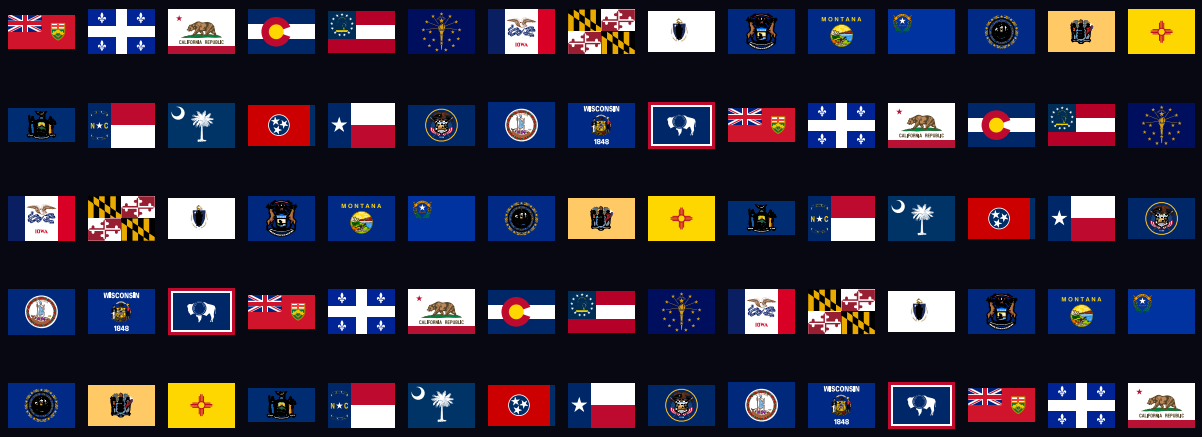
EMPLOYMENT: NORTH AMERICA

USA - New York



LEXOLOGY
Getting The Deal Through

Employment: North America

Quick reference guide enabling side-by-side comparison of key considerations, emerging issues and reform proposal for each state; the employment relationship; hiring; wage and hour laws; discrimination, harassment and family leave; privacy in the workplace; trade secrets and restrictive covenants; labour relations; and discipline and termination procedures.

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USA - New York

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STATE SNAPSHOT

Key considerations

Which issues would you most highlight to someone new to your state?

New York State has progressively instituted new laws over recent years regulating how employers do business in the state. Employers in New York City should also be aware of local laws that go above and beyond state requirements. Employers new to the state should be cognizant of various requirements specific to New York relating to pay frequency, paid and unpaid protected leave of absence, pay transparency, hiring practices, anti-discrimination polices and practices, and restrictive covenants.

Law stated - 24 August 2023

What do you consider unique to those doing business in your state?

- New York Labor Law (NYLL) provides more favorable wage requirements for employees than federal law. The state's minimum wage is higher than what is federally mandated. As of December 31, 2022, minimum wage is $15.00 in New York City, Long Island and Westchester. In addition, the minimum wage requirement for the remainder of New York State most recently increased to $14.20 and will increase overtime until it reaches $15.00. See https://dol.ny.gov/minimum-wage-0; NYLL § 652.
- NYLL § 191 sets forth frequency of pay requirements for various categories of employees, one of which is a manual worker. NYLL § 190(4) defines a manual worker as a mechanic, workingman or laborer. The New York State Department of Labor (NYSDOL) outlines that it has long interpreted manual workers to be those who partake in physical labor, which it interprets broadly, for more than 25% of their working time. Section 191 requires manual workers to be paid on a weekly basis. This loosely defined pay frequency requirement has prompted issues for various businesses in recent years based on judicial interpretation of the law regarding what workers qualify as "manual workers" and what remedies they may seek if paid on a basis less frequently than weekly.
- New York State's Paid Sick Leave Law, which became effective September 30, 2020, requires employers to provide eligible employees with sick and safe leave. The law extends to all private sector workers regardless of industry, occupation, or status (exempt, non-exempt, part-time, seasonal, etc.), though the sick leave requirements vary depending on the size of the employer.
- New York State's Paid Family Leave program offers eligible employees the opportunity to have up to 12 weeks of job-protected paid time off to "bond with a new child, care for a family member with a serious health condition, or to assist loved ones when a family member is deployed abroad on active military service." Unlike the federal Family and Medical Leave Act (FMLA), New York's Paid Family Leave is funded by employees through payroll deductions in increments consistent with their actual wages and is available to more employees than its federal counterpart.
- Cannabis is legal for adults 21 and older in New York State. As such, employers may not discriminate based on using cannabis under state law. NYLL § 201-D(2)(b). An employer may test an employee for marijuana only under certain circumstances ascertained under the law. Employers cannot take adverse actions against those who test positive for marijuana unless marijuana use causes an impairment, manifested by specific articulable symptoms while working.
- Watch for developments relating to AI use in hiring and limitations on restrictive covenants.

Law stated - 24 August 2023

Is there any general advice you would give in the labor/employment area?

It is critical that employers watch for developments in both the law and updated guidance from government agencies on their interpretation of various state laws. For example, the Model Sexual Harassment Policy was recently updated by the NYSDOL to include new language on bystander intervention, and though this did not include the passage of any new law, employers must have sexual harassment policies at least containing information similar to the Model Policy from the NYSDOL. This recent update may require some employers to revise their policies to ensure compliance.

Employers would benefit from tracking proposed legislation on the horizon and determining how it may affect their workforce. For example, recent legislation regarding non-competes has passed the legislature in New York State. The new legislation will significantly change New York labor law with respect to non-competes and impact employment contracts for many employers.

Law stated - 24 August 2023

Emerging issues

What are the emerging trends in employment law in your state, including the interplay with other areas of law, such as firearms legislation, legalization of marijuana and privacy?

Under cannabis legalization for adults 21 and older in New York State, employers must be mindful that they are limited in regulating an employee's legal consumption of marijuana or related activities during off-duty time, and they must afford employees using medical marijuana the same rights, protections, and procedures available to other injured workers. NYLL § 201-D; N.Y. Cannabis Law § 42(6). Employers retain the right to test an employee for marijuana, but only under certain circumstances outlined in the law . Employers cannot take adverse actions against those who test positive for marijuana unless marijuana use causes an impairment, manifested by specific articulable symptoms while working. This brings marijuana use in line with other lawful off-duty conduct outlined in NYLL § 201-D, like political activities, legal recreational activities, legal use of consumable products and union membership.

New gun legislation, effective September 1, 2022, prohibits carrying firearms in sensitive and restricted places as set forth in the law. The law prohibits a person from possessing a firearm on private property unless the owner or lessee has expressly permitted it through signage.

New York has amended the Civil Rights Law by adding § 52-c requiring that, as of May 7, 2022, employers provide notice to their employees and new hires before engaging in electronic monitoring. This notice must be posted in a conspicuous place that is readily available to employees that may be subject to electronic monitoring and must provide the notice in writing to employees or another electronic form, and employees must acknowledge receipt of such notice in writing. NY Civil Rights Law § 52-c(2)(a).

Starting July 5, 2023, New York City employers must comply with Local Law 144, which regulates use of automated employment decision tools (AEDT) found in software used during the application and promotion process. AEDT is defined as any process that is "derived from machine learning, statistical modelling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision-making." Employers should determine if any of their HR professionals use software during the hiring or promotion process that utilizes AEDT to either "substantially assist or replace discretionary decision-making" by humans or "score," classify, or recommend NYC candidates or employees. If software using AEDT is used, employers must: (i) confirm that a bias audit has been conducted; (ii) provide at least 10 days' notice to the applicant or employee that software utilizing AEDT is being or will be used; (iii) explain the qualifications the AEDT will use during the assessment; (iv) provide the data source and type of AEDT being used, and the employer's data retention policy (if not disclosed elsewhere); and (v) inform the applicant or employee that they

may request an alternative means by which to be assessed (or a "reasonable accommodation") under other laws). Employers are also responsible for publishing the results of the bias audit prior to the AEDT's use, generally on the employer's website. The bias audit must be conducted by "independent auditors" who exercise "objective and impartial judgment on all issues within the scope of a bias audit of an AEDT." The auditor cannot have a "direct financial interest or material indirect financial interest" in an employer or entity that uses the AEDT or in the vendor that develops or distributes the software.

Law stated - 24 August 2023

Proposals for reform

Are there any noteworthy proposals for reform in your state?

The New York legislature has passed S.3100A/A.1278-B, pending for Governor Kathy Hochul to sign into law. The legislation would add Section 191-d to the Labor Law prohibiting "non-compete agreement and certain restrictive covenants." The bill would significantly impact the use and enforcement of non-compete agreements in New York for both employees and ancillary persons performing work or providing services (independent contractors). See Section 191-d(1)(b). Indeed, part of the bill declares void "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind." See Section 191-d(3). New York City has introduced similar legislation – Int. No. 1067-23. This would add a new Section 22-511 to Chapter 5 of Title 22 of the Administrative Code, also banning non-compete agreements.

New York City has expanded its already extensive anti-discrimination law by recently including weight and height as protected categories. New York City signed Intro. 209-A into law on May 26, 2023, and it takes effect on November 22, 2023. The law prohibits discrimination based on a person's height or weight in employment, housing, and public accommodations. The law maintains an exemption for employers that are hiring for positions in which height or weight may prevent an applicant from performing essential requirements of the job.

The City Council is also contemplating other bills that would further expand the list of protected categories under the local antidiscrimination law:

- In February 2023, lawmakers proposed a bill that would prohibit discrimination based on a person's "actual or perceived" poverty in connection with employment opportunities and access to public accommodations.
- Another bill proposes to ban workplace discrimination based on a person's tattoos or body art.

The New York City Pay Transparency Law went into effect on November 1, 2022, requiring all employers advertising a job, promotion or transfer opportunity to state the position's minimum and maximum salary in the advertisement. This extends to all categories of employees protected by the New York City Human Rights Law. Employers should follow the law when posting positions that can or will be performed, even partially, in New York City, whether from an office, in the field, or remotely from home.

New York State established a state-wide pay transparency law that is set to go into effect on September 17, 2023. The law requires employers to list salary ranges in advertisements or postings for job opportunities and promotions.

Law stated - 24 August 2023

EMPLOYMENT RELATIONSHIP

State-specific laws

What state-specific laws govern the employment relationship?

Article 5 of the New York Labor Law sets out standards for hours of labor, time allowed for meals, and rest periods. Article 6 governs payment of wages, including paid sick leave. The New York Labor Law also includes provisions for employment of minors and other safety standards. The Department of Labor sets out additional labor standards in Title 12 of the New York Codes, Rules and Regulations.

The New York State Human Rights Law (Article 15 of the Executive Law § 290 et seq.), prohibits discrimination based on protected classes in the areas of employment, housing, credit, places of public accommodations, and non-sectarian educational institutions. Discrimination is prohibited on account of age, race, creed, color, religion, national origin, sexual orientation, gender identity or expression, military status, sex, disability predisposing genetic characteristics, familial status, marital status, pregnancy-related condition, prior arrest or conviction records, status as a victim of domestic violence, and sexual and reproductive-health decisions, and prohibits retaliation for filing a complaint. The New York City Human Rights Law (Title 8 of the Administrative Code of the City of New York) allows for additional protected classes above those in the state law including credit history, caregiver status, unemployment status, and immigration or citizenship status.

The New York State Worker's Compensation Law provides that employers subject to the law provide compensation to employees for injury or death arising in the course of employment, the laws concerning which can be found in the Consolidated Laws of New York, Worker's Compensation (WKC) Chapter 67.

The New York State Paid Family Leave Law contained in Article 9 of the Consolidated Laws of New York, Worker's Compensation (WKC) Chapter 67 expanded family care in 2023 to cover siblings. This addition includes biological siblings, adopted siblings, stepsibling, and half-siblings. It allows for eligible employees to have job-protected, paid time off to bond with a newborn child, care for a family member with a serious health condition, or assist loved ones if a spouse, domestic partner, child, or parent is deployed abroad on active military service. This is funded by employees through payroll deductions.

The New York State Worker Adjustment and Retraining Notification (WARN) Act requires private businesses with 50 or more full-time employees to provide 90 days' notice before a mass layoff, plant closure, relocation, or other covered reduction in work hours. NY WARN covers:

- plant closings affecting 25 or more employees;
- mass layoffs involving 25 or more full-time employees (if the 25 or more employees make up at least 33% of all the employees at the site);
- mass layoffs involving 250 or more full-time employees; and
- certain other relocations and covered reductions in work hours.

Law stated - 24 August 2023

Who do these cover, including categories of workers?

The New York Labor Law applies to all employers whose employees work in the state of New York. However, wages and benefits due under the Labor Law may differ based on an employer's size and employee status.

The New State Human Rights Law applies to all employers, regardless of size, and protects employees, applicants for hire, interns, independent contractors, consultants, and people who provide services under a contractual relationship. See N.Y. Exec. Law § 292

The New York City Human Rights Law applies to employers who have employed four or more people within the previous year, or at least one domestic worker for any period, within the City of New York. Individuals protected under the New York City Human Rights Law are employees, applicants, interns, independent contractors, and freelancers. See NYC Admin. Code § 8-102.

Almost all employers in New York must provide Workers' Compensation coverage .

For the New York State Paid Family Leave Law , full-time employees who work a regular schedule of 20 hours or more per week are eligible after 26 weeks while part-time employees who work less than 20 hours per week are eligible after working for 175 days which do not need to be consecutive. The law applies to most private employers with one or more employees.

The New York State WARN Act applies to employers with 50 or more full-time employees that will be affected by a mass layoff, plant closure, or relocation.

Law stated - 24 August 2023

Misclassification

Are there state-specific rules regarding employee/contractor misclassification?

There are no state-specific rules or statutes governing misclassification of an employee. Rather, evaluation whether an individual is an employee or properly classified as an independent contractor depends on several factors and the degree of control the employer has over the individual's work, with the appropriate test being dependent on the regulatory scheme (tax, worker's compensation) involved.

Factors listed by the New York Department of Labor in assessing whether an employment relationship may exist for the specific purpose of unemployment insurance focus on the level of control the employer has over what will be done by the "contractor" and the manner, means and results. These factors include:

- choosing when, where and how the contractor performs services;
- providing facilities, equipment, tools, and supplies;
- directly supervising the services;
- setting the hours of work;
- requiring exclusive services (i.e. individual cannot work for competitors);
- setting the rate of pay;
- requiring attendance at meetings and/or training sessions;
- asking for oral or written reports;
- reserving the right to review and approve the work product;
- evaluating job performance;
- requiring prior permission for absences;
- having the right to hire or fire.

Manner of compensation is also considered in evaluating worker status. Employees are typically paid a salary, hourly rate or draw against commissions; in addition to receiving various fringe benefits.

New York has a Joint Enforcement Taskforce comprising staff from various state agencies including the Department of Labor and Worker's Compensation Board to address the misclassification of workers .

The New York State Construction Industry Fair Play Act specifically targets misclassification in the construction industry and establishes a stricter three-factor test for independent contractor status consisting of whether a person is:

(i) free from direction and control in performing their job, (ii) performing work that is not part of the usual work done by the business that hired them, and (iii) has an independently established business.

Additionally, on May 15, 2017, New York City's Local Law 140 (Freelance Isn't Free Act) took effect. The law enhances protections for freelance and gig workers in the City of New York. Specifically, the law provides freelances the right to a written contract, timely and full payment, and protection from retaliation. Penalties for violating this law are akin to those afforded to traditional employees including statutory damages, double damages (liquidated damages), injunctive relief and attorneys' fees.

Law stated - 24 August 2023

Contracts

Must an employment contract be in writing?

Employment contracts in general do not need to be in writing and can be either written or oral. The Statute of Frauds requires written agreements for contracts that cannot be performed within one year. If an employment contract extends beyond one year, it should be in writing to satisfy this requirement. N.Y. General Obligations Law § 5-701.

Where a definite period of service is not specified in a contract, the hiring is deemed at will and the employer or employee may terminate the relationship at any time.

A commissioned salesperson's employment agreement must be writing and produced upon request by the commissioner with various details of employment and if the employer fails to produce such writing, it is presumed that the terms of employment presented by the salesperson are the agreed terms of employment. NYLL § 191.

The New York Wage Theft Prevention Act requires employees be given written notice of their rate of pay upon hire. NYLL § 195.

Further, under the Freelance Isn't Free Act , contracts with freelancers in New York City must be in writing as well.

Law stated - 24 August 2023

Are any terms implied into employment contracts?

Employees are subject to an implied duty of loyalty to their employers. W. Elec. Co. v. Brenner , 41 N.Y.2d 291, 392 N.Y.S.2d 409, 360 N.E.2d 1091 (1977) (holding that employer–employee relationship is that of a principal–agent and that the employee is prohibited from acting in any manner inconsistent with agency or trust and is all times bound to exercise good faith and loyalty in performance of duties).

Further, "all contracts imply a covenant of good faith and fair dealing in the course of performance," which necessarily extends to employment contracts. See 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153 (2002).

Law stated - 24 August 2023

Are mandatory arbitration agreements enforceable?

Generally, yes. There is strong public policy favoring arbitration, and arbitration can be subject to a collective bargaining agreement if the agreement contains a dispute resolution provision concerning arbitration. Wilson v. PBM, LLC , 2021 NY Slip Op 00593 (App. Div. 2nd Dept.)

Between 2018 and 2019, New York enacted Section 7515 of the New York Civil Practice Law and Rules (CPLR 7515), which invalidated any agreement seeking to subject discrimination claims to arbitration. However, in Latif v. Morgan

Stanley & Co. LLC, et al., No. 18-cv-11528 (DLC); 2019 U.S. Dist. LEXIS 10702 (S.D.N.Y. Jun. 26, 2019), the Southern District of New York found that the Federal Arbitration Act (FAA) pre-empted CPLR 7515 and found it inconsistent with federal law, which favors, and does not contain any prohibition against, arbitration of discrimination claims.

In March 2022, Congress enacted the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, amending the Federal Arbitration Act and prohibiting employers from enforcing arbitration agreement for disputes involving sexual harassment or assault. Moreover, in Johnson v. Everyrealm, Inc., No. 22-CV-06669 (PAE), 2023 U.S. Dist. LEXIS 312442 (S.D.N.Y. Feb. 24, 2023); Judge Paul Engelmayer held "that, where a claim in a case alleges 'conduct constituting a sexual harassment dispute' as defined, the EFAA, at the election of the party making such an allegation, makes pre-disputes arbitration agreements unenforceable with respect to the entire case relating to that dispute." Furthermore, in Yost v. Everyrealm, Inc., 22 Civ. 6549 (PAE), 2023 U.S. Dist. LEXIS 62623 (S.D.N.Y. Apr. 10, 2023), Judge Engelmayer clarified that a plaintiff cannot simply tack on claim of sexual harassment in hopes of avoiding arbitration. Where no plausible claim of sexual harassment exists, any remaining claim may be subject to arbitration upon showing a valid arbitration agreement between the parties.

Law stated - 24 August 2023

How can employers make changes to existing employment agreements?

Employment contracts can be modified with the mutual consent of both parties to the contract. Gertler v. Davidoff Hutcher & Citron LLP , 2020 NY Slip Op 04731 (App. Div. 2nd Dept.) (holding that plaintiff at-will employee could end employment if new unilaterally altered terms of employment unacceptable).

Oral, at-will agreements can be modified at any time by the employer, as to prospective terms and conditions.

Law stated - 24 August 2023

HIRING

Advertising

What are the requirements relating to advertising open positions?

Starting November 1, 2022, the NYC Human Rights Law requires that employers include a good faith pay range for all job advertisements. Employers with four or more employees or one or more domestic workers are covered by the law, as well as employment agencies regardless of their size. Employers must state a minimum and maximum salary (or hourly wage) they are willing to pay successful job applicants at the time the posting is made. This requirement is applicable to advertisements of a job, promotion or transfer opportunity. This law does not apply to temporary-help firms seeking applicants to join their pool of available workers nor does the law prohibit employers from hiring without using an advertisement or require employers to create an advertisement in order to hire.

Governor Hochul signed S.9427-A/A.10477 in December 2022, which establishes a statewide pay transparency law. The legislation requires salary ranges be listed in advertisements and postings for job opportunities. This will be codified in NYLL § 194-B.

Law stated - 24 August 2023

Background checks

(a) Criminal records and arrests

Article 23-A of the New York Correction Law prohibits employers from unfairly discriminating against a person

convicted of one or more criminal offenses, and specifies eight factors employers must consider when evaluating an applicant with a prior conviction including time elapsed since conviction, age of applicant at time of offense, evidence of rehabilitation, seriousness of conviction, specific duties/responsibilities related to the employment sought, bearing offense has on performance of job duties, public policy considerations, and legitimate interests such as a person's safety or welfare.

New York City has a "Ban the Box" law that prevents NYC employers from inquiring about a criminal conviction history until after consideration of all other qualifications and a conditional offer of employment has been made. The law also has employers undertake a multi-step process for rescinding a job based on the results of a criminal inquiry, which may only occur in limited circumstances. The Fair Chance Act (FCA) prohibits employers from making statements in job posting and recruitment materials related to criminal history. Employers are also prohibited from inquiring about criminal history during the interview process or inquiring or acting on non-conviction information. If an employer is considering withdrawing a conditional offer of employment based on the results of a criminal background check, once run, it must first gather information necessary to assess each of the fair chance factors. Then an employer may only withdraw a conditional offer if it properly determines there is a direct relationship between the applicant's conviction history or pending case and the prospective job; or demonstrates employing the applicant would involve unreasonable risk to property or the safety or welfare of specific individuals or the general public. In withdrawing the conditional offer, the employer must place a copy of the inquiry into the applicant's criminal history, disclose a written copy of its Fair Chance Act Analysis to the applicant, and allow the applicant a reasonable period of at least five business days from receipt of the inquiry and analysis to respond to the employer's concerns. Under a 2021 amendment, protections of this Act were extended to existing employees requiring employers to follow a similar process if taking action against an existing employee based on criminal conduct. If an employer wants to revoke a conditional offer based on a criminal record, the employer must explain this using the Fair Chance Act Notice obtainable from the nyc.gov website, provide the applicant with a copy of the background check report, and give the applicant the opportunity to respond within five business days.

New York State is considering passing the Clean Slate Act , which would automatically seal a criminal record after a certain period.

Law stated - 24 August 2023

(b) Medical history

The Americans with Disabilities Act prevents employers from requiring medical examinations or making inquiries as to employee disability unless it is job-related and consistent with business necessity which includes asking for an employee's medical documentation for their disability.

If job-related, NYLL § 201-b makes it unlawful for an employer to require any applicant to pay for the cost of a medical examination required as a condition of original employment.

The New York Human Rights Law and New York City Human Rights Law both prohibit discrimination against employees and applicants based on actual or perceived disability. An employer also cannot use genetic information to make employment decisions or solicit, require, or administer a genetic test to a person or request information from which a predisposing genetic characteristic can be inferred as a condition of employment, or preemployment application, unless the test is directly related to the occupation environment wherein the individual's susceptibility to disease may be increased as a result of working there. N.Y. Exec. Law § 296; NYC Admin. Code § 8-107.

Law stated - 24 August 2023

(c) Drug screening

New York Labor Law § 201-d now states cannabis used in accordance with state law is a legal consumable product and employers are prohibited from discriminating against employees based on their use of cannabis outside of the workplace or work hours, and when not on the employer's equipment or property. Exceptions exist including those where an employer would be in violation of federal law or cannabis impairs the employee during performance of their tasks or duties.

Covered employers may not test job candidates for marijuana or THC as a condition for employment with exceptions for specific jobs, terms in a collective bargaining agreement, or drug testing that is required by the federal government or other applicable law; or unless permitted by the provisions of NYLL § 201-D(4-a).

Law stated - 24 August 2023

(d) Credit checks

Employers cannot run a credit check or ask about things such as payment history or creditworthiness to employees or job applicants under the New York City Credit Check Law and NYC Human Rights Law. Credit cannot be the reason a person is fired, not hired, or not promoted. Under the NYC Human Rights Law, employers are prohibited from considering credit when making employment decisions about current or potential employees. Employers must have four or more employees to be covered by this law, and the employees do not need to work in the same location or all in NYC. Employers are still allowed to conduct a credit check for certain positions such as police officers or executive-level jobs with control over finances, computer security, or trade secrets.

New York Labor Law Section 194-a also prohibits an employer from directly or indirectly asking any information about an applicant's salary history. This law does not prohibit employers from inquiring about an applicant's salary expectations for the prospective position.

Law stated - 24 August 2023

(e) Immigration status

New York State and New York City Human Rights Law prohibit employers from discriminating based on actual or perceived immigration or citizenship status

Law stated - 24 August 2023

(f) Social media

New York does not currently have laws or regulations that prevent an employer from looking up and/or viewing a potential applicant's public social media accounts when making hiring decisions. However, employers may not make employment decisions based on protected characteristics discovered from an applicant's social media account or make any hiring decisions based on legally protected off-duty conduct found on an applicant's social media account.

Law stated - 24 August 2023

(g) Other

NYLL § 201-a prohibits employers from fingerprinting as a condition of securing or continuing employment except for certain specific occupations, including state or municipal employees.

Employers are also prohibited from administering a psychological stress evaluator examination (polygraph test) as a condition of obtaining or maintaining employment. See NYLL §§ 734-735.

Law stated - 24 August 2023

WAGE AND HOUR

Pay

What are the main sources of wage and hour laws in your state?

The New York Labor Law, Article 6 establishes a minimum wage and addresses hours of labor, payment of wages, and other aspects of wage payment in New York.

The Wage Theft Protection Act, amending section 195 of the Labor Law, requires that employers provide notice to employees of their rate of pay, payday, the employer's intent to claim allowances, and the basis of wage payment. The notice must contain the employer's name as well as other information and be provided in the employee's primary language. The law also amends recordkeeping requirements including that employers must maintain copies of payroll records for six years. See NYLL § 195.

Title 12 of the Official Compilation of Codes, Rules, and Regulations of the State of New York also sets forth various wage and payment requirements, including for hospitality and fast-food workers; farm workers; building service industry; miscellaneous industries; and non-profit organizations.

Law stated - 24 August 2023

What is the minimum hourly wage?

Wage requirements under the New York Labor Law are more favorable for employees than federal law as the state's minimum wage is higher than what is federally mandated. As of December 31, 2022, minimum wage is $15.00 in New York City, Long Island and Westchester. In addition, the minimum wage requirement for the remainder of New York State most recently increased to $14.20 on December 31, 2022 and will increase over time until it reaches $15.00.

Part 146 of Title 12 of the New York Codes, Rules and Regulations allows employers in the hospitality industry to take certain tip credits towards the basic minimum hourly rate if a service employee or feed service worker receives enough tips and if the employee has been notified of the tip credit. See Id., at § 146-1.3.

Law stated - 24 August 2023

What are the rules applicable to final pay and deductions from wages?

When employment ends by termination or resignation, the employer must pay the wages due by the next regular payday for the pay period in which the employee left employment. If asked, the employer must mail final wages to the employee. Pursuant to NYLL § 195, an employer must also notify, in writing, any employee terminated, of the exact date of termination as well as the exact date of cancellation of employee benefits connected with the termination. As part of

their final pay, employees may be entitled to wage supplements (e.g., vacation pay), if company policy dictates or does not explicitly disclaim such payment upon separation. See NYLL § 190-191.

NYLL §§ 193 and 12 NYCRR Part 195 guide deductions from employee wages. Employers are allowed to deduct legally required deductions including for taxes, pre-tax contribution plans approved by the IRS; wage garnishments and levies for child support. Employers may also make deductions for recovery of overpayments and for repayment of salary advances as long as those deductions are done in accordance with the NYLL. Employees may also consent in writing to additional deductions laid out in NYLL § 193(1)(b), which are deemed to be for their benefit. Employers are not allowed to deduct from employee wages losses to the business including breakages, fines, or other similar losses.

Law stated - 24 August 2023

Hours and overtime

What are the requirements for meal and rest breaks?

Non-factory employees are allowed a 30-minute meal break between 11:00 a.m. and 2:00 p.m. for shifts six hours or longer that extend over that period and a 45-minute meal break at the midway point between the beginning and end of their shifts when the shift is more than six hours and starts between 1:00 p.m. and 6:00 a.m. See NYLL § 162.

All workers are entitled to an additional meal break of at least 20 minutes when their workday extends from before 11:00 a.m. and ends after 7:00 p.m. See NYLL § 162.

Factory workers are entitled to at least 60 minutes for a noonday meal; and another 60-minute meal break at the midway point between the beginning and end of their shifts when the shift is more than six hours and starts between 1:00 p.m. and 6:00 a.m. See NYLL § 162.

New York does not have mandatory rest breaks, but it does have break requirements for lactation. See NYLL § 206-c.

Law stated - 24 August 2023

What are the maximum hour rules?

There are no limits on the number of hours a person can work per days (except in the case of children under 18), how early an adult employee may work, and how late an adult employee may work.

Certain industries and occupations require at least 24 hours of rest each calendar week. They include work: in factories, in mercantile establishments, in hotels (except resort/seasonal hotels), in restaurants (except small, rural restaurants), as an elevator operator, as a watchman, as a janitor, as a superintendent, and as a farm worker.

Law stated - 24 August 2023

How should overtime be calculated?

Nearly all covered employees are entitled to overtime pay at a rate of 1.5 times their regular rate of pay for all hours worked in excess of 40 per week, except residential employees, whose entitlement to overtime kicks in for all hours worked beyond 40 hours in a workweek. An employee's regular rate is the amount that the employee is regularly paid for each hour of work.

When an employee is paid on a non-hourly basis, the regular hourly wage is found by dividing the total hours worked during the week into the employee's total earnings. However, the regular rate cannot be less than the minimum wage.

If an employee has multiple rates of pay, their regular rate is found by calculating the weighted average of the worker's

multiple rates of pay for the week based on the number of hours worked.

Variations, such as the fluctuating work week, may also be available.

Law stated - 24 August 2023

What exemptions are there from overtime?

Section 651 of the NYLL and the Federal Fair Labor Standards Act provide exemptions from overtime pay. Generally, New York will follow exemptions provided for in the federal law as well as those provided in the state law. The following are certain positions exempt from overtime pay:

- Executive employees, professional employees and administrative employees (assuming they meet the salary threshold requirements and duties tests outlined in the Labor Law)
- Outside salespeople
- Individuals working for a federal, state, or municipal government
- Farm laborers
- Certain volunteers, interns and apprentices
- Taxicab drivers
- Members of religious orders
- Certain individuals working for religious or charitable institutions
- Camp counsellors
- Individuals working for a fraternity, sorority, student or faculty association
- Part-time babysitters

Law stated - 24 August 2023

Record keeping

What payroll and payment records must be maintained?

With every payment of wages each employee must be furnished with a statement that lists dates of work covered by the payment; the employee's name; the employer's name; the address and phone number of the employer; the employee's rate of pay and its basis; whether paid by the hour, shift, day, week, salary, piece, commission or other; the employee's gross wages; deductions made; allowances, if any, claimed as part of the minimum wage; and net wages. NYLL § 195 (3).

For non-exempt employees the statements should include number of hours worked (overtime and regular) and rates of pay (overtime and regular).

Railroad corporations must include with every payment of wages a statement that lists accrued total earnings and taxes to date and a separate listing of all the employee's daily wages and how they were computed.

Pursuant to NYLL § 195(4), employers in New York must maintain payroll records for no less than six years.

NYLL § 195(1) (New York's Wage Theft Prevention Act) requires that at the time of hire, employees be provided with a notice containing the following information: rate or rates of pay and basis thereof; whether paid by hour, shift, day, week, salary, piece, commission, or other; allowances, if any, claimed as a part of the minimum wage, including tip, meal, or lodging allowances; the regular payday designated by the employer in accordance with Section 191 of NYLL; the name of the employer and any "doing business as" names used; the physical address of the employer's main office or principal place of business, a mailing address if different; the employer's telephone number; plus any information the commission deems material and necessary. Employees must sign and date these notices to acknowledge receipt and

the employer must maintain them for up to six years. For non-exempt employees, the notice should have their regular hourly rate and overtime rate of pay. NYLL § 195(1)(a).

Part 142 of Title 12 of the Official Compilation of Codes, Rules, and Regulations of the State of New York; 12 NYCRR 142 and the Minimum Wage Act, require maintenance of payroll records by employers for six years, as well. See § 142-2.6. These records must contain the following information or each employee: name and address; Social Security Number; wage rate; number of hours worked daily and weekly, including the time of arrival and departure of each employee working a split shift or spread of hours exceeding 10; when a piece-rate method of payment is used, the number of units produced daily and weekly; the amount of gross wages; deductions; allowances, if any, claimed as part of the minimum wage; net wages paid; and student classification. Id.

For staff counsellors at a children's camp, or in an executive administrative or professional capacity, employer records must also show: name and address; social security number; description of occupation; and for individuals working in an executive or administrative capacity, total wages, and the value of allowances, if any, for each payroll period. For each student status claim, employer records must contain a statement from the school the student attends, indicating the student is a student whose course of instruction is one leading to a degree, diploma or certificate; or is required to obtain supervised and directed vocation experience to fulfil curriculum requirements. Id.

Law stated - 24 August 2023

DISCRIMINATION, HARASSMENT AND FAMILY LEAVE

What is the state law in relation to:

Protected categories

(a) Age?

The New York State Human Rights Law (NYSHRL) (N.Y. Exec. Law § 296 et seq.) and the New York City Human Rights Law (NYCHRL) (NYC Admin. Code § 8-107), both prohibit discrimination based on age. However, the NYCHRL only applies to employers with four or more employees. (NYC Admin. Code § 8-102). The age threshold for the NYSHRL is 18 years and up, and the NYCHRL has no age limit, but does include discrimination based on perceived age. Economic damages including front and backpay are available for violation of the laws as well as compensatory damages for emotional distress and pain and suffering. See NYC Admin. Code § 8-120. Civil penalties up to $100,000 are available under the NYSHRL and up to $125,000 under the NYCHRL or $250,000 for wilful violations (NYC Admin. Code § 8-126).

Law stated - 24 August 2023

(b) Race?

- Discrimination based on race is prohibited under both the NYSHRL and the NYCHRL. See N.Y. Exec. Law § 296(1)(a) and NYC Admin. Code § 8-107(1)(a). The NYSHRL defines race to include traits historically associated with race, including but not limited to, hair texture and protective hairstyles. See N.Y. Exec. Law § 292(37).

Law stated - 24 August 2023

(c) Disability?

Discrimination based on disability is prohibited under the NYSHRL. Disability is broadly construed to mean: (i) a physical, mental or medical impairment resulting from anatomical, physiological, genetic, or neurological conditions

that prevents the exercise of normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, (ii) a record of such an impairment, or (iii) a condition regarded by others as such an impairment, provided, however, the definition is limited to disability, which upon the provision of reasonable accommodations, do not prevent the individual from performing in a reasonable manner the activities involved in the job held or sought. See N.Y. Exec. Law § 292(21). Unlike federal law, there is no requirement that the impairment substantially limit a major life activity.

Under the NYSHRL, it is a discriminatory practice for an employer to refuse to provide a reasonable accommodation to individuals with known disabilities or pregnancy-related conditions, provided such accommodation does not impose an undue hardship on the company. See N.Y. Exec. Law § 296(3)(a)-(b). Examples of reasonable accommodations include modifying work schedules, accessible worksites, acquiring or modifying equipment, or increased breaks.

The NYCHRL also prohibits discrimination based on an individual's disability. The term disability means any physical, medical, mental or psychological impairment, or a history or record of such impairment. These impairments mean an impairment of any bodily system, including the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including speech organs, the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin, and the endocrine system; or a mental or psychological impairment. See NYC Admin. Code § 8-102.

The NYCHRL also covers drug addition, alcoholism and other substance abuse as a "disability" when the person is recovering or has recovered and currently is free of such abuse, and does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use. Id.

Law stated - 24 August 2023

(d) Gender?

Both the NYSHRL and the NYCHRL prohibit discrimination on the basis of gender. Under the NYCHRL, the term gender includes actual or perceived sex, gender identity and gender expression, including a person's actual or perceived gender-related self-image, appearance, behavior, expression or other gender-related characteristic, regardless of sex assigned to that person at birth. See NYC Admin. Code § 8-102.

In 2019, the NYSHRL was modified to add general identity and gender expression as protected categories. The Gender Expression Non-Discrimination Act (GENDA) prohibits discrimination based on gender identity or expression including in employment as well as other public accommodations. The term "gender identity or expression" is defined under the law to mean a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including but not limited to, the status of being transgender. See N.Y. Exec. Law § 292(35). Gender identity and expression can also include gender dysphoria, gender non-conforming and non-binary.

Law stated - 24 August 2023

(e) Sexual orientation?

The NYSHRL prohibits discrimination due to sexual orientation which it defines as heterosexuality, homosexuality, bisexuality, or asexuality, whether actual or perceived. See N.Y. Exec. Law § 292(27). The NYCHRL expands the definition of sexual orientation to include an individual's actual or perceived romantic, physical or sexual attraction or lack of attraction to other persons on the basis of gender. See NYC Admin. Code § 8-102.

Law stated - 24 August 2023

(f) Religion?

NYSHRL prohibits discrimination based on religious practices. The NYSHRL prohibits requiring employees to violate a sincerely held religious practice as a condition of being hired for or keeping a job and requires employers, to the extent it does not cause an undue hardship on the company, to make an effort to reasonably accommodate such religious beliefs. See N.Y. Exec. Law §296(10). Examples of accommodations include accommodating prayer requirements, religiously mandated hairstyles or clothing, or change in work schedules. Undue hardships on the company may include if the practice is very expensive, interferes with safe or efficient operation of the workplace, or substantially affects the rights of other workers. Further, employees are not entitled to premium wages or benefits for work performed during hours in which premium wages or benefits would ordinarily be applicable if the employee is working them only as an accommodation to his or her sincerely held religious requirements. Id.

The NYCHRL also prohibits discrimination on the basis of religion. See NYC Admin. Code § 8-107(3). Similar factors are considered under New York City law in determining if a reasonable accommodation may be granted for an individual's religious observance. Further, the New York City law states that an undue hardship will be found if the accommodation results in the inability of the employee seeking the religious accommodation to perform the essential functions of the positions in which the employee is employed.

Law stated - 24 August 2023

(g) Medical?

In addition to its prohibition against disability discrimination described above, the NYCHRL prohibits discrimination based on pregnancy, childbirth or related medical conditions. See NYC Admin. Code § 8-107(22)(a)-(e). This section of the law also sets forth employer requirements regarding lactation accommodations for the workplace and coinciding policies. Id.

The NYCHRL also prohibits discrimination based on sexual and reproductive health decisions. This term means any decision by an individual to receive services which are arranged for or offered or provided to individuals relating to sexual or reproductive health, including the reproductive system and its functions. NYC Admin. Code § 8-102. These services include but are not limited to fertility-related medical procedures, sexually transmitted disease prevention, testing, and treatment, and family planning services and counselling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing and abortion. Id.

Similarly, the New York State prohibits discrimination based on an employee's reproductive health decisions. See NYLL § 203-e.

The NYSHRL also prohibits discrimination based on, predisposing genetic characteristics. See N.Y. Exec. Law § 296(a). This means any inherited gene or chromosome, or alteration thereof, and determined by a genetic test or inferred from information derived from an individual or family member that is scientifically or medically believed to predispose an individual or the offspring of that individual to a disease or disability, or to be associated with a statistically significant increased risk of development of a physical or mental disease or disability. See N.Y. Exec. Law § 292(21-a).

Law stated - 24 August 2023

(h) Other?

The NYSHRL also prohibits discrimination based on creed, color, national origin, citizenship or immigration status,

military status, familial status, marital status, status as a victim of domestic violence or on the basis of prior arrests or criminal accusations terminated in favor of the individual. See N.Y. Exec. Law § 296(a) and 296(16). Further, New York State law prohibits discrimination based on lawful off-duty conduct (NYLL § 201-d).

The NYCHRL also prohibits discrimination and discriminatory practices based on creed, color, national origin, marital status, partnership status, caregiver status, uniformed service or immigration or citizenship status (§ 8-107(a)) pending arrests and criminal accusations and criminal convictions preceding and during employment (§ 8-107(10)), non-pending arrests and criminal accusations, and dispositions of charges (§ 8-107(11)), unemployment status (§ 8-107(21)), consumer credit history (§ 8-107(24)), pre-employment marijuana testing (§ 8-107(31)), or status as a victim of domestic violence, sex offences or stalking (§ 8-107(27)).

The NYCHRL also prohibits inquiring about an applicant's salary history. Id. at § 8-107(25).

New York City signed Intro. 209-A into law on May 26, 2023, and it takes effect on November 22, 2023. The law prohibits discrimination based on a person's height or weight in employment, housing, and public accommodations. The law will create an exemption for employers that are hiring for positions in which height or weight may prevent an applicant from performing essential requirements of the job.

Law stated - 24 August 2023

Harassment

What is the state law in relation to harassment?

The NYSHRL protects against harassment in the workplace and has undergone some revisions in recent years. In August 2019, it was updated to strengthen protections against discrimination and harassment. The NYSHRL is to now be liberally construed under state law without reference to any federal law that may lead to a more restrictive result. As of October 2019, the State Human Rights Law explicitly includes protection in employment from harassment based on any protected class. The law also provides further protection to victims of harassment by establishing: (i) harassment is against the law whenever an individual is subjected to inferior terms, conditions, or privileges of employment; (ii) the harassment does not need to be severe or pervasive for an employer to be liable; (iii) to establish liability, the complainant does not have to identify a similarly situated person/employee that was treated more favorably; and (iv) a complainant does not have to complain to their employer or file a formal grievance to establish liability. Further, non-employees working in the workplace are protected from discrimination. This extends protections to contractors, vendors, consultants, and others providing services in the workplace. Moreover, settlements of employment discrimination claims may only include conditions of confidentiality of the underlying factual basis forming the claim if that is the complainant's preference.

As of January 2020, settlement of employment discrimination claims also cannot prevent complainants from speaking to an attorney, the New York State Division of Human Rights, the U.S. Equal Employment Opportunity Commission, local human rights commission, or any other form of law enforcement. As of February 2020, the Human Rights Law applies to all employers in New York State, regardless of size and as of August 2020, the statute of limitations for filing with the New York State Division of Human Rights was extend from one year to three years for sexual harassment cases. Id.

New York City's Human Rights Law also prohibits harassment of employees, agents, and applicants on the basis of protected categories. See NYC Admin. Code § 8-107(1). Similar to the revised NYSHRL, the NYCHRL also has a more liberal construction than federal law. See Woodard v. TWC Media Solutions, Inc., 2011 U.S. Dist. LEXIS 1536 (S.D.N.Y. Jan. 03, 2021).

Both the NYCHRL and the NYSHRL have broad sexual harassment and anti-discrimination training and policy requirements.

In 2018 New York State passed legislation directed at preventing sexual harassment. As a result, employers must

adopt a comprehensive sexual harassment policy , which must include a complaint form for use by employees and provide annual sexual harassment prevention training, including notice of the program. The state provides a model policy and training for use by employers, who may choose to create their own policies and training as long as they meet all requirements of those put forth, and include all requisite information outlined, by the state.

The policy must:

- prohibit sexual harassment consistent with guidance issued by the New York State Department of Labor (NYSDOL) in consultation with the Division of Human Rights;
- provide examples of prohibited conduct that would constitute unlawful sexual harassment;
- include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims, and a statement that there may be applicable local laws;
- include a complaint form;
- include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;
- inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;
- clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue; and
- clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful.

The training must be delivered annually and:

- be interactive;
- include an explanation of sexual harassment consistent with guidance issued by the NYSDOL in consultation with the Division of Human Rights;
- include examples of conduct that would constitute unlawful sexual harassment;
- include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims;
- include information concerning employees' rights of redress and all available forums for adjudicating complaints; and
- include information addressing conduct by, and any additional responsibilities of, supervisors.

As of January 2019, any employer bidding on a New York State contract must affirm they maintain a sexual harassment prevention policy and comply with the annual training requirement for all employees. See New York Finance Law, § 139-l.

In passing the Stop Sexual Harassment Act, New York City also implemented harassment prevention training and poster requirements on employers in New York City. See NYC Admin. Code § 8-107(29)-(30).

Employers in New York City must display a poster regarding sexual harassment prevention in a conspicuous place for employee viewing. They must also distribute at the time of hire a fact sheet developed by the city discussing information on sexual harassment. NYC Admin. Code § 8-107(29).

The training must be given annually by employers with 15 or more employees, be interactive, include supervisory and managerial employees, and given within the first 90 days of hire for employees that work more than 80 hours in a calendar year. NYC Admin. Code § 8-107(30). The requirements of the trainings content are similar to that of the state's

training and are enumerated in NYC Admin. Code § 8-107(30)(b)(1)-(8).

New York City employers must keep a record of all trainings, including employees signed acknowledgments, for at least three years. In addition to employees, the training must be provided to interns, freelancers, and independent contractors.

Law stated - 24 August 2023

Family and medical leave

What is the state law in relation to family and medical leave?

Since launching in 2018, New York State Paid Family Leave allows eligible employees to have up to 12 weeks of job-protected, paid time off to "bond with a new child, care for a family member with a serious health condition, or to assist loved ones when a family member is deployed abroad on active military service." This is funded by employees through payroll deductions in increments consistent with their actual wages. Most recently, the list of family members whom eligible workers can take Paid Family Leave to care for now include siblings with a serious health condition. This addition includes biological siblings, adopted siblings, stepsiblings, and half-siblings.

After the COVID-19 pandemic, the Paid Family Leave Law was amended to allow for use to care for a family member who contracted COVID-19, and requiring some employers, based on size, to provide at least 5 or 14 days of job protected paid COVID-19 sick leave to employees due to a mandatory or precautionary order of quarantine. Notably, the law provides for this leave up to three times, with the second and third time requiring an employee be positive for COVID-19. Further, unlike other COVID-19 paid leave laws, this amendment to the Paid Family Leave Law has no sunset date. Rather, employees may only qualify three times in total.

Law stated - 24 August 2023

PRIVACY IN THE WORKPLACE

Privacy and monitoring

What are employees' rights with regard to privacy and monitoring?

On May 7, 2022, New York's electronic monitoring law went into effect. Codified as New York Civil Rights Law § 52-C*2, it requires employers that monitor their employee communications to provide prior written notice at the time of hire to all employees that may be monitored. The law applies to employers in New York who monitor email, telephone communications, and/or internet use through electronic devices or systems. This law does not apply to actions performed solely for system maintenance or protection. The notice must advise the employee that all of their various electronic communications may be monitored, and the employee must acknowledge receipt of the notice by signing in writing or electronically. The employer also must post a notice of electronic monitoring in a place readily available for viewing by employees who are subject to electronic monitoring.

Section 203-C of the New York Labor Law prohibits employers from recording video of employees in private spaces, such as locker rooms and restrooms, unless the employers have a court order allowing videotaping. However, this law does not apply to audio surveillance, and permits video surveillance in other public areas. (N.Y. Lab. Law § 203-c; N.Y. Gen. Bus. Law § 395-b).

Under New York's wiretapping law, employers can record a telephone conversation between employees or between an employee and a third party in New York if the employer is a party to the conversation, or one of the employees involved

in the conversation consents. (N.Y. Penal Law § 250.00; N.Y. Penal Law § 250.05).

New York Senate Bill S04457 , known as the Biometric Privacy Act, was introduced in February 2023 to amend the general business law in relation to biometric privacy. Under the new law, employers must notify employees in writing and obtain an executed written release from employees before collecting, obtaining, or purchasing a biometric identifier or biometric information. The employers would be required to develop and made available a written policy outlining a retention schedule and guidelines on destruction of such information. S04457 is a companion to Assembly Bill 1362, which was introduced to in January 2023. The bill remains in committee.

Effective December 16, 2022, New York employers must now make digital versions of the physical notices available, either on the employer's website or via email. (N.Y. Lab. Law § 201).

Law stated - 24 August 2023

Are there state rules protecting social media passwords in the employment context and/or on employer monitoring of employee social media accounts?

There is no New York workplace privacy law preventing employers from accessing employees' social media accounts.

Law stated - 24 August 2023

Bring your own device

What is the latest position in relation to bring your own device?

If employers allow employees to use their own devices for work and monitor them, New York's Electric Monitoring Law is not limited to employer-issued devices, and employers should provide notice of any monitoring of that device.

Law stated - 24 August 2023

Off-duty

To what extent can employers regulate off-duty conduct?

Under Section 201-D of New York Labor Law, employers are prohibited from discriminating against employees for their lawful off-duty conducts, including political activities, legal recreational activities, legal use of consumable products (including cannabis), and union membership.

Employers may take action against employees' use of cannabis if (i) the employer is required to take such action by state or federal statute, regulation, ordinance, or other state or federal governmental mandate; (ii) the employer's failure to act would be in violation of federal law or cause it to lose a federal contract or federal funding; or (iii) the employee, while working, manifests specific articulable symptoms of cannabis impairment that decrease or lessen the employee's performance of the employee's tasks or duties, or interferes with the employer's obligation to provide a safe and healthy workplace as required by state and federal workplace safety laws. (N.Y. Lab. Law § 201-d(4-a)).

However, the off-duty conduct law does not apply to employee conduct that create a material conflict of interest related to the employer's trade secrets, proprietary information, or other business interests. Additionally, employers shall not be in violation of the law where their actions are required by statute, regulation, ordinance, or other governmental mandate, or where their actions are permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract, or collective bargaining agreement. (N.Y. Lab. Law § 201-d(3); N.Y. Lab. Law § 201-d(4)).

Law stated - 24 August 2023

Gun rights

Are there state rules protecting gun rights in the employment context?

The new gun legislation , effective September 1, 2022, prohibits carrying firearms in sensitive and restricted places.

Sensitive areas include government buildings, religious institutions, healthcare facilities, colleges and universities, public transportation, places where alcohol is consumed, Time Square, homeless shelters and other public residential facilities, entertainment venues, such as stadiums, theaters, casinos, and polling places, and places where children gather, such as schools, daycare centers, playgrounds, libraries parks and zoos.

Restricted location is any private property where the owner or lessee of such property has not permitted such possession by clear and conspicuous signage indicating that the carrying of firearms, rifles, or shotguns on their property is permitted or has otherwise given express consent.

Though not specifically referencing employment, employers should be cognizant of how the law will affect their workforce and workplaces.

Law stated - 24 August 2023

TRADE SECRETS AND RESTRICTIVE COVENANTS

Intellectual property

Who owns IP rights created by employees during the course of their employment?

New York Senate Bill S5640 was introduced in March 2023 to amend the New York Labor law in relation to inventions made by employees. The bill would add a new section 203-F, under which any employment agreement shall be unenforceable if it requires employees to assign to their employers any rights in inventions that the employees developed using their own property and time. The restriction will not apply to employee inventions created with actual or demonstrably anticipated research of the employers, or from work performed by the employees in the course of their work for the employers.

The bill has passed both houses of the New York State Legislature. It will take effect immediately once signed into law.

Law stated - 24 August 2023

Restrictive covenants

What types of restrictive covenants are recognized and enforceable?

New York recognizes non-compete agreements, non-solicitation agreements, and non-disclosure agreements.

However, the New York legislature has passed S.3100A/A.1278-B, for Governor Hochul's signage into law. The legislation would add Section 191-d to the Labor Law prohibiting "non-compete agreement and certain restrictive covenants." The bill would significantly impact the use and enforcement of non-compete agreements in New York for both employees and ancillary persons performing work or providing services (independent contractors). See Section 191-d(1)(b). Indeed, part of the bill declares void "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind." See Section 191-d(3).

Separately, in June 2023, New York City introduced Int No. 1067 to amend Chapter 5 of Title 22 of the Administrative code by adding a new section 22-511. The bill would prohibit employers from entering non-compete agreements with employees, and it would rescind any non-compete agreements that predate the effective date of the bill. The bill would

also apply to independent contractors. Employers would be subject to a $500 civil penalty for each violation.

Law stated - 24 August 2023

Non-compete

Are there any special rules on non-competes for particular classes of employee?

S3100A creates a carve-out for broadcast employees, such that their existing non-compete protections will govern if all or part of the bill is held to be invalid by any court of competent jurisdiction.

Law stated - 24 August 2023

LABOR RELATIONS

Right to work

Is the state a “right to work” state?

New York is not a “right to work” state. New York is an “at-will” employment state.

Law stated - 24 August 2023

Unions and layoffs

Is the state (or a particular area) known to be heavily unionized?

New York has the second-highest union membership rate in the country in 2022, at 20.7%.

Law stated - 24 August 2023

What rules apply to layoffs? Are there particular rules for plant closures/mass layoffs?

The New York Worker Adjustment and Retraining Notification Act (NY WARN), offers more protections to covered employees than the Federal Worker Adjustment and Retraining Notification Act (Federal WARN).

NY WARN requires private employers with 50 or more full-time employees to provide at least 90 calendar days advance written notice for a plant closing, mass layoff, relocation, and reduction in work hours. Employers must provide notice to affected employees and their representatives, New York State Department of Labor (NYSDOL), and applicable local workforce development boards. Employers who violate NY WARN may be required to pay back wages and benefits to employees and face civil penalties.

In March 2023, NYSDOL amended NY WARN regulations to address remote workers. The updates include the following:

- Individuals working remotely but based at a particular employment site are counted as employees in determining the threshold of fifty employees.
- Where an employer has sold all or part of a business, if the transfer of employees is a good faith condition of the purchase agreement, the purchasing employer must provide notice and the selling employer is relieved of the notice obligation.
- In addition to NYSDOL and applicable local workforce development boards, employers must also provide notice to the chief elected official of the unit of local government, the school district, and the locality that provides

police, firefighting and other emergency services where the employment site is located.

- Notice to the Commissioner of Labor must include the name, address (including home address), personal telephone number(s), personal email address(es), job title, and work locations of each employee to be laid off. The notice must also identify whether the employee is paid on an hourly, salary, or commission basis, whether the employee is part-time or full-time, and any affiliation to an employee representative.
- Notice to the Commissioner of Labor must include the total number of full-time and part-time employees in New York State and at each affected site, as well as the number of affected employees at each affected site; and
- Notices to affected employees must include additional information, such as information on severance package or financial incentives if the employee remains and works until the effective date of the mass layoff, relocation or employment loss, available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration.

- If an employer is seeking an exception to the NY WARN notice requirements, the employer must make a submission to the Commissioner of Labor and obtain a determination from the Commissioner that the employer established all of the requirements for the exception.
- To qualify for the faltering company exception, which is available only in a plant closing, the employer must show that the financing or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs.
- Public health emergencies, including but not limited to a pandemic, and terrorist attacks directly affecting operations are added as examples of business circumstances that are not reasonably foreseeable for the unforeseeable business circumstances exception.
- The new "payments in lieu of notice of separation or layoff" provision requires that employers that wish to pay employees in lieu of providing the required NY WARN notice must maintain a "uniformly applied company policy" that requires a "definite period of notice" prior to separation from employment.

Separately, Senate Bill S5617 (S5617) was introduced in March 2023 to amend some of the definitions in NY WARN. Additionally, the proposed bill would remove certain exclusions for employer notice requirements for the closing of a facility; remove the discretionary reduction of penalties for employers for certain acts or omissions concerning notice requirements for mass layoffs, relocations or employment loss; remove the maximum period for backpay determination; allows the attorney general to assist certain employees to receive backpay; and require employers to pay severance in certain instances of plant closings, relocations, or mass layoffs.

Law stated - 24 August 2023

DISCIPLINE AND TERMINATION

State procedures

Are there state-specific laws on the procedures employers must follow with regard to discipline and grievance procedures?

New York does not have any state laws on procedures employers must follow regarding discipline and grievance.

New York City's Just Cause Job protections for fast-food workers went into effect July 5, 2021. Fast food employers cannot fire, lay off, or reduce hours of more than 15% for any worker without just cause.

Law stated - 24 August 2023

At-will or notice

At-will status and/or notice period?

New York is an “at-will” employment state. In an at-will employment relationship, both the employer and the employee can terminate the employment without notice, at any time and for any reason not prohibited by law. Absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will.

Law stated - 24 August 2023

What restrictions apply to the above?

New York recognizes a few exceptions to the at-will presumptions, including written contracts and implied contracts. A contractual employment relationship would not be at-will unless so stated. An implied contract could be created when an employer makes oral or written representations to employees regarding job security. An employee may overcome the at-will presumption by “establishing that the employer made the employee aware of its express written policy limiting its right of discharge and that the employee detrimentally relied on that policy in accepting the employment.” Campeggi v. Arche Inc., 15 Civ. 1097 (PGG), 2016 U.S. Dist. LEXIS 124814 at *8 (S.D.N.Y. Sept. 13, 2016).

New York Labor Law prohibits employers from discriminating against employees for their lawful off-duty conducts. These conducts include political activities, legal recreational activities, and legal use of consumable products, including cannabis. (N.Y. Lab. Law § 201-D).

Additionally, an employer may not terminate an employee for discriminatory reasons , such as the employee’s membership in a protected class, including but not limited to: race, color, creed, religion, disability, national origin, sexual orientation, gender identity or expression, military status, predisposing genetic characteristics, sex, age, marital status, status as a victim of domestic violence, arrest record or conviction record. In New York City, it is also illegal to discriminate based on immigration or citizenship status, sexual and reproductive-health decisions, employment status, credit history, and caregiver status. Id.

Law stated - 24 August 2023

Final paychecks

Are there state-specific rules on when final paychecks are due after termination?

Employers shall pay wages not later than the regular payday for the pay period during which the employment termination occurred. Employees may request to have the wages paid by mail. (N.Y. Lab. Law § 191(3)).

* The authors wish to thank Amanda Rudolf, Connie Keng and Asif Mahmud for their contribution to the chapter.

Law stated - 24 August 2023

Jurisdictions

Canada - Ontario	.
Canada - Quebec	Stikeman Elliott LLP
USA - California	DLA Piper
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USA - Georgia	Ogletree Deakins
USA - Indiana	Ogletree Deakins
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USA - Tennessee	Bass Berry & Sims PLC
USA - Texas	Ogletree Deakins
USA - Utah	Holland & Hart LLP
USA - Virginia	Woods Rogers Vandeventer Black PLC
USA - Wisconsin	Lindner & Marsack
USA - Wyoming	Holland & Hart LLP