

2024

# BUSINESS IN 2023

WEEKLY WEBINAR SERIES

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# Introduction



**Kristen E. Smith**

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Syracuse, NY

# TODAY'S AGENDA

**Kristen Smith – (12:00PM-12:05PM)**

- Introduction / Agenda

**Seth Gilbertson – (12:05PM-12:15PM)**

- Preparing for Pay Transparency in NYS

**Colin Leonard – (12:15PM-12:25PM)**

- Final NYS WARN Regulations

**Curtis Johnson – (12:25PM-12:35PM)**

- NYS Statute Making Landlord Participation in Section 8 Compulsory Found Unconstitutional

**Kristen Smith – (12:35PM – 12:45PM)**

- Requesting Public Documents: NYS Freedom of Information Law (FOIL) Basics

# Preparing for Pay Transparency in NYS



## Seth F. Gilbertson

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# Reminders

- Goes into effect **September 17, 2023**
- Applies to entities with four or more employees
  - Only temp firms exempt
- Must disclose “range of compensation”
  - “the minimum and maximum annual salary or hourly range of compensation . . . that the employer ***in good faith believes*** to be accurate at the time of the posting of an advertisement” for the job, promotion or transfer opportunity
- DOL can issue civil penalties for noncompliance



# Scope

- Applies to: “a job, promotion, or transfer opportunity that *will* physically be performed, at least in part” in New York State
  - Includes jobs that will physically be performed outside of New York but report to a supervisor or office in New York
- Applies to “advertisements”. Defined as “to make available to a pool of potential applicants for internal or public viewing, including electronically, a written description of an employment opportunity”

# Preparation

- Map out your reporting structures for clarity on application
- Update Job Descriptions
  - Review essential functions and qualification standards
- Perform an equity and compression analysis
  - Know what an investigator or plaintiff will discover
  - Work with counsel to structure this to meet the needs of your organization and maintain privilege

## Common Issues

- Can we agree to a salary outside the posted range?
- Do I have to include a job description?
- Can I still ask applicants about their salary expectations?
- If I already comply with the NYC law, what else do I have to do?



# Final NYS WARN Regulations



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# NYS Statute Making Landlord Participation in Section 8 Compulsory Found Unconstitutional



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# Requesting Public Documents: NYS Freedom of Information Law (FOIL) Basics



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Syracuse, NY

# What is FOIL?

- New York Public Officers Law Sections 84-90 requires governmental agencies, including state agencies, villages, towns, cities, libraries, public authorities and school districts, to enact rules and regulations governing the availability of records; to maintain certain records; and to make all records available for public inspection and copying except those specifically defined in statutory exceptions.

# Policy and Rules

- Each agency must have written rules and regulations pertaining to the availability of records, including but not limited to:
  - The times and places records are available;
  - The persons from whom records may be obtained (e.g., the Records Access Officer); and
  - Fees for copies of records

# Inspection and Copying

- Records must be available for inspection and copying at all reasonable times, *i.e.*, during all hours that the entity is regularly open for business.
- Any member of the public may inspect or obtain copies of records, whether or not he or she resides in the village, town, city, etc.
- Any person has the right to inspect accessible records at no charge.
- However, there may be situations in which some aspects of a record – but not the entire record – may be properly withheld. In that case, the agency may prepare a redacted copy and charge the established fee for the copy (*i.e.*, \$.25 per page).



# What are Records?

- Under FOIL, a “record” is defined as “any information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever.”
- This can include, but is not limited to:
  - Letters/Emails/Text Messages
  - Contracts, vendor data, invoices, etc.
  - Permits/Codes documents
  - Police/Fire reports
  - Body worn camera footage
  - Collective bargaining agreements

# Records That May Be Withheld

- Exempt by another state or federal statute, e.g.
  - Family Educational Rights and Privacy Act (FERPA)
  - Attorney-client communications;
- Unwarranted invasion of personal privacy Public Officers Law Section 89(2);
- Impairment of present or imminent contract awards or collective bargaining negotiations;
- Trade secrets or records/information from commercial enterprise which, if disclosed, would cause substantial injury to the competitive position of the enterprise

# Records That May Be Withheld cont'd

- Compiled for law enforcement purposes and which, if disclosed, would:
  - Interfere with law enforcement investigations or judicial proceedings;
  - Deprive a person of a right to a fair trial or impartial adjudication;
  - Identify a confidential source or disclose confidential information relating to a criminal investigation; or
  - Reveal criminal investigative techniques or procedures, except routine techniques and procedures
- Endangerment of the life or safety of any person;

## Records That May Be Withheld cont'd

- Examination questions or answers which are requested prior to the final administration of such questions;
- Computer access codes;
- Inter/intra-agency exception...

# Inter/Intra Agency Exception

- Designed to provide for open internal communications
- Does not include:
  - Statistical or factual tabulations or data;
  - Instructions to staff that affect the public;
  - Final agency policy or determinations;
  - External audits, including but not limited to audits performed by the comptroller and the federal government

# Procedures: Responding to a Request

- Must respond to a written request for a record reasonably described within **five (5) business days** of receipt of the request by:
  - Making the record available; or
  - Denying the request in writing; or
  - Furnishing a written acknowledgement of the receipt of the request and a statement of the approximate date, which is reasonable under the circumstances of the request, when the request will be granted or denied, including, where appropriate, a statement that access to the record will be determined in accordance with Public Officers Law Section 89(5).



# Procedures: Constructive Denial

- If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, or if a public entity delays responding for an unreasonable time after it acknowledges that a request has been received, a request may be considered to have been constructively denied.
- Constructive denials may be appealed.

## Procedures: Extensions

- If request cannot be fulfilled within twenty (20) business days from the date of the acknowledgement of the receipt of the request, the agency must state, in writing, the **reason** for the inability to grant the request within twenty (20) business days and **a date certain within a reasonable period**, when the request will be granted in whole or in part.

# Procedures: Voluminous Requests

- Cannot deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome.
- If the agency lacks sufficient staffing, it may engage an outside professional service to provide copying, programming, or other services required to provide the copy.

# Procedures: Creating Records

- No obligations to prepare a record that it does not possess or maintain. However...
  - If portions of records (i.e., databases) can be extracted or generated from existing records with reasonable effort, the agency is required to do so.
  - Any programming necessary to retrieve a record maintained in a computer storage system and to transfer the record to the medium requested by a person is not deemed to be the preparation or creation of a new record.

# Procedures: Fees

- Can charge \$0.25 per page.
- Can charge a fee for a medium (i.e., flash drive)
- Can require payment in advance of the preparation of copies.
- Cannot charge for employee copying/searching/redacting time.

# Administrative Appeal

- Denials can be appealed in writing within 30 days
  - Appeals go to the agency's head or chief executive or governing body or individual designated by the governing body to receive and decide such appeals.
- Response must be made within 10 business days of receipt and must fully explain in writing to the person requesting the record the reasons for further denial or access to the record sought must be provided.



## Administrative Appeal cont'd

- Response must provide a “particularized and specific justification for denying access” or a “factual basis” for claiming an exemption.
- Appeal and the determination must be filed with the Committee on Open Government.

# Judicial Appeal

- Appeal denials can be challenged in State Supreme Court pursuant to CPLR Article 78.
- The court must award reasonable attorney's fees and other litigation costs against the agency if the person requesting the record substantially prevails and the court finds that the agency had no reasonable basis for denying the request.

# Your 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

The information in this presentation is intended as general background information.  
It is not to be considered as legal advice.  
Laws can change often, and information may become outdated.

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