

New York State Department of Labor Division of Labor Standards

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IN THIS SEMINAR WE WILL DISCUSS:

- Wage-hour recordkeeping
- Overtime pay
- Meal and rest periods
- Penalties

Sources of Legal Authority

- New York Labor Law Section 195, 135, 191.1c, 661 (NYLL)
- New York Codes Rules and Regulations (12 NYCRR)
 - Part 142: Wage Order for Miscellaneous Industries and Occupations
 - Part 146: Hospitality Industry Wage Order
 - Part 141: Building Service Industry Wage Order
 - Part 195: Deductions from wages
 - Part 192: Methods of payment of wages (12 CRR-NY)
- United States Law
 - Fair Labor Standards Act (FLSA – 29 U.S.C 201 et seq.)
 - Code of Federal Regulations (CFR)
 - Motor Carrier Act (interstate commerce) 29 CFR 782

New York State Labor Law Section 195

Notice and record-keeping requirements

- 195.1: Pay notice
- 195.2: Notify of changes to the pay notice
- 195.3: Wage statements (pay stubs)
- 195.4: Time and payroll records
- 195.5: Written fringe benefit policy
- 195.6: Written notice of termination

NYLL 195.1 Pay Notice

- Provide at the time of hiring
- Must be in English and the employee's primary language (templates available on DOL website: Forms and Publications, form LS53 through LS59)
- Rates of pay: regular rate and overtime rate
- Basis of pay (hourly, daily, weekly, etc.)
- Allowances claimed: tips, meals, lodging

NYLL 195.1 Pay Notice

- Designate a regular pay day
- Employer name and any “dba” (doing business as)
- Employer’s main office address and telephone
- Signed by employer and employee
- Must be maintained for 6 years

NYLL 195.2 Notify of changes to pay notice

- Employer must give 7 days notice of changes to the pay notice
- Notice not necessary if the change is reflected in the wage statement

NYLL 195.3 Wage statement

- Also called a “pay stub”
- Dates of work covered by that payment of wages
- Employee name
- Employer name, address and phone
- Rates of pay: regular rate and overtime rate
- Basis of pay (hourly, daily, weekly, etc.)

NYLL 195.3 Wage statement

- Gross wages
- Hours worked: regular hours and overtime hours (regular hours are up to 40, overtime is after 40)
- Deductions and allowances
- Net wages

NYLL 195.3 Wage statement

- For a janitor in a residential building, the wage statement should show the number of units in the building instead of the hours worked
- For an employee working at a piece rate, the wage statement should show the piece rate and the number of pieces completed

NYLL 195.5 Written fringe benefit policy

- Employer must notify employees in writing, or by publicly posting, the employer's policy on:
 - Sick leave
 - Vacation
 - Personal leave
 - Holidays
 - Hours
 - Forfeiture provisions must be in writing
 - If no fringe benefits are offered, that should be in writing

NYLL 195.6 Written notice of termination

- Must notify any terminated employee in writing of:
 - Exact date of termination
 - Exact date of termination benefits
- Notice must be no more than 5 working days after termination
- Failure to notify an employee of cancellation of accident or health insurance may subject an employer to an additional penalty, which may include reimbursement for medical expenses.

NYLL 195.4 Time and payroll

- Maintain time and payroll for at least 6 years
- Weekly hours worked: regular and overtime hours
- Rates of pay: regular rate and overtime rate
- Basis of pay (hourly, daily, weekly, etc.)
- Gross wages
- Deductions
- Allowances
- Net wages

Wage orders require additional records to be kept (Parts 142-2.6, 146-2.1, 141-2.1)

- Employee name, address, SSN
- Student classification
- Occupational classification (Hosp & Bldg Serv)
- Money paid in cash (Hosp & Bldg Serv)
- Tip, meal and lodging credits (Hosp)
- Value of free apartment and utilities (Bldg Serv)
- Apartment number if allowance is claimed (Bldg Serv)
- For janitors in a residential building, the number of units in the building (Bldg Serv)

Other records

- Deductions: employer must retain authorizations, notices, responses, replies or determinations for 6 years (12 NYCRR 195-5.3)
- Paying wages by direct deposit or debit card: employer must retain the employee's written consent for 6 years (12 CRR-NY II G 192)
- Employment of minors: employer must keep minor's original employment certificate on file (NYLL 135)
- Commission sales: the commission agreement must be in writing, signed by employer and employee, kept for 3 years (NYLL 191.1c)

Overtime

- The requirement to pay overtime is found in the New York State wage orders:
- Part 142-2.2 Miscellaneous
- Part 146-1.4 Hospitality
- Part 141-1.4 Building service (porters, doormen)
- Overtime is after 40 hours in a week
- For a residential employee (an employee who lives in the home of the employer), overtime after 44 hours
- Janitors (supers) are not entitled to overtime

Overtime

- An employer shall pay an employee for overtime at a wage rate of one and one-half times (1.5x) the employee's regular rate
- If an employee was paid below the state minimum wage rate, DOL will compute regular wages earned at the minimum wage rate, and overtime wages earned at 1.5x the minimum wage rate.

Overtime example #1

Paid below State Minimum Wage Rate

- 2018, NYC small employer, SMWR \$12.00/hr, OT rate \$18.00/hr
- Employee works 50 hours at \$10.00/hr, is paid \$500.00
- DOL calls this “straight time for all hours worked”
- DOL computes wages earned as follow:
- 40 regular hrs @ \$12.00/hr = \$480.00
- 10 overtime hrs @ \$18.00/hr = \$180.00
- Total wages earned \$660.00
- Underpayment: $\$660.00 - \$500.00 = \$160.00$

Overtime example #2

Paid above State Minimum Wage Rate

- Employee works 50 hrs at \$20.00/hr, is paid \$1,000.00
- This pay is “straight time for all hours worked”
- Overtime rate: $1.5 \times \$20.00/\text{hr} = \$30.00/\text{hr}$
- DOL computes wages earned as follows:
- 40 regular hrs @ \$20.00/hr = \$800.00
- 10 overtime hrs @ \$30.00/hr = \$300.00
- Total wages earned \$1,100.00
- Underpayment: $\$1,100.00 - \$1,000.00 = \$100.00$

Overtime example #2 (continued)

Paid above State Minimum Wage Rate

- Alternate method of computing overtime when the regular rate is above the state minimum wage rate and the regular rate has been paid for all hours worked:
- Compute halftime for 10 OT hours
- Regular rate is \$20.00/hr, halftime is \$10.00/hr
- 10 OT hrs @ \$10.00/hr = \$100.00 underpayment
- This is called “halftime for overtime”

Overtime example #3

Tipped employee with tip allowance/credit

- An employer may pay an hourly rate equal to the state minimum wage rate minus a tip allowance/credit
- The point to remember here is that when you calculate the overtime rate, you first multiply the state minimum wage rate by 1.5, then subtract the tip allowance/credit (don't subtract, then multiply)
- Regular hours paid at \$12.00/hr - \$2.95 tip allowance = \$9.05/hr
- Overtime hours paid at \$12.00/hr x 1.5 = \$18.00, minus \$2.95 tip allowance, = \$15.05/hr

Overtime example #4

Hospitality wage order salaried employee

- It is illegal to pay an employee a salary in the Hospitality industry: all employees must be paid an hourly rate
- The salary is treated as wages paid for the regular hours or the first 40 hours, whichever is less, and no wages are considered to have been paid for the hours over 40
- Example: a worker is paid a \$500.00 salary for 50 hours
- Regular rate: $\$500/40 \text{ hrs} = \$12.50/\text{hr}$
- Overtime rate: $\$12.50/\text{hr} \times 1.5 = \$18.75/\text{hr}$
- Overtime earned: 10 overtime hrs @ $\$18.75/\text{hr} = \187.50
- Underpayment: \$187.50

Overtime example #5

Paid wages plus commissions or bonus

- Add the commissions or bonus to the wages earned to obtain total compensation
- Divide the total hours worked into the total compensation to obtain a derived hourly rate. This is the rate paid for all hours worked.
- Assuming for this example that the derived rate is above the minimum wage rate, divide the derived rate in half to obtain the halftime rate
- Multiply overtime hours by the halftime rate to calculate overtime earned

Overtime example #6

Employee paid at two pay rates

- Two situations can occur: the first situation is where there is a prior agreement to pay overtime at 1.5x the regular rate for the particular type of work that was overtime. Calculate overtime at the agreed OT rate.
- The second situation is where there is no such agreement. In that case:
 - Compute total wages earned at both rates
 - Divide total hours worked into total wages earned to obtain a “blended rate” paid for all hours worked
 - Assuming the blended rate is above the minimum wage, multiply overtime hours by half the blended rate to calculate overtime earned

Employees exempt from overtime

- Each of the wage orders has a definition of employee and a list of workers who are not considered to be employees (Part 142-2.14, Part 146-3.2, Part 141-3.2)
- Only “employees” are entitled to overtime
- Examples of workers who are not employees: baby-sitters; companions; booth renters; someone employed in executive, administrative or professional capacity; outside salespersons; taxicab drivers; students working in or for a university; staff counselors in a children’s camp

Employees exempt from overtime

- The Fair Labor Standards Act (FLSA) exempts some employees from overtime at 1.5x their regular rate. Under New York State wage orders, these employees are entitled to overtime at 1.5x the minimum wage rate.
- Drivers, drivers' helpers, loaders and mechanics engaged in activities affecting safety for employers engaging in interstate commerce (FLSA 13(b))
- Sales people, parts people and mechanics in an automobile dealership (FLSA 13(b))

Employees exempt from overtime

- Employees paid commissions if they meet all of the following requirements during a representative period of one month to a year (FLSA 7(i)):
 - Employed in retail or service establishments (includes restaurants and hotels)
 - More than 50% of their compensation is commissions
 - Their regular rate (all weekly earnings divided by hours worked) exceeds 1.5x the minimum wage rate

See the wage orders and the FLSA for additional exempt occupations

NYLL 162 Meal period

Who	Shift	Noon day meal (11am-2pm)	Other meal
Factory worker	(no specific shift in the law)	60 minutes	
Everyone except factory workers	A shift of more than 6 hours extending over 11am-2pm	30 minutes between 11am-2pm	
Everyone	Starting before 11am and continuing past 7pm		Additional meal period of 20 minutes between 5pm-7pm
Factory worker	A shift of more than 6 hours starting between 1pm and 6am		60 minutes midway during the shift
Everyone except factory workers			45 minutes midway during the shift

Rest periods

- Short breaks during the day: not required, but if permitted, breaks of 5 minutes to about 20 minutes must be counted as work time (29 CFR 785.18 Rest)
- One day of rest in seven: employers who operate a factory, mercantile establishment, hotel, restaurant, or who employ an elevator operator, movie picture projectionist, fireman, janitor, watchman or domestic worker, must allow these workers one day of rest each week (NYLL 161.1)
- Domestic workers are entitled to 3 paid days off after one year of employment (NYLL 161.1)

Penalties

- First violation: \$0-\$1,000
- Second violation: \$500-\$2,000
- Third and subsequent violation: \$2,000-\$3,000

Common violations that receive penalties

- Recordkeeping (usually issued as a violation of section 661 of the NY Minimum Wage Act, NYLL 650-665)
- Wage statements
- Meal period
- Day of rest
- Frequency of payment: not paying on regular payday
- Illegal deductions
- Tip appropriation
- Failure to post a minimum wage poster
- Failure to allow employee interviews
- Fringe benefit policy not in writing
- Child Labor (employment of minors)

Liquidated Damages

- 25% liquidated damages for unpaid wages in DOL's preliminary determination
- 100% liquidated damages if the preliminary determination is not paid or settled and DOL has to refer the matter for legal action (Order to Comply)

Retaliation

- It is illegal to discharge, penalize or discriminate against an employee who makes a complaint
- Applies even if the employee was mistaken about the law
- It is illegal for any person to retaliate, whether employer or former employer
- DOL may assess liquidated damages up to \$20,000
- Employer may have to pay lost wages

Further information

- Website: www.labor.ny.gov
- Contact center: 1-888-469-7365
- Laws of New York:
<http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO>:
- Local office: 75 Varick St, 7th Floor, New York NY 10013