



BUSINESS IN 2024

WEEKLY WEBINAR SERIES

 **BOND** **SCHOENECK & KING** ATTORNEYS

Your Host



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The NLRB and College Athletics: Labor Unions at the Gymnasium Door

**Complimentary Webinar
Wednesday, February 28
12 – 1 p.m.
[Register here](#)**

TODAY'S AGENDA

Kristen Smith – (12:00PM-12:05PM)

- Introduction

Suba Viswanathan – (12:05PM-12:20PM)

- Inclusion of Bonuses and Commissions in the Regular Rate for Overtime Computation

Kim Wolf Price – (12:20PM-12:35PM)

- New York State Constitution - Equal Rights Amendment

Devin Karas – (12:20PM-12:45PM)

- Long-Term, Part-Time Employee Contribution Roll-Out

Kristen Smith – (12:45PM)

- Questions

Inclusion of Bonuses and Commissions in the Regular Rate for Overtime Computation



Subhash Viswanathan

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Regular Rate – In General

- All remuneration paid to or on behalf of an employee, except:
 - Sums paid as gifts
 - Payments made for occasional periods when no work is performed due to vacation, holiday, or illness, and reimbursement for expenses
 - Discretionary bonuses and payments under bona fide profit-sharing plans
 - Contributions to bona fide employee benefit plans
 - Extra premium compensation for exceeding daily or weekly hours requirements, or for working on weekends and holidays
 - Value or income derived from stock options

Discretionary Bonuses – Excluded from Regular Rate

- The employer must have complete discretion over
 - Whether to pay the bonus
 - The amount of the bonus
- The bonus cannot be paid pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly

Non-Discretionary Bonuses

- Bonuses announced to employees to incentivize production, efficiency, attendance, and remain in employment
 - Attendance Bonuses
 - Individual or Group Production Bonuses
 - Bonuses for Quality or Accuracy of Work
 - Longevity Bonuses
- A bonus does not have to be paid pursuant to a written bonus plan for it to be considered non-discretionary

Non-Discretionary Bonuses (cont.)

- Weekly Bonus

- Add bonus to the hourly compensation and divide by hours worked in the work week to compute the regular rate
- Example:
 - Employee works 45 hours in a work week at a \$20.00 hourly rate
 - Employee also earns a \$90.00 production bonus for the work week
 - Regular rate is \$22.00 per hour ($\$990.00 \div 45$ hours)
 - Extra half-time = \$11.00 per hour
 - Total Compensation = \$900.00 hourly straight time + \$90.00 bonus + \$55.00 overtime = \$1,045.00

Non-Discretionary Bonuses (cont.)

- Monthly Bonus
 - Multiply bonus by 12 and divide by 52 to compute weekly equivalent
 - Divide the weekly equivalent of the bonus by hours worked each work week during the month to compute extra overtime owed
- Example
 - Employee works 42 hours during the work week ending February 23, 2024
 - Employee earns a \$364.00 production bonus for the month of February
 - Weekly equivalent of the bonus = \$84.00 ($\$364.00 \times 12 \div 52$)
 - Regular rate increases by \$2.00 per hour ($\$84.00 \div 42$ hours)
 - Extra half-time owed = \$1.00 per hour for 2 hours = \$2.00

Non-Discretionary Bonuses (cont.)

- Quarterly Bonus
 - Divide by 13 to compute weekly equivalent
 - Divide the weekly equivalent of the bonus by hours worked each work week during the quarter to compute extra overtime owed
- Example
 - Employee works 46 hours during the work week ending February 23, 2024
 - Employee earns a \$2,392.00 production bonus for the first quarter of 2024
 - Weekly equivalent of the bonus = \$184.00 ($\$2,392.00 \div 13$)
 - Regular rate increases by \$4.00 per hour ($\$184.00 \div 46$ hours)
 - Extra half-time owed = \$2.00 per hour for 6 hours = \$12.00

Non-Discretionary Bonuses (cont.)

- Annual Bonus
 - Divide by 52 to compute weekly equivalent
 - Divide the weekly equivalent of the bonus by hours worked each work week during the year to compute extra overtime owed
- Example
 - Employee works 50 hours during the work week ending February 23, 2024
 - Employee earns a \$5,200.00 production bonus for 2024
 - Weekly equivalent of the bonus = \$100.00 ($\$5,200.00 \div 52$)
 - Regular rate increases by \$2.00 per hour ($\$100.00 \div 50$ hours)
 - Extra half-time owed = \$1.00 per hour for 10 hours = \$10.00

Commissions

- Commissions paid to non-exempt salespersons must be included in the regular rate
- Method of inclusion is the same as the method of inclusion of bonuses

Potential Liability

- Federal statute of limitations – 2 years (3 years for willful violations)
- New York statute of limitations – six years
- Failure to include all compensation in the regular rate can result in a class/collective action
- Potential liability for the six-year period includes
 - Unpaid overtime compensation
 - Interest
 - 100% liquidated damages
 - Attorneys' fees

New York State Constitution - Equal Rights Amendment



Kim Wolf Price

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New York's Equal Rights Amendment

- As Election Day – November 5th approaches, you will likely hear more about NY's ballot referendum on the ERA.
 - Mini civics lesson
 - Give you a brief overview of the ERA language
 - Talk about whether this makes changes to current NYS laws

New York's Equal Rights Amendment

- **What is a ballot referendum?**
 - Vote of the people of NY on a proposed constitutional amendment
 - Legislation must first pass both houses of the NYS Legislature in two consecutive 2-year sessions and then be signed by the governor
 - The ERA passed the required two consecutive legislative sessions and was signed by Governor Hochul in January 2023, putting it on the ballot for this November
- **Don't we already have protections for women and others in NY's Constitution?**
 - Currently, the NY state constitution only protects against racial and religious discrimination.
 - The ERA would prohibit discrimination based on a person's ethnicity, national origin, age, disability, and sex
- **Do other states have a state ERA?**
 - Yes, the majority of states do though not as broad
 - Twenty-nine state constitutions contain provisions that guarantee equal rights, particularly for women, either in their original text or added later as an amendment.
 - The last state to adopt an equal rights provision in its state constitution was Nevada in 2022

How Did the Amendment Get on the Ballot?

- **The passage of NY's ERA in the two consecutive legislatures was NOT a tight vote**
 - First session:
 - On July 1, 2022, the New York State Senate introduced the amendment. It passed on the same day by a vote of 49-14.
 - The bill was then transferred to the New York Assembly on the same day, where it passed by 95-45 of vote.
 - Second session:
 - The amendment was then introduced in the next legislative session in 2023.
 - On January 24, 2023, it passed the Senate by 43-20.
 - On the same day, it passed the Assembly by 97-46. Signed by Governor Hochul in January.
 - The measure was then referred to the ballot.

What Does the Amendment Say?

- If passed, it will amend the NY State Constitution Art 1, Section 11: Equal Protection of Laws; Discrimination in Civil Rights Prohibited
- **Text of ERA:**
 - A. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, ethnicity, national origin, age, disability creed, or religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy, be subjected to any discrimination in his or her their civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state pursuant to law.
 - B. Nothing in this section shall invalidate or prevent the adoption of any law, regulation, program, or practice that is designed to prevent or dismantle discrimination on the basis of a characteristic listed in this section, nor shall any characteristic listed in this section be interpreted to interfere with, limit, or deny the civil rights of any person based upon any other characteristic identified in this section.

Is This an Expanded Definition?

- **Definition of sex in ERA**
 - includes sexual orientation, gender identity, gender expression, pregnancy and pregnancy outcomes. It would also protect against any government actions that would curtail a person's reproductive autonomy or their access to reproductive health care.
- **Religious institutions/freedom of religion**
 - The addition of LGBTQ+ and reproductive health was a point of significant discussion based on freedom of religion.
 - Sponsors added a section:
 - NOTHING IN THIS SECTION IS INTENDED TO ALTER OR DIMINISH THE EXISTING PROTECTIONS FOR RELIGION SET FORTH IN ARTICLES THREE AND ELEVEN OF THIS CONSTITUTION. (emphasis in original)

Would This Change Current Law?

- **Is this an expansion of rights? Aren't these already codified in NY?**
 - Many NY laws prohibit discrimination, including:
 - The New York State Human Rights Law prohibits discrimination on the basis of "age, race, creed, color, national origin, sexual orientation, military status, sex, marital status or disability" in employment, housing, education, credit, and access to public accommodations.
 - In 2019, New York passed the Reproductive Health Act
 - Equality Act (marriage equality)
 - However, it changes the level of scrutiny – strict scrutiny applied to race/national origin/religion
 - Would extend that to gender, gender identity, age, disability, reproductive health, ethnicity
 - Strict scrutiny is a form of judicial review that courts use to determine the constitutionality of certain laws. Strict scrutiny is often used by courts when a plaintiff sues the government for discrimination.
 - As it stands, women (and other groups mentioned) do not have the same protections and rights under the NY Constitution as men do.

What About the Federal ERA?

- What about the Federal ERA?
 - That is still not ratified.
 - Reinvigorated efforts to do so.
- Global perspective:
 - Today, 85% of the 193 United Nations member states have a provision in their constitutions that specifically addresses gender equality, and an additional 115 have a provision that prohibits discrimination on the basis of sex.

What Does NY's ERA Do?

- So, what does the NY ERA do?
 - Adds to existing enumerated protections against discrimination based on race and religion already in the NY Constitution.
 - This amendment would explicitly prohibit discrimination based on a person's ethnicity, national origin, age, disability, and sex—including their sexual orientation, gender identity, gender expression, pregnancy and pregnancy outcomes, reproductive healthcare and autonomy.
- This provides the strongest level of legal protection against discrimination
 - Cannot be changed quickly.
 - Making it harder to eliminate or narrow existing legal protections.
 - As the name states, provides equal protection to women and others in the Constitution. Racial and religious discrimination are already enumerated

Will This Directly Impact Business?

- What does it mean for businesses in NY?
 - Discrimination Laws already codified in NYS
 - As well as some protections already in NY Constitution (religion/race)
- Would elevate the level of scrutiny in certain court reviews
 - Government decision or laws
- Could lessen frequent changes to the law.
- Will not cause immediate changes.
 - Nothing in particular to prepare for.
- Follow current anti-discrimination laws, policies and practices you have in place. Train team to do the same.

Long-Term, Part-Time Employee Contribution Roll-Out



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SECURE Act Change

- Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act).
- Requires **all** 401(k) plan sponsors to allow “long-term, part-time employees” to make pre-tax elective salary deferrals to sponsor’s 401(k) effective for plan years beginning on or after January 1, 2024.
- For calendar year plans EFFECTIVE JANUARY 1, 2024.
- Who is a long-term, part-time employee?
 - For 2024: any part-time employee who performed at least 500 hours of service (but less than 1,000), in each of the preceding three years (i.e., any employee who worked 500 hours in 2021, 2022, and 2023).
 - For 2025: measurement period is reduced from three years to two. Also, beginning in 2025, 403(b) plans will be required to allow long-term part time employees to make deferrals (less of an issue due to universal availability).

Proposed Regulations Issued Late 2023

- In late 2023, the IRS issued proposed regulations governing implementation of long-term, part-time employee rule.
 - Proposed not yet finalized but may be relied upon.
 - Comment period ended a month ago so final regs likely to be issued in near future.
- Proposed Regs addressed:
 - Excludable employees
 - Plans may exclude collectively bargained employees, non-resident aliens, and other employees otherwise excludable under the plan
 - Measurement period
 - Initial 500-hour measurement period is 12-consecutive months from hire date; after first 12-month period plan may shift to plan year measurement period.

Proposed Regulations Issued Late 2022 (continued)

- Counting Hours
 - Plans may, but are not required to, count actual hours worked in preceding consecutive 12-month periods.
 - “Hours Equivalency” method may be used where if part-time employee works one hour a week will be credited with 20-hours for example.
 - “Elapsed-Time” method technically may be used, but because ET method only allows sponsor to count 1,000 hours worked in 1-year period for eligibility purposes, part-time employees will be deemed eligible after 1-year, not three consecutive years of service.
 - ET method swallows the rule. Not practical, not recommended.

Proposed Regulations Issued Late 2022 (continued)

- Once in Never Out
 - Once a part-time employee meets 500 HoS for three year period (2-year period beginning in 2025), that employee must always be eligible to make elective salary deferral contributions to 401(k) plan.
- 401(k) Contributions Only
 - Proposed regs. clarified that the LTPT rules only apply to employee salary deferral contributions. May be excluded from employer matches, non-elective employer contributions, catch-up contributions, Roth.
- If Employer Decides to Make Contributions for LTPT Employees
 - Full year of vesting service must be credited even though employees only work 500 hours.

Proposed Regulations Issued Late 2022 (continued)

- Plan Testing: LTPT employees may be excluded from nondiscrimination tests (e.g., ADP, ACP, minimum coverage, and top-heaving testing) but plan document must expressly exclude LTPT employees from such tests for safe harbor plans.
 - Proposed regulations are less clear about test exclusions, but for now until regulations are finalized best practice would be to exclude LTPT employees in plan documents.
- Next Steps
 - Proposed regulations to be finalized in coming months so watch this space
 - If plan has not yet complied with LTPT rules, self-correction under EPCRS is an option, in light of liberalized self-correction requirements.
 - Best to review to see if you have had any LTPT employees that are eligible, notify them of their right to contribute and enroll if any LTPT employees want to be enrolled for deferrals.

Questions?



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New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar [here](#).

Non-NYS Bar Association Members can purchase through Amazon [here](#).

Thank You

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It is not to be considered as legal advice.
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