



**LEGAL UPDATE FOR THE
CONSTRUCTION INDUSTRY**


MARCH 3 2022



PAUL MARTHY, ESQ.
THOMAS A. CONLON, ESQ.
DAWN J. LANOUETTE, ESQ.
HINMAN, HOWARD & KATTELL, LLP
80 EXCHANGE STREET | BINGHAMTON, NY 13901
DLANOUETTE@HHK.COM | (607) 231- 6917

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**GENERAL CONTRACTOR
LIABILITY FOR UNPAID WAGES**

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BASIC NEW RULE

- GC joint and severally liable for wages, benefits or wage supplements owed to a wage claimant by subcontractor at any tier

<https://legislation.nysenate.gov/pdf/bills/2021/A3350A>




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DEFINITIONS

- Wages
- Benefits
- Wage Supplements


Question:
What about unpaid PTO at time of termination?



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GC LAW DETAILS

- Can't Get Around It with an Agreement
- Can't Raise defense that you did not know, were not the employer or aren't responsible
- Can sue the subcontractor — if they are still around



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GC LAW DETAILS – CONT.

Exclusions Include:

- Public Work Contracts – Labor Law Art. 8
- Home Improvement Contracts For Owner Occupied Building
- Home Construction Contract for One or Two Family Dwellings Except Where More Than 10 Dwellings at One Site Annually



GC LAW DETAILS – CONT.

- Three Year Statute of Limitations
- May Be Waived by Collective Bargaining Agreement
- Applies to Construction Contracts Entered Into, Renewed, Modified or Amended After January 4, 2022.

Question:

What about Change Orders on Existing Contracts Issued after Effective Date?



ENFORCEMENT TOOLS FOR GC

- Law gives GC the “right” to get certified copies of payroll records
- Law gives GC the “right” to get additional information
 - Names of workers, names of independent contractors, name of lower tier subs, contract start date
- GC can withhold payment to subcontractor at any tier if it does not supply requested information



CONTRACT PROVISIONS TO MITIGATE RISK?

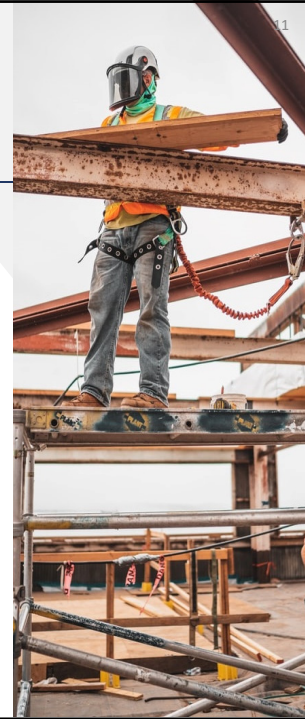
- Agreement by subcontractor to timely pay all wages, benefits and supplements to employees.
- Subcontractor agrees to comply with all applicable federal, state and local wage and hour laws.
- Subcontractor agrees to comply with any benefit laws.



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CONTRACT PROVISIONS TO MITIGATE RISK?

- Agreement by subcontractor to certify on periodic basis that it is in compliance with applicable laws
- Agreement by subcontractor to allow audit by GC of its compliance as requested.
- Agreement to indemnify GC for expenses and amounts paid in connection with a claim.

A man wearing a hat and a light-colored shirt is standing on rocks, looking out at a sailboat on the water. The background shows a large body of water and distant hills. The image is framed by a dark blue border.

RETIREMENT BENEFIT

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NEW YORK STATE SECURE CHOICE SAVINGS PROGRAM

- Originally created in 2018 as a voluntary retirement savings program
 - Allows private sector and non-profit employees to participate through automatic enrollment payroll deductions
- In October 2021, the law was amended to require certain private employers to automatically enroll employees in the program



WHICH EMPLOYERS DOES THIS APPLY TO?

Applies to both for-profit and not-for profit employers

- Employer meets the following requirements:
 - The employer has not already offered their employees a qualified retirement plan including, but not limited to, a 401(a), 401(k), 403(a), 403(b), 408(k), 408(p) or (457(b) plan, in the last two (2) years.
 - The employer has at least ten (10) employees in the state over previous calendar year at all times.
 - The employer has been in business for a minimum of two (2) years.

WHICH EMPLOYERS DOES THIS APPLY TO?

- If all three (3) requirements are met, an employer's participation in the Secure Choice Savings Program (SCSP) is **mandatory**.
- Employers that already offer one of the qualified retirement plans listed on the prior slide **are prohibited from** terminating their existing plan to participate in the SCSP.



WHICH EMPLOYEES DOES THIS APPLY TO?

- Covers all employees age 18 or older who work in New York
- No hours requirement
 - Available to both full-time and part-time employees
 - Covers all employees age 18 or older who work in New York
- Employees meeting these requirements must be automatically enrolled in the SCSP
 - Employees can choose to opt out at any time
 - If an employee opts out and wishes to rejoin, must wait until an annual open enrollment period

HOW DOES THE SCSP WORK?

- Employee contributions deposited to a Roth Individual Retirement Account (IRA) managed by the SCSP board
 - The SCSP board selects and monitors the investment options
 - Participating employers are not fiduciaries under the SCSP.
 - As such, employers are shielded from liability with respect to benefits paid and investment returns amongst SCSP participants.
 - The New York SCSP Board serves as the fiduciary of the program and is solely responsible for designing and operating it.

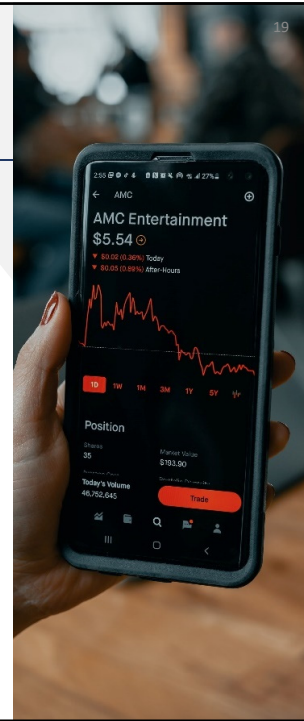
HOW DOES THE SCSP WORK?

- New York State pays the administrative costs to create and manage the SCSP until the SCSP has sufficient assets to cover these costs
 - The SCSP fund will pay the administrative costs from that point forward
- Participants may select a specific contribution amount to the SCSP
 - either a percentage (%) of wages or a specific dollar amount within the IRS Roth IRA limit for that year

I N V E S T M E N T

HOW DOES THE SCSP WORK?

- If a participant has not opted out and does not elect a contribution amount, a default election of three percent (3%) of wages applies
- As these amounts are deposited into a Roth IRA, they are “after-tax” deductions



WHAT MUST AN EMPLOYER DO?

- Employers covered by the law must:
 - Make the state's employee informational materials available to employees
 - Automatically enroll each employee in the SCSP unless they opt out
 - Set up the payroll deposit retirement savings arrangement to allow employees to participate in the SCSP
 - Manage the employee contributions to the SCSP

NEXT STEPS

- The 2021 amendment was effective when signed by the Governor on October 21, 2021
- No set date for the SCSP to open for enrollment – expected sometime this year
- Once the SCSP opens for enrollment, employers have nine (9) months to set up the payroll deposit system
- Be on the lookout for additional requirements and any regulations that are issued

A wooden gavel resting on a stack of books, symbolizing law and justice.

**NEW YORK STATUTES AFFECTING
EMPLOYERS—NOTICES REQUIRED**

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EXPANSION OF THE WHISTLEBLOWER STATUTE

- Now protects employees who make reports if they “reasonably believe” the conduct violates the law (including executive orders), even if it does not
- No longer required to relate to public health and safety
- **Effective January 26, 2022**



OTHER SIGNIFICANT CHANGES

- Applies to former employees and contractors
- All laws, regulations, executive orders, decisions, etc.
- Expanded Definition of Retaliation



WHISTLEBLOWER STATUTE (cont.)

REMOVES THE AFFIRMATIVE DEFENSE WHERE:

- there is an imminent and serious danger to public health and safety;
- the employee reasonably believes that the result of disclosure would be destruction of evidence or concealment of activity;
- there is a reasonable expectation of activity that could lead to endangering the welfare of a minor;
- the employee reasonably believes disclosing would result in physical harm to the employee or another person; or
- the employee reasonably believes a supervisor is already aware and will not correct the problem.

WHAT ELSE?


- Statute of Limitations increased from 1 to 2 years
- Jury trial
- Civil Penalty up to \$10,000



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WHAT SHOULD EMPLOYERS DO NOW?


- Draft a Policy and Notice—
DOL has not put out a model notice yet
(<https://dol.ny.gov/posting-requirements-0>)
- Non-Profits Need to Check their Policies



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EMPLOYEE MONITORING STATUTE

- <https://www.nysenate.gov/legislation/bills/2021/s2628>
- Applies to: “Any employer who monitors or otherwise intercepts telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage of or by an employee by any electronic device or system”



EMPLOYEE MONITORING STATUTE (cont.)

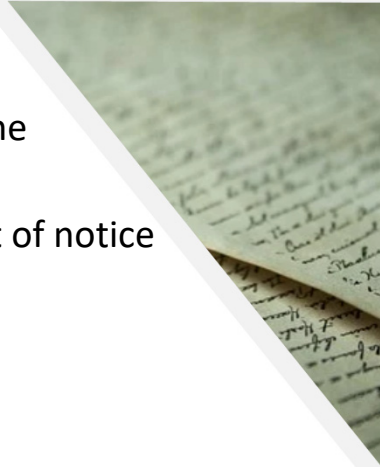
- Employer must advise “that any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by an electronic device or system . . . May be subject to monitoring at any and all times by any lawful means”



EMPLOYEE MONITORING STATUTE (cont.)

MAY 7, 2022

- Must provide notice to employees on hiring (or at time of effectiveness) in writing
- Must obtain acknowledgment of notice
- Must post notice



EMPLOYEE MONITORING EXCEPTION

NO NOTICE REQUIRED, IF

- Computer processes that manage electronic communications and internet usage or systems maintenance
- Must also not target the activities of a particular individual
- Performed solely for the purpose of computer system maintenance or protection.

Question:

Will We Get a Model Notice?

A group of construction workers wearing hard hats and safety vests are sitting in a circle in a warehouse, listening to a presentation. A man in a green hard hat is standing and speaking. The background shows stacks of white bags in a warehouse setting.

OSHA AND INSPECTIONS

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WHAT ARE THEY UP TO?

- Proposed rule to update industrial truck standards
<https://www.osha.gov/news/newsreleases/national/02152022>
- Indoor and Outdoor Workers from Heat Hazards
<https://www.osha.gov/news/newsreleases/national/12022021>
- Civil Penalties Increased
- Fall Prevention Emphasis

CHANGE TO NY EVIDENTIARY STANDARD

CPLR 4549

- Adopts a more liberal standard for a statement against interest
 - Instead of “authority to speak” changes it to the topic is within the scope of job duties
- Impact on Employers:
 - Low level supervisor admissions or statements are now, more than ever, attributable to the employer
- **Bottom Line: Train Your Supervisors!**



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JOINT TASK FORCE ON PREVENTING RETALIATION

- DEPARTMENT OF LABOR (INCL. OSHA)
- EEOC
- NLRB

Emphasis on immigration, termination.

Remember:
Don't discipline or terminate an employee for a complaint!



PREVAILING RATES FOR PRIVATE WORK

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WHEN DOES THIS LAW APPLY?

- Any construction project exceeding \$5 million for which “public funding” exceeds 30% of “total construction project costs”
- January 1, 2022
Labor Law Sec. 224-A



WHAT ARE PUBLIC FUNDS?

- Includes virtually any benefit by a state or municipal entity including IDAs
- Grants
- Below-market loan interest, fees, insurance or other costs
- Tax credits, tax abatements, tax exemptions
- Forgivable loans or loans for which credits other than payment are applied



WHAT ARE THE EXCEPTIONS?

- Brownfield remediation tax credits
- Funds to incentivize (but not construct) comprehensive sewage systems
- NYC exceptions
- Owner occupied one or two family dwellings
- Construction for private NFP with Gross of \$5 mil. Or less per year
- Labor Union exemption

WHAT DOES THIS MEAN?

- Major Impact to Bids
- Many applications to the newly created Public Subsidy Board
- Much uncertainty
- New requirements for certified payrolls
- *That joint and several liability law will apply to underpayments*



PAID FAMILY LEAVE UPDATE
<https://paidfamilyleave.ny.gov/2022>

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PAID FAMILY LEAVE 2022

- Benefits at 12 weeks at 67% of wages up to statewide average weekly wage
 - Maximum is \$1,068.36 (up \$96.75)
- .511% payroll deduction up to the cap of \$423.71



NEW PFL FAQ

<https://paidfamilyleave.ny.gov/2022>

- Questions about leaves that go over from 2021 to 2022:
“You get the benefit rate in effect on the first day of your leave.”
- Questions about multiple leaves
- Updated forms for 2022
- **Employer Tip:**
Make sure your handbook is up to date



PFL CHANGE TO CALCULATION OF INTERMITTENT LEAVE

In effect January 1, 2022

- removed the 60-day cap on intermittent leave
- Intermittent leave benefits will be calculated by multiplying the average number of days per week that the employee works by 12 weeks

http://www.wcb.ny.gov/content/main/regulations/12NYCRR380_25_pfl-intermittent-leave/



PFL—Additional Update

Starting in 2023

- biological, adopted, step-, and half-siblings.



MARIJUANA

LEGALIZED MARIJUANA IN NEW YORK

WHAT'S NEW

<https://cannabis.ny.gov/adult-use>

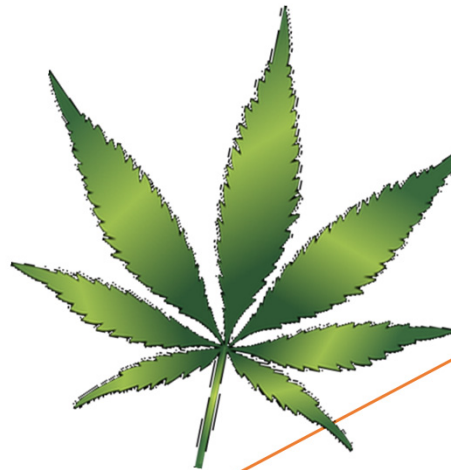
- Can't smoke it where you can't smoke tobacco
- Landlords can ban use on their properties
- Hotel owners can ban use in hotels



I'M READY TO GROW!

NOT SO FAST!

- Only after regulations issued which is 18 mos. after first adult-use retail sale



IMPAIRMENT AT WORK PROHIBITED

- New Fact Sheets for Employers:

- What Is In the Law

<https://cannabis.ny.gov/system/files/documents/2021/09/cannabis-management-fact-sheet-9-21-employer-05.pdf>

- Adult Use Cannabis and the Workplace

<https://cannabis.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf>

A photograph of a sign attached to a utility pole. The sign is white with a red border and contains the text "EVERY HUMAN HAS RIGHTS" in black and red capital letters. The background is blurred, showing a city street scene.

**DIVISION OF HUMAN RIGHTS
AND EEOC CHANGES**

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DIVISION OF HUMAN RIGHTS POLICY CHANGE

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<https://dhr.ny.gov/law-2021>

- Complaints filed on or after 10-12-21 no private settlements
- Removes exemption for owner-occupied two-unit dwellings
- Notice Requirements for landlords regarding tenant rights relating to disabilities
- Expands protection to domestic workers
- Schools and colleges covered



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EEOC PRIORITIES

- Retaliation still most frequently filed claim
- Disability failure to accommodate is next
- Gender pay/Gender equity-physical tests



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**HERO ACT
WORKPLACE SAFETY COMMITTEE**

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**PROPOSED RULE FOR
WORKPLACE SAFETY COMMITTEE**

<https://dos.ny.gov/system/files/documents/2021/12/122221.pdf>

- Public Hearing will be Feb. 9 at 11 a.m. Location and/or web information will be on NY DOL website
- Must recognize after receipt of written request of 2 or more non-supervisory employees
- Must provide notice to all employers after recognition

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WHO QUARANTINES/ISOLATES?

<https://coronavirus.health.ny.gov/quarantines-contacts>

Vaccinated No Symptoms:	No. Test 3-5 days after exposure. Wear a mask indoors for 10 days.
Unvaccinated No Symptoms:	5 days; wear a mask indoors for 5 days.
Positive Test:	5 days from onset of symptoms (day 0) or date of positive test (day 1) when symptoms resolving and fever free with no assistance for 24 hours

Latest Return to Work Guidance:
https://coronavirus.health.ny.gov/system/files/documents/2022/01/guidance_matrix_01042022.pdf

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NEW YORK QUARANTINE LEAVE

<https://paidfamilyleave.ny.gov/COVID19>

- Order of quarantine
- Up to 3 times (2nd and 3rd time require positive test)
- Size of employer determines amount of leave
 - 1-10 depends on income
 - 11-99 at least 5
 - Above 99 at least 14
 - PFL and disability for other time
- Job protected

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PAID FAMILY LEAVE FOR MINOR CHILDREN

- <https://paidfamilyleave.ny.gov/if-your-minor-dependent-child-quarantined>

If a minor child receives an order of quarantine (or if there is a school closure??), employee may seek Paid Family Leave

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NY VACCINE LEAVE

- Labor Law 196-c
- Up to 4 hrs. per shot (includes booster)
- Paid at Regular Rate
- Cannot Replace Other Leave
 - https://dol.ny.gov/system/files/documents/2021/10/cd6-paid-leave-for-covid19-vaccinations-10-12-21_0.pdf

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REMEMBER . . .

Cannot require employee to use New York Paid Sick Leave or PTO instead of available COVID leaves if they apply



WHAT MIGHT WE SEE?

- Increased penalties for wage theft
- Pregnant Worker's Fairness Act (federal)
- Increased activity at NLRB toward non-unionized employers
- Increased DOL enforcement— independent contractors



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DON'T FORGET . . .



- Annual Harassment Training
- Wage Rate Sheets
- EEO-1
- OSHA 300



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YOUR QUESTIONS



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