





WORKPLACE LAW UPDATE

OCTOBER 18, 2023

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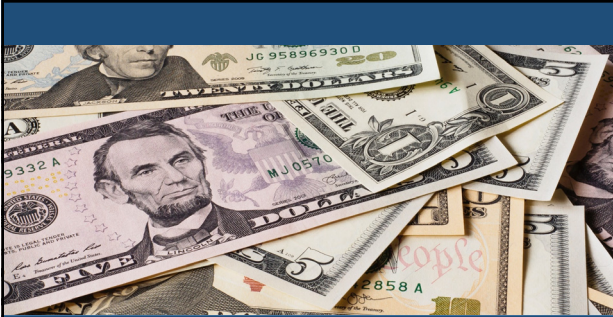
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WAGE AND HOUR LAW



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Upstate NY Minimum Wage Increasing!

- December 31, 2023 increases to \$15.00 (\$16 New York City and Nassau, Suffolk, and Westchester)
 - \$15.50 in 2024, then to \$16 in 2025
- Future Increases published on or before October 1 of each year



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OTHER CHANGES

- Minimum Weekly Wage Est. \$1,125 Weekly

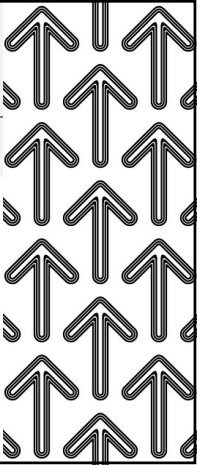
Tipped Service Workers

Year	New York City, Westchester, Nassau, Suffolk Counties	Upstate New York
2024	\$10.70	\$10.00
2025	\$11.00	\$10.35
2026	\$11.35	\$10.70

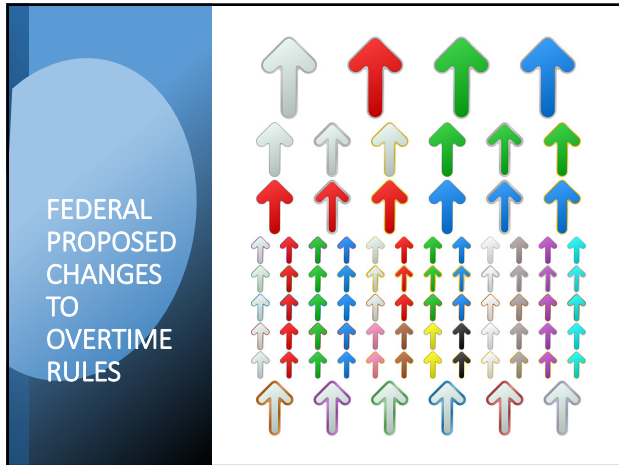
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What About the Minimum Weekly Wage for Exempt?

- Not Published Yet
- Historically 75 times hourly minimum wage per week
- Best Guess--increase from \$1,064.25 weekly (\$55,341 annually) to \$1,124 weekly (\$58,500 annually)



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WHAT'S IN THE PROPOSAL?

- Applies to white collar exemptions—Executive, Professional, Administrative, Computer Professional
- No increase for Outside Sales
- Increase from \$35,568 to \$55,068 a year (from \$684 per week to \$1,059 per week)
- California, Colorado, Maine, New York and Washington currently higher

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ONE TIP . . .

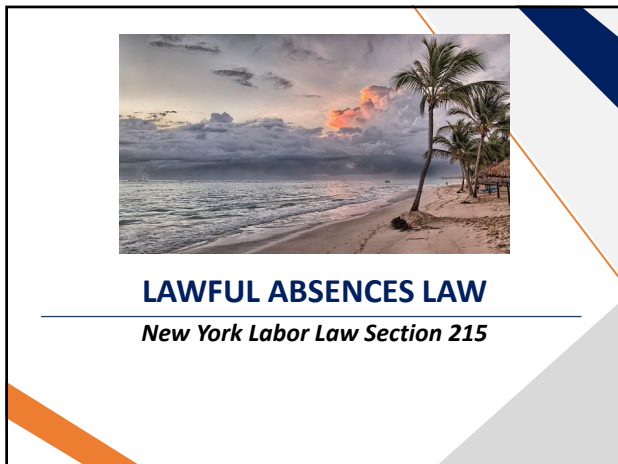
- Use the Increases as the Time to Audit
 - Be Aware of Position Creep
 - Use the Actual Tests—
 - <https://dol.ny.gov/system/files/documents/2021/12/administrative-employee-overtime-exemption-frequently-asked-questions.pdf>
 - <https://dol.ny.gov/system/files/documents/2021/03/professional-employee-overtime-exemption-frequently-asked-questions.pdf>
 - <https://dol.ny.gov/system/files/documents/2021/03/executive-employee-overtime-exemption-frequently-asked-questions.pdf>

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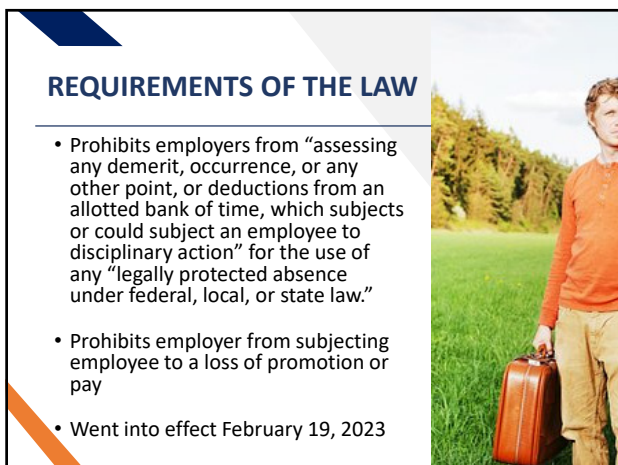
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MAY NEED TO MODIFY:

- Perfect Attendance Bonuses
- Call Out Penalties
- No Fault Attendance Policies



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DIGITAL LABOR LAW POSTERS

Amendment to Labor Law 201

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EMPLOYERS REQUIRED TO MAKE LABOR POSTERS AVAILABLE DIGITALLY

- Old Rule—Commissioner makes posters available, employer required to post them (“on each floor of the premises”)
- New Rule—Employer also required to provide digital copies
 - Via “employer’s website or by email”
 - All documents “required to be physically posted at a worksite pursuant to state or federal law or regulation”
- Notice to employees that documents required for physical posting are also available electronically



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HELPFUL TO KNOW WHERE TO GET THEM

Posters Available Here

<https://dol.ny.gov/posting-requirements-0>

<https://www.dol.gov/general/topics/posters>



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New Law Concerning Mandatory Meetings

- S4982/A6604} –Prohibits employers from disciplining employees who opt not to participate in meetings sponsored by the employer concerning the employer’s views on political and religious matters
- **What About Union Matters?**

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HARASSMENT AND DISCRIMINATION LAW UPDATE



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NEW ANTI-HARASSMENT POLICY

<https://dol.ny.gov/news/new-york-state-department-labor-unveils-strengthened-sexual-harassment-prevention-policy>

- Expanded Explanation of Supervisor responsibilities
- Include remote workers
- Defines different gender identities and expands on gender discrimination
- Provides examples of sexual harassment and retaliation across a broader spectrum of careers.
- Includes bystander intervention methods




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NEW ANTI-HARASSMENT TRAINING MATERIALS

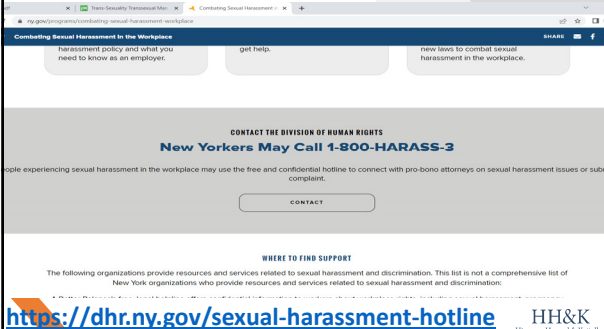
<https://www.ny.gov/combating-sexual-harassment-workplace/sexual-harassment-prevention-model-policy-and-training>

- Video
- Question Sheet




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NEW 1-800 NUMBER FOR HARASSMENT CLAIMS



<https://dhr.ny.gov/sexual-harassment-hotline>



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ADDITION OF NEW CATEGORIES OF PROTECTION

- New law adds citizenship and immigration status
- “citizenship of any person or the immigration status of any person who is not a citizen of the United States”
- Can still determine authorization to work status



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THIS APPLIES TO EVERYONE

- REMEMBER TO UPDATE YOUR POLICY
- Must provide information to employees on hiring AND at annual training. Remote/hybrid employees must have it electronically



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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION UPDATE

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PROPOSED UPDATED GUIDANCE ON PREVENTING HARASSMENT

Open for Comment Until Nov. 1

- Context Matters
- Includes updated and expanded definition of sex and gender based harassment
 - Includes gender identity
 - Includes intentionally using wrong pronouns
- Workplace “culture” does not excuse harassment
- Employee may be “harassed” by conduct directed at others

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WHAT ELSE?

<https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace>

- Addresses Remote Work
- Addresses Temporary Employment Agencies
- Addresses Social Media and On-line Harassment
- Provides Updated guidelines on policy issues
- Provides Updated guidelines on Investigations

CHECKLIST



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ENFORCEMENT PRIORITIES

<https://www.eeoc.gov/strategic-enforcement-plan-fiscal-years-2024-2028>

- Focus on Underserved Workers
- Recruitment and Training Policies
- Focus on Increased Use of Technology
- Emerging Issues
 - Pregnancy and Childbirth
 - Long Covid
 - Technology
- “Legal Issues”—Waivers, NDA, Non-Disparagement

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PREGNANT WORKER'S FAIRNESS ACT

<https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf#page=1626>

<https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act>

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OVERVIEW OF THE LAW

The law “prohibits employment practices that discriminate against making reasonable accommodations for qualified employees affected by pregnancy, childbirth, or related medical conditions.

A qualified employee is an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the position, with specified exceptions.”

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SPECIFIC PROVISIONS

- Employer must make reasonable accommodations to known limitations of pregnant employees unless the accommodation would impose an undue hardship on an entity's business operation;
- Cannot require a qualified employee to accept an accommodation other than any reasonable accommodation arrived at through an interactive process;
- Cannot deny employment opportunities because the employer must make an accommodation;
- Cannot require a pregnant employee to take paid or unpaid leave if another reasonable accommodation can be provided;
- Prohibits taking adverse action in terms, conditions, or privileges of employment against a qualified employee requesting or using such reasonable accommodations.

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SOME THOUGHTS . . .

- If You Accommodate Worker's Comp People, You Must Accommodate Pregnant Workers to at least the Same Extent
- Applies to State and Municipal Entities (no 11th Amendment Immunity)
- Went into effect on June 27, 2023



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EEOC REGULATIONS

<https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act>

- Similar Structure to the ADA—reasonable accommodation unless can show an undue hardship
- Recognizes that the accommodations are temporary
- Allows Employee to Seek Damages for failure to accommodate

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POSSIBLE ACCOMMODATIONS

- job restructuring; part-time or modified work schedules; more frequent breaks; acquisition or modification of equipment, uniforms, or devices; allowing seating for jobs that require standing or standing in jobs that require sitting; appropriate adjustment or modification of examinations or policies; permitting the use of paid leave (whether accrued, short-term disability, or another type of employer benefit) or providing unpaid leave, including to attend health care-related appointments and to recover from childbirth; ^[19] assignment to light duty; ^[20] telework; and, accommodating a worker's inability to perform one or more essential functions of a job by temporarily suspending the requirement that the employee perform that function, if the inability to perform the essential function is temporary and the worker could perform the essential function in the near future.¹

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PUMP ACT FOR NURSING MOTHERS

Providing Urgent Maternal Protections for Nursing Mothers Act (P.L. 117-328)

<https://www.fns.usda.gov/pl-117-328>

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WHAT'S IN THE LAW?

- Protection for Employees to pump breast milk for up to 2 years after birth of child
- Breaks only unpaid if employee is completely relieved of other duties
- Expands protection to salaried employees
- Includes protection even if child is stillborn or mother does not retain custody
- Employer with fewer than 50 employees can be exempt if they can show it's an undue hardship
- Regulations to be issued within 60 days

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WHAT ELSE?

DOL Guidance

- Must Provide private location even while employee is at client or other location
- Space must be completely free from surveillance
- Employee must be completely relieved of duty for at least 21 minutes in order to not pay compensation
- Frequently Asked Questions: <https://www.dol.gov/agencies/whd/nursing-mothers/fag#:~:text=Under%20the%20PUMP%20Act%2C%20most,year%20after%20the%20child's%20birth.>
- Fact Sheet #73: <https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers>

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**NYS NURSING MOTHERS IN THE
WORKPLACE ACT**

Expands Existing Required Accommodations
New York Labor Law 206-c

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WHAT'S IN THE LAW?

- In effect on June 7, 2023
- Up to 3 years post-birth of the child
- New Requirements for the Location
 - *Cannot* be a restroom
 - Must be close to the employee's work area
 - Shielded from other individuals' view and free from intrusion from other employees or the public
 - Contain sufficient lighting
 - Have a chair
 - Have an open surface
 - Be close to clean running water
 - Contain at least one electrical outlet



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OTHER INFORMATION

- New model policy and frequently asked questions:
<https://dol.ny.gov/breast-milk-expression-workplace>
- Employers required to provide policy to each employee upon hiring, annually, upon return from birth of a child.



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- New Updated Form <https://www.uscis.gov/i-9>
- Back to In Person Inspections EXCEPT:
 - E-verify Users May Conduct Remote Review (<https://www.uscis.gov/i-9-central/form-i-9-related-news/new-e-verify-employers-may-use-alternative-procedure-for-form-i-9-documents-examined-remotely-during#:~:text=If%20you%20choose%20to%20use,never%20in%20person%20physically%20examined>)

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**WHAT ABOUT THOSE REMOTELY
INSPECTED DOCUMENTS DURING COVID?**

<https://www.uscis.gov/i-9-central/form-i-9-related-news/new-e-verify-employers-may-use-alternative-procedure-for-form-i-9-documents-examined-remotely-during#:~:text=If%20you%20choose%20to%20use,never%20in%20person%20physically%20examined>

1. performed remote examination of an employee's documents between March 20, 2020, and July 31, 2023;
2. been enrolled in E-Verify at the time they completed the Form I-9 for that employee;
3. created a case in E-Verify for that employee (except for reverification); and
4. be currently enrolled in and continue to participate in E-Verify.

Otherwise—must physically inspect all documents by August 30, 2023

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NEW YORK STATE LAW

Would go into effect 30 days after signing

- Would Ban Non-Competes
- Applies Prospectively—requiring a non-compete or attempting to enforce would invite a lawsuit
 - What About Retrospectively?
- Provides Private Right of Action Against Employer

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EXCEPTIONS TO THE NY LAW

- During a Fixed Term of Service
- Non-Disclosure of Confidential Information
- Non-Solicitation of Clients the Employee Learned about During Employment
 - Wait! No Exception for Sale of a Business? Not yet.

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FTC REGULATION

- Rule would ban employers from using noncompete clauses with their workers, including independent contractors
- Require employers to rescind existing noncompete clauses with workers and actively inform their employees that the contracts are no longer in effect.

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PUBLIC COMMENT TOPICS

- Whether franchisees should be covered by the rule
- Whether senior executives should be exempted from the rule, or subject to a rebuttable presumption rather than a ban
- Whether low- and high-wage workers should be treated differently under the rule

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WHAT'S NEXT?

- FTC Responds to Comments
- Publishes Final Rule
- Lawsuits Commence

Where to find more?

<https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>

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OTHER ATTACKS ON NON-COMPETE AGREEMENTS

• FTC LAWSUITS

<https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-takes-action-against-another-company-imposed-harmful-noncompete-restrictions-its-workers>

• NLRB GUIDANCE AND CASE

<https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-issues-memo-on-non-competes-violating-the-national>

<https://www.tradesecretsandemployeemobility.com/2023/06/articles/non-compete-agreements/nlr-finds-its-first-noncompete-target-and-its-charges-go-well-beyond-an-overbroad-noncompete/>

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**BOTTOM LINE:
NON COMPETE
AGREEMENTS
ARE RISKY**

- CONSIDER
ALTERNATIVES:
 - Non-Solicitation
Agreements
 - Confidentiality
Agreements



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**CHALLENGES TO
SETTLEMENT
AGREEMENTS**



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WHO IS AFFECTED?

- Anyone Who Is Not a Supervisor
Under the National Labor
Relations Act
 - Definition Is Different From
FLSA or Harassment Laws
- Applies to Unionized and Non-
Unionized Employers



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RELEASES

- Prohibits “Overly Broad” Releases
 - Not clear what this means, but at a minimum must not prohibit employee from going to the NLRB





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CHANGES-- CONFIDENTIALITY

- Restricts Confidentiality Clauses
 - Trade Secret Restrictions are OK
 - Amount Paid Is Likely OK
 - Cannot Include All Terms of the Agreement
 - Cannot Include Underlying Facts or Negotiations





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RESTRICTS NON-DISPARAGEMENT

- Can Only Prohibit Defamatory Statements
- Statements That Are Made Knowing They Are Untrue or Made with Reckless Disregard for the Truth
 - Note: Will Not Apply to Negative Opinions





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WHAT ELSE SHOULD WE KNOW?

- Proffering the Agreement, Even if Not Enforced Could Be a Violation
- Entire Agreement Would Likely Be Void
- Decision Applies Retroactively





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SPEAK OUT ACT

- Prohibits the enforcement of confidentiality or non-disparagement provisions in cases of sexual harassment or assault IF entered “before the dispute arises.”

<https://www.congress.gov/bill/117th-congress/senate-bill/4524>

<https://www.littler.com/publication-press/publication/president-biden-enacts-speak-out-act-curtailling-use-pre-dispute-non>





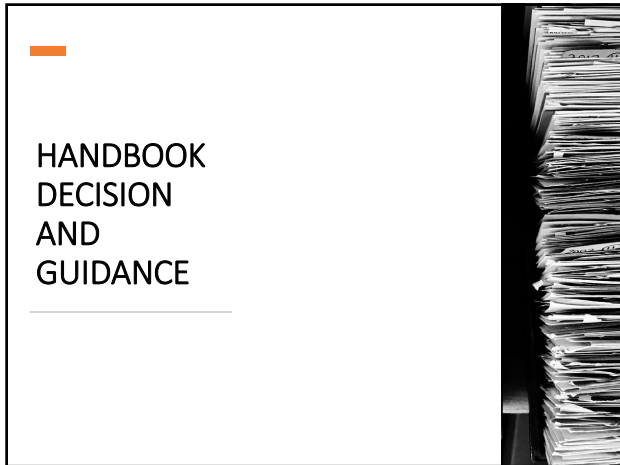
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DON'T FORGET

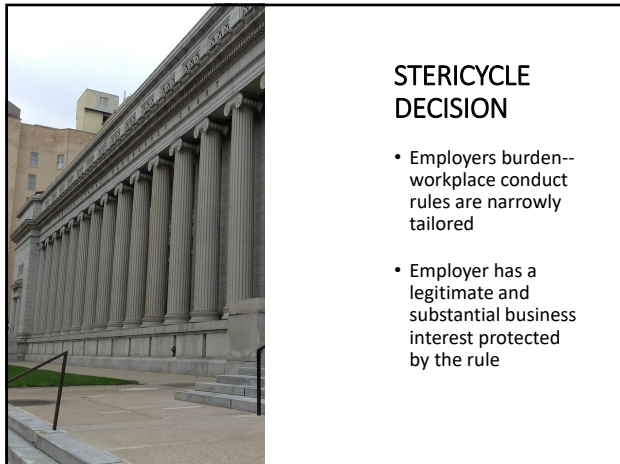
- NYS Restricts Settlement Agreements For Sexual Harassment and Discrimination Claims
- Wage and Hour Settlements Have Restrictions



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REMOTE WORKERS GUIDANCE

<https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-1.pdf>



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FAMILY AND MEDICAL LEAVE ACT FOR REMOTE WORKERS

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FMLA FOR REMOTE WORKERS

- Worksite is not their home but where they report
- Must consider actual hours worked in calculating 12 weeks (not just 40 hour work-week)
- Eligible employee with a serious health condition that necessitates limited hours may use FMLA leave to work a reduced number of hours per day (or week) for an indefinite period of time as long as the employee does not exhaust their FMLA leave entitlement

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FLSA GUIDANCE FOR REMOTE WORKERS

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GUIDANCE ON REMOTE WORK PAY

- Breaks of twenty minutes or less must be counted as hours worked. See 29 C.F.R. § 785.18
- If employee has flexibility, periods of time relieved of work are not compensable if employee can effectively use the time for their own purpose.

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SALARY DISCLOSURE LAW



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WHAT'S IN THE REGULATIONS

<https://dol.ny.gov/system/files/documents/2023/09/text-salary-transparency-8.28.23-for-website.pdf>

- Applies to Jobs Performed at least in part in New York or performed outside of New York, but Report to a New York Supervisor
- Does not apply to temporary help firm listings unless for the help firm itself
- All Advertisements regardless of format
- Advertisements must contain a job description for the opportunity if a job description exists.

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REGULATIONS CONTINUED

- Base rate of pay, regardless of the frequency of payment
- Range must be for a single opportunity and a single geographic location or region
- minimum and maximum annual salary, or hourly rate, for an opportunity that the employer believes in good faith to be accurate at the time of the posting of an advertisement for such opportunity

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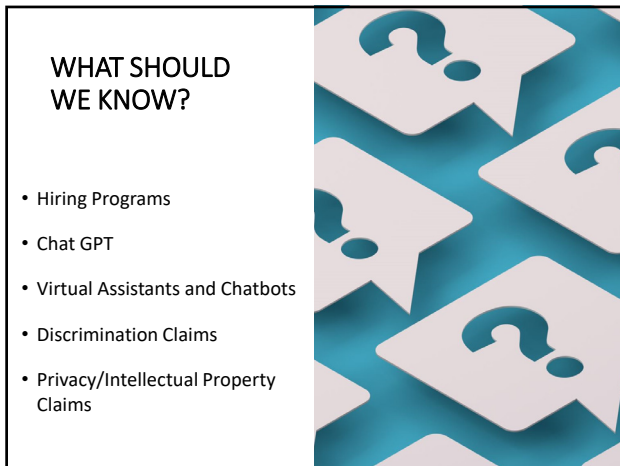
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KEEP UP?

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YOUR
QUESTIONS

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