

2024

# BUSINESS IN 2023

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# Introduction



## Kristen E. Smith

Member

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Syracuse, NY



# Managing the Struggling Employee:

Mental and Emotional Health and the Law

## Labor and Employment Law Fall 2023 Breakfast Briefing

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# TODAY'S AGENDA

**Kristen Smith – (12:00PM-12:05PM)**

- Introduction / Agenda

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

- NYS Proposed Regulations on Pay Transparency

**Rebecca LaPoint – (12:15PM-12:25PM)**

- US Department of Labor's New Proposed White Collar Exemption Rule

**Tom Eron – (12:25PM-12:35PM)**

- Second Circuit Clarifies Federal Law on Workplace Retaliation Claims

**Frank Mayer – (12:35PM-12:45PM)**

- IRS announcement Concerning the Processing of Employee Retention Tax Credit Claims

# NYS Proposed Regulations on Pay Transparency



**Seth F. Gilbertson**

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# Reminders

- Went into effect **September 17, 2023**
- Applies to entities with four or more employees
- 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”

# The *Proposed* Regulations (and new guidance)

- Range must be for single opportunity and single geographic location or range (if multiple levels of supervisory authority or seniority or multiple locations, must include multiple ranges of compensation)
- “Good faith” factors may include: job market, current employee compensation levels, hiring budget, experience and education levels acceptable for the opportunity
  - An employer is not precluded from adjusting the range of compensation after collecting additional information through the hiring process
  - The range can be so broad as to constitute a violation if it has the effect of preventing the potential applicant from understanding the legitimate range the employer is willing to pay



# The Proposed Regulations (and new guidance)

- Advertisements must contain job description for the opportunity if a job description exists
  - Limited exception where the position/title clearly conveys the full extent of the duties (e.g. dishwasher)
- Pool of applicants = more than one
- Incidental or infrequent presence in NY does not constitute physical presence for purposes of coverage

# Common Questions

- Does the law apply to public entities?
- Do I have to create a job description?
- Does the law apply to advertisements that were posted prior to September 17?
- Do I need to include benefits?
- Do I have to advertise every opportunity?

# US Department of Labor's New Proposed White Collar Exemption Rule



**Rebecca J. LaPoint**

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# USDOL Proposed Rule

- Issued on August 30, 2023
- Proposed rule would:
  - Increase minimum weekly salary to qualify for the FLSA executive, administrative, and professional white collar exemptions from \$684 per week (\$35,568 annually) to \$1,059 per week (\$55,068 annually)
  - Increase the annual salary threshold to qualify for the highly compensated employee exemption from \$107,432 to \$143,988
  - Establish automatic increases to these salary levels every three years

# USDOL Proposed Rule

- Does not include any changes to the duties requirements for any of the white collar exemptions
- No changes for employees whose exemption status determined only by duties test (e.g., doctors, lawyers, and teachers)

# Timeline

- The proposed rule will be open to public comment until November 7, 2023
- We do not know the exact timeline for the DOL's publication of a final rule or when a final rule might go into effect
  - The time between the 2019 proposed rule and the final rule was approximately 10 months. However, this could occur much sooner

# Timeline

- There may also be some legal challenges to the rule if it is ultimately adopted, just as there were in 2016
  - In 2016, the USDOL issued a final rule increasing the exempt salary threshold to \$913 per week
  - The U.S. District Court for the Eastern District of Texas issued a nationwide injunction prohibiting the USDOL from implementing the final rule and the rule was formally rescinded

# Key Takeaways

- If this proposed rule is adopted, employers that use housing or meal allowances to meet the New York salary threshold will still need to ensure that the new federal salary threshold is met because federal minimum salary does not count housing or meal allowances
- New York does not set a minimum salary level to qualify for the professional exemption
  - If the proposed rule is adopted, employers will need to review the salary levels of professional employees to ensure they meet the new federal threshold



# Key Takeaways

- New York's minimum salary level to qualify for the executive and administrative exemptions is currently higher than \$1,059 per week in all regions
- NOTE: USDOL indicated the actual salary threshold will be based on earnings data as of the date the final rule takes effect
  - The salary minimum may ultimately be higher than the projected \$55,068- potentially more than \$60,000 annually

# Second Circuit Clarifies Federal Law on Workplace Retaliation Claims



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# IRS announcement Concerning the Processing of Employee Retention Tax Credit Claims



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# Your Questions



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### **New York Employment Law: The Essential Guide**

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

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