating hours schedule receives overtime at one-half of the rate by dividing the salary by the number of hours worked during that workweek. Id.

1. For example, an employee who works 50 hours and earns a $800 fluctuating workweek salary has a derived rate of $16 per hour. The employee would be entitled to an additional $160 in overtime for that workweek.

F. Travel Time

1. In determining whether time spent in travel is working time under the FLSA, the kind of travel involved must be examined. Regular commuting
time by employees to and from work is not normally compensable, while most travel time during the work day is considered working time.

a. Home to Work

(1) An employee traveling from home to work and returning home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. It makes no difference whether the employee works at a fixed location or at different job sites. Normal travel from home to work is not compensable work time under the FLSA. 29 C.F.R. § 785.35.

(2) Except where altered by an agreement, custom, or practice, employees are not entitled to compensation for time spent “walking, riding, or traveling to or from the work site.” However, if an employee is required to report to a meeting place to receive instructions or to pick up or drop off tools, equipment or other employees, all the time spent traveling to and from that meeting place may be considered as compensable working time. In certain emergency or call-back situations, the USDOL will also consider employee travel time to be compensable, particularly where the employee must travel a substantial distance to perform the call-back or emergency work. 29 C.F.R. §§ 785.34-785.38.

b. Special one day assignment in another city

(1) When employees who normally work at one location are given a special one-day assignment that requires them to travel to another city and back in one day—for example, from Washington, D.C., to New York—most, if not all, of the travel time that day would be considered time worked. 29 C.F.R §. 785.37. An employer would have to pay that employee for the time that the employee would ordinarily be paid on a regular work day (e.g., deduct time spent traveling from home to the railroad station because it falls in “home to work” category).

(2) However, an employer need not pay employees for out-of-town travel time outside their normal working hours if they are merely a passenger in an airplane, train, boat, bus, or car driven by another person. 29 C.F.R. § 785.39.

c. All in a day’s work

(1) Time spent by an employee in travel as part of his principal activity (i.e., travel from job site to job site during the
workday) is counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place may be considered to be part of the day’s work, and, if so, must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5:00 p.m. and is sent to another job which she finishes at 8:00 p.m. and is required to return to her employer’s premises arriving at 9:00 p.m., all of the time is working time. However, if the employee goes home instead of returning to the employer’s premises, the travel after 8:00 p.m. is home-to-work travel and is not hours worked. 29 C.F.R. § 785.38.

d. Away from home overnight

(1) Travel that keeps an employee away from home overnight is travel away from home and is considered work time when it cuts across the employee’s workday; according to USDOL, the employee is simply substituting travel for other duties. 29 C.F.R. § 785.39.

(2) The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on nonworking days (i.e., if an employee regularly works from 9:00 a.m. to 5:00 p.m. from Monday through Friday, the travel time during these hours is work time if it occurs on Saturday and Sunday as well as on the other days).

(3) However, an employer need not pay employees for regular meal period time, and for out-of-town travel time outside their normal working hours if they are merely a passenger in an airplane, train, boat, bus, or car driven by another person. 29 C.F.R. § 785.39.

2. The NYSDOL Minimum Wage Orders may provide additional requirements concerning the compensability of travel time under the NYLL. For example, under NYLL’s Minimum Wage Order for “Miscellaneous Industries and Occupations,” the minimum wage must be paid to an employee for “time spent in traveling to the extent that such traveling is part of the duties of the employee.” 12 N.Y.C.R.R. § 142-2.1(b).

a. According to NYSDOL, work is considered part of an employee’s “duties” if the activity is integral and indispensable to the
employee’s principal employment activities. The regulation applies to all employees without regard to the extent of their travel and an employer must pay for wages for any travel that is part of the employee’s duty. NYSDOL Op. Ltr. RO-09-0170 (Jan. 15, 2009).

b. NYSDOL has also taken the position that time must be considered part of the “employee’s duties” where the employee is not completely relieved from duty and cannot effectively use the time for his/her own purposes. NYSDOL Op. Ltr. RO-09-0023 (March 10, 2009) (entire thirty minute window which employee had to travel time between shifts to another jobsite was time worked); NYSDOL Op. Ltr. RO-10-0068 (May 7, 2010) (time spent by employee traveling back and forth from required parking space for pick up and drop off of company vehicle was working time)).

c. NYSDOL has previously stated that it interprets the compensability of travel time after work hours or during non-work hours in line with the FLSA regulations. NYSDOL Op. Ltr. RO-09-0190 (Aug. 10, 2010).

d. According to the NYSDOL, to the extent that the NYLL provides additional benefits to employees over and beyond what the FLSA requires, e.g., deeming travel time to be time "worked," the enhanced benefits provided by the NYLL control. NYSDOL Op. Ltr. RO-09-0170 (Jan. 15, 2009).

G. Lectures, Meetings and Training Programs

1. If an employee is required to attend lectures, meetings, or training programs during the normal work day, the time spent is generally compensable under the FLSA.

2. For training time not to be counted toward hours worked, the four following conditions must be met under the FLSA’s regulations: (1) attendance must occur outside the employee’s regular working hours; (2) attendance must be voluntary; (3) the employee must do no productive work while attending; and (4) the program, lecture, or meeting must not be directly related to the employee’s job.

   a. Attendance is not voluntary if it is required by the employer or if the employee is led to believe that non-attendance will prejudice the employee’s working conditions or employment standing.

   b. Generally, the program lecture or meeting is considered directly related to the employee’s job if it aids the employee in handling her present job better, as distinguished from teaching the employee another job or a new or additional job skill.
3. Training for the purpose of upgrading the employee to a higher skill that is not intended to make the employee more efficient in his present job is generally not considered to be directly related to the employee’s job, even though the training may incidentally improve the employee’s skills needed for his current job. 29 C.F.R. §§ 785.27 – 785.29.

a. Independent Training

(1) An employee who spends time pursuing independent trade schools or correspondence courses outside of regular working hours is not engaged in hours worked, even if these courses are job-related. Similarly, if an employer establishes for the benefit of its employees a program of instruction which corresponds to courses offered by an independent institution, voluntary participation in such a program outside of working hours will not be considered part of hours worked, even if the program is directly related to the job, or is paid for by the employer. 29 C.F.R. §§ 785.30 – 785.31.

b. Apprenticeship Training

(1) Time spent receiving instruction under a bona fide apprenticeship program may be excluded from hours worked provided: (a) the apprenticeship is governed by a written agreement or program which substantially meets the standards of the USDOL’s Bureau of Apprenticeship and Training; and (b) such time does not involve productive work or performance of the apprentice’s regular duties. 29 C.F.R. § 785.32. The apprenticeship agreement, however, may state that the apprentice’s time counts as hours worked. Mere payment for time spent in apprenticeship instruction does not constitute an agreement that such time counts toward hours worked.

4. NYSDOL has previously opined on certain training time issues and whether such time is compensable under the NYLL. NYSDOL Op. Ltr. RO-08-0020 (Aug. 27, 2008) (Childcare workers were not “employed” by employer during state-mandated training because the training was not unique to the employer’s business); NYSDOL Op. Ltr. RO-09-0035 (April 15, 2009) (Voluntary attendance at training sessions on new products or engineering concepts does not constitute suffered or permitted to work, unless the employer’s policy or practices results in non-attendance negatively affecting the employee’s employment).
H. Purchase of Employee Uniforms & Laundering Expenses

1. Required Uniforms under the FLSA

   a. Under the FLSA, if the wearing of a uniform is required by some other law, the nature of a business, or by an employer, the cost and maintenance of the uniform is considered to be a business expense of the employer. If the employer requires the employee to bear the cost, it may not reduce the employee’s wage below the minimum wage. Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA); Wage and Hour Op. Letter FLSA2001-7 (Feb. 16, 2001) (“an employer may not lawfully require an employee to pay for an expense of the employer’s business if doing so reduces the employee’s pay below any statutorily-required minimum wage or overtime premium pay”).

      (1) If an employer merely prescribes a general type of ordinary basic street clothing to be worn while working and permits variations in details of dress, the garments chosen by the employees would not be considered to be uniforms;

      (2) Where the employer does prescribe a specific type and style of clothing to be worn at work, (e.g., restaurant or hotel requires a tuxedo or a skirt and blouse or jacket of a specific or distinctive style, color, or quality) such clothing would be considered uniforms. Wage and Hour Op. Ltr. FLSA2008-4 (May 15, 2008) (citing Field Operations Handbook (FOH) § 30c12(e)(1)).

2. Required Uniforms Under the NYLL

Certain of the NYSDOL’s Minimum Wage Orders address the issue of employee uniforms and impose certain obligations for covered employers. See, e.g., 12 N.Y.C.R.R. § 141 (Building Service Industry); 12 N.Y.C.R.R. § 142 (Miscellaneous Industries & Occupations); and 12 N.Y.C.R.R. § 146 (Hospitality Industry). These obligations may differ from order to order.

   a. For example, the “Miscellaneous Industries and Occupations” order provides:

      (1) No Minimum Wage Allowance

           (a) No allowance for the supply, maintenance or laundering of required uniforms shall be permitted as part of the minimum wage. 12 N.Y.C.R.R. § 142-2.5(c).
b. Purchase of Required Uniforms
   
   (a) Where a covered “employee” purchases a required uniform, he shall be reimbursed by the employer for the cost thereof not later than the time of the next payment of wages. 12 N.Y.C.R.R. § 142-2.5(c).

c. Uniform Maintenance Pay
   
   (1) Where an employer does not launder or maintain required uniforms for any employee, the employer must pay to the employee in addition to the minimum wage:
   
   (a) $ 9.00 per week for work weeks over 30 hours;
   
   (b) $ 7.10 per week for work weeks of more than 20 but not more than 30 hours; and
   
   (c) $ 4.30 per week for work weeks of 20 hours or less. 12 N.Y.C.R.R. § 142-2.5(c).

   (2) The “Miscellaneous Industries and Occupations” order also provides that a “required uniform” is clothing worn by an employee, at the request of an employer, while performing job-related duties or to comply with any State, city or local law, rule or regulation; however, it does not include clothing that may be worn as part of employee’s “ordinary wardrobe.” 12 N.Y.C.R.R. § 142-2.22; see also NYSDOL Op. Ltr. RO-07-0100 (Oct. 1, 2007) (required short sleeved golf type shirts supplied by employer at no cost with a particular color scheme and no company logo was ordinary wardrobe); NYSDOL Op. Ltr. RO-07-0132 (Feb. 6, 2008) (required black dress slacks and button - down dress shirt without any visible logo provide at no cost was ordinary wardrobe).

II. KEEPING THE SALARY BASIS – 29 C.F.R. § 541.602

1. In order for an employee to be exempt under the FLSA, the employee must satisfy three requirements: minimum salary test, salary basis test, and duties test. If an employer makes improper deductions from an exempt employee’s salary, the employer risks losing the exempt status for that employee.

2. An employee is paid on a salary basis if his or her pay is not reduced because of variations in the quality or quantity of the work performed. If the employee is ready, willing, and able to work, his/her salary may not be reduced except in limited circumstances.
a. Exceptions to the salary basis test include: teachers, doctors, and lawyers.

3. Deductions for absences caused by jury duty, attendance in court as a witness, or temporary military leave may not be made without losing the exemption. 29 C.F.R. § 541.602(b)(3).

4. Full-day absences
   a. An employer may deduct for full day absences if:
      (1) the absence is for personal reasons other than sickness or injury; or
      (2) 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. 29 C.F.R. § 541.602(b)(1) & (2).

5. Partial day absences
   a. An employer may make deductions from an exempt employee’s salary in partial day increments if:
      (1) the employer is covered by the FMLA;
      (2) the employee is eligible for FMLA leave; and
      (3) the deduction is pursuant to an intermittent or reduced leave arrangement under the FMLA. 29 C.F.R. § 541.602(b)(7).

6. Safety rule infractions
   a. Deductions may be made for penalties imposed in good faith for infractions of safety rules of major significance (e.g., those relating to prevention of serious danger in the workplace or to other employees). 29 C.F.R. § 541.602(b)(4).

7. Disciplinary suspensions
   a. An employer may make deductions for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees.
   b. The suspension must be for a violation of a serious “workplace conduct” rule such as workplace violence or sexual harassment (as opposed to performance or attendance issues). 29 C.F.R. § 541.602(b)(5).
8. Furloughs
   a. If an exempt employee does not perform any work during a workweek, for whatever reason, the employee does not have to be paid. 29 C.F.R. §541.602(a) (“Exempt employees need not be paid for any workweek in which they perform no work.”).
   b. Accordingly, if a business shuts down for a week long period, it does not have to pay exempt employees during this full week shutdown.
      (1) It is essential, of course, that exempt employees not perform any work at home or elsewhere during the shut-down (this would include, for example, remote computer access to the office, use of PDAs, etc.).
      (2) If an exempt employee were to perform any such work, the employee would likely be entitled to his or her full salary for that workweek. 29 C.F.R. §541.602(a) (“[A]n exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.”).

9. Schedule Adjustments
   a. Under the FLSA, deductions may not be made from an exempt employee's predetermined salary for absences occasioned by the employer or by the operating requirements of the business.
      (1) If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available. U.S. Department of Labor Wage and Hour Division Fact Sheet #70, available at http://www.dol.gov/whd/regs/compliance/whdfs70.htm.
   b. If the employer seeks volunteers to take time off due to insufficient work, and the exempt employee volunteers to take the day(s) off for personal reasons, other than sickness or disability, salary deductions may be made for one or more full days of missed work. The employee’s decision must be completely voluntary. Id.
   c. An employer is not prohibited from prospectively reducing the predetermined salary amount to be paid regularly to an exempt employee during a business or economic slowdown, provided the change is bona fide and not used as a device to evade the salary basis requirements. Such a predetermined regular salary reduction, not related to the quantity or quality of work performed, will not result in loss of the exemption, as long as the employee still
receives on a salary basis at least $455 per week (or $543.75, as applicable, under New York state law). *Id.*

d. On the other hand, deductions from predetermined pay occasioned by day-to-day or week-to-week determinations of the operating requirements of the business constitute impermissible deductions from the predetermined salary and would result in loss of the exemption. *Id.*

e. The difference is that the first instance involves a prospective reduction in the predetermined pay to reflect the long term business needs of the employer, rather than a short-term, day-to-day or week-to-week deduction from the fixed salary for absences from scheduled work occasioned by the employer or its business operations.

10. Additional Compensation

a. Employers may provide an exempt employee with additional compensation beyond the minimum salary guarantee without violating the salary basis requirement. For example, an employee guaranteed a minimum salary for all hours worked may also receive additional compensation in the form of commissions, bonuses, or on an hourly basis, flat sum basis, or any other basis for hours worked beyond the normal workweek. 29 C.F.R. §541.604.

b. Employers devising exempt compensation plans must beware of devising unusual compensation arrangements or bonus structures that could result in allegations that rather than applying a proper FLSA exemption, they are attempting to circumvent the Act’s overtime requirements. See *Bell v. Callaway Partners, LLC*, 2010 U.S. App. LEXIS 17981 (11th Cir. 2010).

11. “Safe Harbor” Policy

a. The FLSA regulations include a “safe harbor” provision whereby an employer may preserve the exemption notwithstanding that improper deductions were made, and regardless of the reason for the improper deductions, by maintaining a clearly communicated policy prohibiting deductions proscribed under the salary basis test. 29 C.F.R. §541.603(c).

b. To take advantage of this “safe harbor,”:

   (1) the employer’s policy must include a complaint procedure;

   (2) employees must be reimbursed for any improper deductions; and
(3) the employer must make a good faith commitment to comply in the future. 29 C.F.R. §541.603(d).

c. An employer that “willfully violates the policy by continuing to make improper deductions after receiving employee complaints” cannot invoke the safe harbor provision and loses the exemption “during the period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions.” 29 C.F.R. §541.603(d).

III. Meal Periods and Other Break Requirements

A. General Requirements for Meal Periods: the 30-Minute Break

1. In New York, employees working a shift of more than 6 hours must generally be provided a meal period of at least 30 minutes. N.Y. Lab. L. § 162(2).

   a. Factory workers are allotted 60 minutes for meal periods.

   b. This is intended to be a “noonday” meal period, taken between 11 AM and 2 PM if the shift extends through that time.

   c. If the shift starts anywhere between 1:00 PM to 6:00 AM, then the meal break should be midway during the shift.

   An employer may seek NYSDOL approval of a shorter meal break period, but the shorter break period may not be less than 20 minutes, and such approval will be granted only in special or unusual cases after investigation and issuance of a special permit. NYSDOL has stated that 30-minute meal periods are allowed “as a matter of course” unless they pose “a hardship to employees.”


B. Automatic Deductions

1. USDOL recently opined that automatic deductions for meal breaks may not violate the FLSA so long as certain conditions are met:

   a. “[T]he employer’s proposal to discontinue the use of a time clock to record the meal period does not violate the FLSA so long as the employer accurately records actual hours worked, including any work performed during the lunch period.” DOL Opinion Letter FLSA2007-1NA, available at

b. Several federal courts have also found that automatic deductions do not, by themselves, violate the FLSA. For example, the Northern District of New York recently held that “the mere existence and implementation of a policy or practice of making automatic deductions for scheduled meal breaks in and of itself does not violate the FLSA.” Fengler v. Crouse Health Found., Inc., 595 F. Supp. 2d 189, 195 (N.D.N.Y. 2009); see also Frye v. Baptist Memorial Hosp., 2010 U.S. Dist. LEXIS 101996, at *15 (W.D. Tenn. Sept. 27, 2010); (“Standing alone, an employer policy providing automatic deductions for meal breaks does not violate the FLSA.”)

2. NYSDOL has not issued a similar opinion and, during past enforcement investigations, has been skeptical of automatic deductions.

   a. In an October 28, 2010, opinion letter, the NYSDOL stated that “[w]hile an employer can require an employee to sign off on their weekly timesheet, the employee’s signature on a weekly timesheet neither relieves the employer of its obligations . . . under the Labor Law, nor does it prevent an employee from filing a complaint with this Department or bringing an action for a violation of . . . the labor law.” NYSDOL Op. Ltr. RO-10-0003 (Oct. 28, 2010).

C. Waiver of Meal Periods

   1. As a general rule, employees CANNOT waive their statutorily-required meal periods.

   2. Exceptions:


      b. In “single-shift employee” situations, the employee may waive the unpaid meal period.

D. Additional Breaks

   1. Under New York law, employers are not required to provide additional breaks beyond the general 30-minute meal period discussed above.

      a. Exception: Employees beginning work before 11 AM and working past 7 PM must be provided an additional break of at least 20 minutes between 5 PM and 7 PM. N.Y. Lab. L. § 162.
2. According to the U.S. Department of Labor, breaks of up to 20 minutes are compensable time:
   a. “Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in the industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time.” 29 C.F.R. 785.18.

3. NYSDOL has similarly opined that breaks of up to 20 minutes are compensable time. “[R]est periods of short duration (five to twenty minutes) are customarily paid as work time and must be counted as hours worked. (see 29 CFR 785.18).” NYSDOL Op. Ltr. RO-09-0027 (March 6, 2009).

E. Nursing or Pumping

1. New York law requires all employers to provide reasonable unpaid break time to nursing mothers for up to three (3) years following childbirth, in a location other than a bathroom. N.Y. Labor L. § 206-c.
   a. The federal Patient Protection and Affordable Care Act (PPACA), passed in 2010, requires employers to provide reasonable unpaid break times for nursing mothers for up to one (1) year after childbirth, in a location other than a bathroom, unless they have less than 50 employees and can show that providing such breaks would cause an “undue hardship” to the employer. 29 U.S.C. 207(r)(1).
   b. As the federal requirement does not pre-empt more generous state laws, New York employers must comply with the requirements of Section 206-c.

2. NYSDOL has issued guidance that each lactation break “shall generally be no less than twenty (20) minutes.” In addition, “[t]he number of unpaid breaks an employee will need to take for expression purposes varies depending on the amount of time the employee is separated from the nursing infant and the mother’s physical needs. In most circumstances, employers shall provide unpaid break time at least once every three hours if requested by the employee.” Guidelines Regarding the Rights of Nursing Mothers, available at http://www.labor.ny.gov/formsdocs/wp/LS702.pdf (emphasis added).
   a. USDOL has not promulgated a rule establishing the length of a “reasonable” break time or the number of breaks that must be provided. However, in a Request for Information, it expressed expectations similar to the NYSDOL guidance:
(1) “...nursing mothers typically will need breaks to express milk two to three times during an eight hour shift. Longer shifts will require additional breaks to express milk. The length of time necessary to express milk also varies from woman to woman. The act of expressing breast milk alone typically takes about 15 to 20 minutes, but there are many other factors that will determine a reasonable break time. Employers should consider these factors when determining how they will provide both reasonable break time and space for nursing mothers.” 75 C.F.R. 80073 (Dec. 21, 2010) (emphasis added).

F. Single-Shift Employees

1. In some instances where only one employee is on duty or is the only one in a specific occupation, it is customary for the employee to eat on the job without being relieved (for which time the employee should be paid).

2. NYSDOL will accept these special situations as compliance with Section 162 where the employee voluntarily consents to the arrangements.

3. However, an uninterrupted meal period must be provided to every employee who requests one from their employer.


G. Interruption of Meal Periods

1. USDOL: A meal break is compensable “if employees’ meals are interrupted to the extent that meal period is predominately for the benefit of the employer.” Source: USDOL Wage & Hour Division Fact Sheet #53.

H. Best Practices

1. If feasible, have employees clock out and in for meal periods. Maintain documented, contemporaneous records.

2. If that is not feasible, develop an alternate documented, contemporaneous system (such as sign-out/sign-in sheets), or a system for documenting for the rare occasions when meal breaks are missed so that employees can be paid for such breaks.

3. Develop a clearly defined meal policy, distributed in handbooks, intranet, initial and periodic employee training, etc.
IV. PROPER DOCUMENTATION


1. In December 2010, Governor David Patterson signed the Wage Theft Prevention Act ("WTPA"), which became effective April 9, 2011. The Act imposes new notice and recordkeeping obligations upon employers and significantly increases penalties for non-compliance with wage and hour laws.

2. Initial Hire and Annual Notices

   a. Employers are now required to give written notices to employees at the time of hire and annually on or before February 1 of each subsequent year. The annual notice requirement CANNOT be satisfied by giving notice at some other point in the year (e.g., when annual increases are implemented). Also, employers must issue annual notices even if there have been no changes.

   b. The following information must included in the initial and annual notice:

      (1) rate of pay;
      (2) overtime pay rate;
      (3) pay day;
      (4) basis of pay (hour, shift, week, salary, commission, piece, etc.);
      (5) allowances (if any);
      (6) the name, address and telephone number of the employer and any DBA; and
      (7) “any other information the Commissioner deems material and relevant.”

   c. If employees are paid at multiple hourly or piece rates, the notice should disclose all the rates that may apply (either on the notice itself or on an attached sheet).

   d. NYSDOL backed off its prior position that notices issued to exempt employees must specify the exemption that applies to the employee. It now states that employers "may state the specific exemption that applies," but are not required to do so. Guidelines for Written Notice of Rates of Pay, available at
3. Notice Templates

   a. NYSDOL has issued templates for the written notices for the following groups of employees:
      
      (1) Hourly rate employees;
      
      (2) Multiple hourly rate employees;
      
      (3) Employees paid a weekly rate or a salary for fixed number of hours (40 or fewer in a week);
      
      (4) Employees paid a salary for varying hours, day rate, piece rate, flat rate, or other non-hourly basis;
      
      (5) Prevailing rate and other jobs; and
      
      (6) Exempt employees.

   b. Employers are not required to use the DOL-issued templates and may develop and use their own so as long as they contain all the required information.

   c. NYSDOL expressly "reserves the right to require use of DOL forms in the future, if employer notices do not meet the requirements."

4. Distribution and Retention of Notices

   a. NYSDOL states that while the New Hire Notice may be "included in" letters and/or employment agreements provided to new hires, the notice itself must "be on its own form."

   b. Notices may be given electronically but there must be a system for the employee to acknowledge receipt of the notice and print out a copy of the notice.

   c. Employers must provide the written notices in English and in the employee’s primary language. Thus far, the Commissioner has established dual-language templates in Chinese, Haitian-Creole, Korean, Polish, Russian and Spanish.

   d. Employers must obtain signed and dated written acknowledgement each time notice is given and retain the acknowledgement for six
(6) years. If an employee refuses to sign the acknowledgment, the Department advises that "the employer should still give the notice and note the worker's refusal on its copy of the notice."

5. Notice of Changes
   a. Employers must provide written notice to employees when a change is made to any of the information on the Section 195 notice within seven calendar days prior to such change. N.Y. Lab. L. §195(2). This obligation is satisfied if such change is indicated on the employee’s subsequent wage statement.

   b. Except for hospitality industry employers, a separate notice is not required when there is an increase in an employee's pay rate, if the increase is reflected on the corresponding wage statement. For all employers, the employee must receive such written notice at least seven (7) days before any decrease in the employee’s pay rate.


6. Pending Legislation
   a. Senate Bill S06063 would repeal the annual notice requirement.

   b. The bill passed the New York Senate on February 29, 2012. It is currently being considered by the Assembly Labor Committee.

   c. While it has many co-sponsors in the Assembly, its fate remains unknown, and Governor Cuomo has not stated whether he would sign the bill if approved by the Assembly.

B. Wage Statements – N.Y. Labor L. § 195(3)

1. The WTPA requires employers to provide more information than previously required with each payment of wages:
   a. The dates of work covered by that payment;
   b. Name of the employee and employer;
   c. Address and phone number of employer;
   d. Rate(s) of pay and basis thereof (e.g., whether paid by the hour, shift, week, salary, commission, etc.).
e. Gross and net wages;

f. Deductions; and

g. Any allowances claimed as part of the minimum wage.

2. For each non-exempt employee, the following must also be provided in the wage statement:

a. Regular and overtime hourly rate(s) of pay; and

b. Number of regular and overtime hours worked.

3. For each employee paid at a piece rate, the following must also be provided in the wage statement:

a. Applicable piece rate or rates of pay; and

b. Number of pieces completed at each piece rate.

4. Upon employee request, employers must provide a written explanation of how wages were computed. N.Y. Lab. L. § 195(3).

5. Employers must retain these payroll records for six (6) years. N.Y. Lab. L. § 195(4).

6. If a retroactive wage increase is implemented, the amount of the retroactive increase must be separately noted on the wage statement in the period in which it is paid.

7. Wage statements may be provided electronically, if employees can access and print their statements on a computer provided by the employer.

C. Commission Salespersons – N.Y. Labor L. § 191(c)

1. New York law requires that the agreed terms of employment for commission salespersons shall be reduced to writing, signed by both the employer and the commission salespersons, kept on file by the employer for a period not less than three (3) years, and made available to the commissioner upon request.

2. Such writing shall include a description of how wages, salary, drawing account, commissions and all other monies earned and payable shall be calculated.

3. Where the writing provides for a recoverable draw, the frequency of reconciliation shall be included.
4. Such writing shall also provide details pertinent to payment of wages, salary, drawing account, commissions and all other monies earned and payable in the case of termination of employment by either party.

5. The failure of an employer to produce such written terms of employment, upon request of the commissioner, shall give rise to a presumption that the terms of employment that the commissioned salesperson has presented are the agreed terms of employment.

D. Termination & Payment for Accrued but Unused Time

1. New York employers generally have no obligation to provide paid time off or vacation. Employer policy dictates the employer’s responsibility to pay an employee for accrued paid time off, such as upon termination of employment. See N.Y. Lab. L. §§ 191(3), 198-C; NYSDOL Op. Ltr. RO-07-0070 (July 12, 2007).

2. An employer may have a policy whereby employees forfeit accrued vacation, but employees must have advance written notice of the policy.

3. In the absence of an express forfeiture policy, NYSDOL takes the position that an employer must pay out accrued, unused paid time off upon termination from employment.
   a. “[A]n employer who is a party to an agreement to pay or provide benefits or wage supplements (which would include paid time off) to an employee, but who fails, neglects or refuses to abide by such agreement, is guilty of a misdemeanor.” NYSDOL Op. Ltr. RO-07-0070 (July 12, 2007) (citing N.Y. Lab. Law § 198-C).

E. Recommended Steps

1. Employers should review their policies concerning PTO, sick, personal and vacation time, as well as termination of employment, and ensure they address payment of accrued but unused time at termination. If an employer does not want to pay employees for accrued but unused time at termination or wish to condition such payment, they must expressly state in the policy the conditions under which forfeiture will occur.

2. Employers should consistently apply their policy and be aware that different rules apply in other states (such as Massachusetts & California).

V. SCHEDULING CONCERNS

A. One Day Rest in Seven – N.Y. Labor L. § 161

1. Employees working in certain establishments are required to be given 24 hours of consecutive rest in a given calendar week.
a. NYSDOL considers the calendar week as beginning on Sunday. NYSDOL Op. Ltr. RO-06-0104 (October 3, 2006).

2. These establishments include:
   a. mercantile establishments (places where goods are offered for sale);
   b. hotels and restaurants;
   c. freight or passenger elevators;
   d. movie and live theatres;
   e. apartment and office buildings;
   f. garages; and
   g. warehouses and other storage places.

3. Domestic workers also must be given one day’s rest in seven unless they waive this requirement in exchange for receiving overtime.

B. Compensability of On-Call Time – 29 C.F.R. § 785.17

1. Time is considered to be “on-call” and compensable if employees are required to remain near the worksite, or expected to respond shortly after being called.

2. The time is not compensable if employees are merely required to leave word where they can be reached and have adequate time to report when called.

3. The key consideration is whether the employee is “waiting to be engaged” (not compensable) or “engaged to be waiting” (compensable). Or, in other words, if the employee is so restricted that he/she cannot use time effectively for his/her own purposes, then the time is compensable.

C. Call-In Pay – 12 N.Y.C.R.R. § 142-2.3

1. Under New York law, an employee who by request of the employer reports to work on any day must be paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage.

   a. If “there is work available to an employee but the employee, on their own accord, stops working [before four hours have passed], such employee is not entitled to call-in pay.” NYSDOL Op. Ltr. RO-09-140 (December 14, 2009).
2. If the employee’s wages for the week “exceed[] the minimum and overtime rate for the number of hours worked and the minimum wage rate for any call-in pay owed, no additional payment for call-in pay is required during that workweek.” NYSDOL Op. Ltr. RO-09-140 (December 14, 2009).

D. Preparing/Finishing Activities – 29 C.F.R. §§ 785.14-16

1. Several federal regulations cover whether the time employees spend at work putting on clothes or safety equipment (“donning”) or removing the clothes or safety equipment (“doffing”) is compensable.
   a. Employees must be paid if the “donning” and “doffing” is integral and indispensable to their principal work activities.
   b. The USDOL has opined that donning and doffing is compensable if an employee at work is donning or doffing “protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job.” Administrator’s Opinion 2010-2, available at http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.htm.

2. Completing paperwork, setting-up, fueling, conducting inspections, and removing trash will generally be compensable if it is done at the employer’s behest and is to the employer’s benefit. See, e.g., Dunlop v. City Elec., Inc., 527 F.2d 394, 401 (5th Cir. 1976).

3. **De Minimis** Exception: Minor or trivial work performed outside of scheduled working hours (generally less than 10 minutes per work day) may be disregarded. (Examples include putting on equipment easily donned or doffed, such as earplugs, hairnets, or safety goggles, or spending a few moments checking emails.)
   a. Employers should be cautious in relying on this exception, however, because the USDOL is generally skeptical of de minimis arguments.


E. Spread of Hours/Split Shift – 12 N.Y.C.R.R. § 142-2.4

1. Under New York law, employees must receive one hour’s pay at the basic minimum hourly wage rate in addition to at least the minimum wage required for any day in which the spread of hours exceeds 10 hours; or there is a split shift; or both situations occur.
2. The spread of hours is the interval between the beginning and end of an employee's workday. The spread of hours for any day includes working time plus time off for meals plus intervals off duty. 12 N.Y.C.R.R. § 142-2.18.

3. A split shift is a schedule of daily hours in which the working hours required or permitted are not consecutive. No meal period of one hour or less shall be considered an interruption of consecutive hours. 12 N.Y.C.R.R. § 142-2.15.

VI. MISCELLANEOUS “WAGE & HOUR” ISSUES

A. Jury Duty

1. Payment obligations

   a. An employer may withhold wages of any employee serving as a juror during the period of such service, except that an employer who employs more than ten employees shall not withhold the first forty ($40) dollars of such employee’s daily wages during the first three (3) days of jury service. N.Y. Jud. L. § 519.

2. Retaliation Prohibitions

   a. Under the New York Judiciary Law, it is unlawful for an employer to discharge or penalize an employee for serving as a juror and such acts may be prosecuted by the New York State Office of the Attorney General and subject to criminal penalties.

   (1) According to guidance from the New York Unified Court System, it is an illegal penalty to force an employee to charge jury duty absence against vacation, personal or sick time. However, an employee may choose paid leave over losing wages. N.Y. Unified Court System, Juror Information for Employers, available at http://www.nyjuror.gov/pdfs/hb_EE.pdf (last visited March 27, 2012).

   (2) The New York Unified Court System has also issued guidance that an employer may not require an employee who has reported or served for a full day of jury service to then work a full evening or night shift. Thus, it may constitute an illegal penalty to force an employee to work a full shift while the employee is serving full days on jury service. Where a day’s jury service is completed with less than a full day’s court appearance, or where the required reporting to work is for a relatively short period of time, Jury Commissioners exercise their discretion to determine
whether the required reporting to work is an illegal penalty. *Id.*

B. **Witness Duty**

1. **Criminal Proceedings**
   
a. New York employers may not discipline or discharge an employee who misses work because he or she appears as a witness in a criminal proceeding where the employee was the victim of the offense at issue or was subpoenaed to attend the proceeding as a witness.

b. N.Y. Penal Law § 215.14 applies only to criminal proceedings and provides that:

   (1) Any person who is the victim of an offense or, is subpoenaed to attend a criminal proceeding as a witness or who exercises his rights as a victim and notifies his/her employer of the intent to appear as a witness, to consult with the district attorney prior to the day of his attendance, shall not on account of his/her absence from be subject to discharge or penalty. N.Y. Pen. L. § 215.14.

   (2) However, upon request of the employer, the party who sought the attendance or testimony must provide verification of the employee’s service and the employer may withhold wages of any such employee during the period of such attendance.

   (3) Subjecting an employee to discharge or penalty on account of absence from employment by reason of required attendance as a witness at a criminal proceeding is a class B misdemeanor.

C. **Voting Leave**

1. Employers must permit an employee who is a registered voter two (2) hours to vote in any election, unless the employee has four (4) consecutive nonworking hours to vote while the polls are open (this is a common occurrence in New York, as polls are generally open for long periods of time, e.g., from 6:00 a.m. until 9:00 p.m.).

   a. The employer may specify the hours to be taken, but also must display a notice of these voting provisions 10 days prior to the election. N.Y. Elec. L. § 3-110.
2. An employer is guilty of a misdemeanor if it refuses to allow an employee to vote in an election or subjects the employee to a penalty or reduction of wages for voting. N.Y. Elec. L. § 17-118.

D. Blood Donation Leave

1. New York law mandates that employers provide leave time to employees for the purpose of donating blood. N.Y. Lab. L. § 202-j.
   
a. Private and public sector employers that employ 20 or more employees are covered by Section 202-j.

2. An employer must either, at its option:
   
a. Grant three (3) hours of leave of absence in any twelve month period to an employee who seeks to donate blood; or
   
b. Allow its employees without use of accumulated leave time to donate blood during work hours at least two times per year at a convenient time and place set by the employer, including allowing an employee to participate in a blood drive at the employee’s place of employment. N.Y. Lab. L. § 202-j(2).

3. Off-premises blood donation is not required to be paid leave. Leave taken by employees at a company-designated donation alternative (i.e., employer-sponsored blood drive at the workplace) must be paid leave that is provided without requiring the employee to use accumulated vacation, personal, sick, or other leave time.

4. Section 202-j guidelines provide that employers must give employees written notice of their right to take blood donation leave in a manner that will ensure that employees see it, such as by posting in a prominent spot in an area where employees congregate, inclusion of notice with employees’ paychecks, mailings, notices in employee handbooks, or other comparable method. Guidelines for Implementation of Employee Blood Donation Leave, § V, available at http://www.labor.state.ny.us/formsdocs/wp/ls703.pdf (last visited April 12, 2012).

5. Employers may require that employees give "reasonable notice" of their intent to take leave to give blood.
   
   (1) If leave is for off-premises blood donation, at least three (3) working days notice is required.
   
   (2) If, however, the employee is in a position that is essential to the employer's operations, and three (3) days notice is an insufficient amount of time for the employer to fill the
employee's position, the employer can require more than three (3) days prior notice. Such advance notice for employees occupying "essential positions" is limited to no longer than is necessary to feasibly fill the position and cannot exceed 10 working days.