INTRODUCTION TO EMPLOYMENT AND LABOR LAWS AFFECTING LOW WAGE AND IMMIGRANT WORKERS

David Colodny, Urban Justice Center
Elizabeth Joynes, Make the Road New York

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I. Employment-at-Will and Lay-Offs

The default rule in New York is that employment is at will: an employer can fire an employee for any reason or no reason as long as the reason is not illegal (e.g., discriminatory or unlawful retaliation). Some exceptions to at-will employment:

- Government employees generally are not at-will due to civil service laws;
- Union workplace governed by a Collective Bargaining Agreement;[1] and
- Employment contract with terms setting forth how long the employment will last (e.g., a contract to employ someone for a year) or limiting the circumstances under which an employee can be terminated (e.g., only for good cause or misconduct). Note, most employee handbooks have a clause explicitly stating they are *not* employment contracts.
- Neither federal nor state law provides a legal right to severance pay, absent a binding promise by the employer to provide it.
- Federal and state law (the WARN Acts) requires employers to give 60 days notice prior to closing plants facilities or making mass lay-offs. Under the federal act, employers are covered if they have 100 or more employees (not counting employees who worked less than 6 of the past 12 months or fewer than 20 hours per week). Under the NY Warn Act, employers with 50 or more full time employees are covered by the Act. For more information on when these statutes apply, go to: www.doleta.gov/programs/factsht/warn.htm and www.labor.ny.gov/workforcenypartners/warn/warnportal.shtm.

II. Unemployment Insurance

The unemployment insurance program in New York is administered by the New York Department of Labor. Unemployment Insurance (UI) is temporary income:

- For eligible workers
- Who lose their jobs
- Through no fault of their own (i.e., who were not fired b/c of serious misconduct)

To collect benefits, you must be ***ready, willing, and able to work.***

A. ELIGIBILITY

Several conditions apply in order for an employee to qualify for UI benefits:

1. Sufficient Earnings History. To qualify for UI benefits, an employee must have enough work and wages in "covered employment" during the preceding 15-18 month period. Benefits are based on the employee's earnings, and there is a minimum level of earnings that the employee must have had in the preceding period to be eligible.

[1] If an employee is terminated in violation of a Collective Bargaining Agreement, the employee's remedy is typically limited to remedies provided within the CBA. Most CBA's require the employee to notify the Union within a very short time period (e.g., 5 days), and then the Union might pursue a claim against the employer. The Union usually has discretion as to what efforts it must make to dispute the termination. Often, the union will pursue a grievance against the employer, but may or may not seek to arbitrate if the grievance is unsuccessful.

2. Termination from Employment. The employee must have been terminated from their job. If they quit, they generally will not be eligible to receive benefits unless there was good cause to quit, which can be a difficult standard to meet (e.g., was working but not getting paid).
3. The employee must not have been at fault for the termination. For example, an employee laid off for lack of work would be eligible for benefits. An employee fired for excessive lateness probably would not be eligible.

Undocumented workers are not eligible for UI benefits.

B. FILING A CLAIM

Claims can generally be filed by phone or through the internet on the Department of Labor website. The Department of Labor provides information about how to file a claim on its website: http://labor.ny.gov/ui/how_to_file_claim.shtm. Translation services are available for claimants filing by phone.

Once a claim is filed, claimants generally must certify each week or every other week that they have been available and looking for work, and they must report any wage income earned during that period because such earnings would affect whether the claimant remains eligible for benefits, or may cause a reduction in the amount of benefits they receive for that period. Weekly benefits also can be claimed through the DOL website.

C. BENEFITS

If a claim is accepted, the claimant can receive benefits for up to 26 weeks during the one year claim period unless benefits are extended (e.g., due to recession and high unemployment rate). The maximum amount of benefits that can be received is $420 per week. The maximum benefit will continue to increase each year until it reaches 50 percent of the average weekly wage in New York State.

D. ONE STOP CAREER CENTERS

The Department of Labor oversees One-Stop Career Centers that offer reemployment services including:

- Job referral and placement
- Individual and group counseling
- Current labor market information
- Job search workshops and job finding clubs
- Referral to training when appropriate

To find the One-Stop Career Center office nearest your client, go to www.labor.ny.gov.

E. APPEALS AND MORE INFORMATION

Claimants can appeal the DOL's decision as to benefits will be awarded at all, as well as the DOL's decision about the amount of benefits to be awarded.

A comprehensive handbook for claimants is available at: https://www.labor.ny.gov/formsdocs/ui/TC318.3e.pdf

III. Workers' Compensation

What is it?	• State system of insurance-based benefits—specific medical treatment and limited wage-replacement for lost work hours • Coverage if you're injured on the job (accident) or suffer illness as a result of work (occupational disease) • Coverage if a previous injury or illness is exacerbated by work • Agency is NYS Workers' Compensation Board
Who can get it?	• Part-time and fulltime employees (not independent contractors)
How does one apply?	• Most important thing is to seek medical treatment and keep records • Give (written) notice to employer within 30 days of injury or after you realize your illness is work-related • File claim based on injury or illness within two years • Use C-3 filing form
Is a lawyer necessary?	• Difficult bureaucracy with many hearings and medical-evidence requirements, so good to have lawyer from beginning • Lawyers are paid a fee set by law which is taken out of the wage-replacement award at the end of the case. Workers will not have to pay for the lawyer up front. However, because lawyer fees come out of wage awards, it may be difficult to find a lawyer to take a case that involves medical expenses, and no lost wages, because there will be no fee award. • Private bar of claimant-side attorneys; public interest groups don't really do workers' compensation
What are the hurdles for low-wage workers?	• If informal employment, have to make sure testimony is strong because may not have official work records • Wage-replacement is based on what you earned, so there's no correction for unlawfully low wages • If you don't have medical insurance, it can be hard to get treatment pending workers' compensation reimbursement • Many hearings, so requires missing days of work
What are the hurdles for immigrant workers?	• Usually no live interpretation, only telephonic • Interpretation/translation very limited and incomplete • Undocumented workers can get almost all workers' compensation benefits, excepting job-placement services • Judges may not be educated about undocumented workers' rights
For more info	• www.wcb.state.ny.us

IV. Discrimination and Sexual Harassment

Employers cannot discriminate against employees on the basis of certain protected categories – e.g., race, religion, sex, age, disability, sexual orientation, etc. Prohibited actions that are made on the basis of one of these protected categories include decisions about hiring and firing, promotions, compensation (including wages and benefits). Employers cannot harass people on the basis of a protected category. In addition, employers have a duty to try to remedy harassment from co-workers when they have knowledge of such harassment. Federal, state, and city laws overlap in certain ways, with some key differences summarized below:

	Title VII	§1981	Equal Pay Act	ADA	ADEA	NYS HRL	NYC HRL
# of employees[2]	15 or more	No Minimum	No Minimum	15 or more	20 or more	4 or more	4 or more
Administrative Exhaustion Required Before Court	✓			✓	✓		
Race	✓	✓				✓	✓
Color	✓					✓	✓
National Origin	✓					✓	✓
Alienage or Citizenship Status							✓
Sex	✓		✓			✓	✓
Gender Identity							✓
Pregnancy[3]	✓					✓	✓
Religion/Creed	✓					✓	✓
Sexual Harassment	✓					✓	✓
Age					✓ (40+)	✓	✓
Disability				✓		✓	✓
Marital Status						✓	✓
Partner Status							✓
Sexual Orientation						✓	✓
Genetic Predisposition[4]						✓	
Prior Arrest or Conviction						✓	✓

[2] The New York City Human Rights Law expressly extends all protections to "interns" whereas other laws may protect interns only if they are de facto "employees."

[3] The New York City Human Rights Law prohibits discrimination on the basis of pregnancy, childbirth or a related medical condition.

[4] "'Predisposing genetic characteristic' shall mean 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." N.Y. Exec. Law § 292(21a). Examples include sickle cell trait and carriers of Tay-sachs disease.

Military Status						✓	
Status as Victim of Domestic Violence, Stalking , Sex Offenses							✓
Unemployment Status							✓

A. SEXUAL HARASSMENT

Sexual harassment is a form of gender discrimination, and is prohibited by federal, state and city discrimination laws. Sex harassment can take different forms:

- Quid Pro Quo. It is unlawful for an employer to condition treatment in the workplace (e.g., hiring, promotion, firing) on whether someone will engage in sexual activities.
- Hostile Work Environment.
  - Under Federal law, the harassment must be "severe or pervasive" in order to be unlawful.
  - Under City law, an employee need only show that (s)he has been treated "less well" than other employees because of the employee's gender.

V. Wage and Hour Laws

Employers often fail to pay minimum wage, overtime or comply with other "wage-hour" laws, particularly in low wage service industries, such as restaurants, nail salons, supermarkets, food distribution, day labor construction work and domestic work. Workers often seek advice about one issue for which there may not be a legal remedy – e.g., termination in an employment-at-will situation or not being paid extra for working on holidays – but they may have remedies to recover unpaid minimum wage or overtime plus statutory liquidated damages and interest. In certain situations, workers may be entitled to workers' compensation or unemployment insurance benefits.

A. MINIMUM WAGE

1. New York Labor Law

- Basic Minimum Wage. The New York state minimum wage is generally applicable unless there is an industry-specific minimum wage. New York Labor Law ("NYLL") § 652(1). The generally applicable hourly minimum wage is:

Time Period	3/31/00 – 12/31/04	1/1/05 – 12/31/05	1/1/06 – 12/31/06	1/1/07 – 7/23/09	7/24/09 – 12/3013	12/31/13– 12/30/14	12/31/14 – 12/30/15	12/31/15 -
Min. Wage	$5.15	$6.00	$6.75	$7.15	$7.25	$8.00	$8.75	$9.00

"Wage" includes allowances, in the amount determined in accordance with the provisions of this article, for gratuities and, when furnished by the employer to employees, for meals, lodging, apparel, and other such items, services and facilities.

- Regulations. There are separate sets of regulations applicable to the hospitality industry (restaurants and hotels), the building service industry, farm workers and one for miscellaneous

industries. These are known as Industry Wage Orders, and can be found on the N.Y. Department of Labor website. The Wage Orders should always be consulted because they contain detailed rules applicable to the different industries.

- Note on Minimum Wage Orders for Tipped Workers.

	Before 12/30/2013	12/31/2013 – 12/30/2014	12/31/2014 – 12/30/2015	12/31/2015 -
Standard Minimum Wage	$7.25	$8.00	$8.75	$9.00
Non Hospitality Tipped Workers	$5.50	$6.05	$6.65	$6.80
Other Tipped Workers	Varies	Varies	Varies	Varies
Food Service Tipped Workers like Restaurant Workers	To Be Determined			

    - In the Hospitality Industry, tipped workers and fast food workers may expect wage rate increases on December 31st, 2015. These will be in addition to the general Minimum Wage increase to $9.00 per hour on December 31, 2015. Once the Regulations are finalized, the New York State Department of Labor will update its publications.
        - The "Tipped Worker Order" (http://www.labor.ny.gov/workerprotection/laborstandards/pdfs/wage_board_order.pdf) and "Fast Food Order" (http://www.labor.ny.gov/workerprotection/laborstandards/pdfs/FastFood-Wage-Order.pdf) contain information about the pending increase.

- Exemptions. The following is a *non-exhaustive* list of exemptions from minimum wage coverage under NYLL § 651(5):
    - Part-time Babysitters. 5(a).
    - Bona fide executive, administrative, or professional employees. 5(c).
    - Outside salesmen. 5(d).
    - Taxi drivers. 5(e).
    - Certain apprentices and volunteers. 5(f).

- Extra Pay for Split Shifts and Lengthy Shifts.
    - Spread of hours: Regulations passed pursuant to New York Minimum Wage laws may require employers to pay minimum wage employees an extra hour of pay at the minimum wage if they work a shift that exceeds ten hours from start to finish, regardless of the amount of time on break – this is known as "spread of hours" pay. Spread of Hours pay is required in the hospitality industry.
    - Split shift: In certain industries (but not restaurants), an employee who works a "split shift," which is a shift that includes a mandatory break exceeding one hour in length, must receive an extra hour of pay at the full minimum wage.

- Call-in (or "reporting") pay: An employee who by request or permission of the employer reports for work on any day shall be paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage. 12 N.Y.C.R.R. § 142-2.3.

- Uniforms. When an employee is required to wear a uniform, the employer may be required to pay for the purchase and maintenance (cleaning) of the uniforms. Regulations set an amount of additional pay required to compensate employees for cleaning their own uniforms. Some types of required clothing are not considered uniforms – e.g., khaki pants and a white shirt.

2. Federal Law

- Basic Minimum Wage.

Time Period	4/1/91 – 9/30/96	10/1/96 – 8/31/97	9/1/97 – 7/23/07	7/24/07 – 7/23/08	7/24/08 – 7/23/09	7/24/09 - Present
Min. Wage	$4.25	$4.75	$5.15	$5.85	$6.55	$7.25

- Exemptions. The following is a *non-exhaustive* list of exemptions from minimum wage coverage under FLSA:
    - U.S. Government employees (most). 29 U.S.C. § 203(e)(2)(A).
    - New York State Government employees (most). 29 U.S.C. § 203(e)(2)C).
    - Executive, Professional or Administrative Workers. 29 U.S.C. § 213(a)(1).
    - Amusement and Recreational Workers. 29 U.S.C. § 213(a)(2).
    - Certain agricultural workers. 29 U.S.C. §§ 213(a)(6) and (g).
    - Employees excluded under Special Certificate or Order by the Secretary of Labor. 29 U.S.C. § 213(a)(7) (apprentices, students, disabled).
    - Casual Babysitters and persons providing "Companionship Services." 29 U.S.C. § 213(a)(15).[5]

3. Minimum Wage for Tipped Employees

- Under both Federal and NY law, if certain conditions are met, an employer may pay employees who also earn tips an hourly wage that is less than the full minimum wage by applying a "tip credit" towards meeting the minimum wage. *See below.*
    - Federal law: the employer could pay as little as $2.13 per hour if all of those conditions are met.
    - NY law: the appropriate wage is based on the type of work being performed. For example, a server in a restaurant ("food service worker") must be paid at least $5.00 per hour and credit for tips shall not exceed $3.75 per hour. A delivery worker in a restaurant must be paid at least $5.65 per hour and credit for tips shall not exceed $3.10 per hour. NYCRR § 146-1.3. See the Industry Wage Orders for more details.

[5] *See infra* regarding the scope of the companion exemption and new federal regulations narrowing the scope of the exemption.

- In general, in order for an employer to take advantage of this "tip credit" under both federal or state law, **several conditions must be met**: (1) the employer must inform the employee of the minimum wage provision and the employer's intention to use a tip credit to satisfy its minimum wage obligation (under the FLSA, such notice can be provided orally, but under the NYLL hospitality regulations, such notice must be in writing, 12 N.Y.C.R.R. §§ 146-1.3, 146-2.2);[6] (2) the amount of tips earned must equal or exceed the difference between the wage paid and the full minimum wage; and (3) the employee must be allowed to keep all the tips that they earn, although they may be required to participate in a tip pool that only includes other tipped employees. *See* 29 C.F.R. § 531.59(b); *see also* N.Y.C.R.R. tit. 12 § 137-2.2 (former restaurant regulations until January 1, 2011); N.Y.C.R.R. §§ 146-2.2, 146-2.3 (current hospitality regulations).
    - Many restaurants pay less than the full minimum wage because the employees earn tips, but fail to provide notice legally required to take a tip credit. Even if the employee has earned significant tip income, the employer will still be liable for the difference between the hourly wage paid and the full minimum wage if the employers have not met the prerequisites to claim a tip credit.
    - Managers, owners, or non-tipped workers must not receive any share of the tips. Employers must allow the tipped employee to retain her share of the tips. 29 U.S.C. § 203(m).
    - In addition, under N.Y. law, an employer cannot take a tip credit for any day in which the employee spends more than 20% of their time performing non tipped work.

4. Tip Stealing and Tip Pooling

- Under both FLSA and NYLL, if an employer keeps any portion of the employee's tips, the employer cannot claim the tip credit and must pay the full minimum wage rate.
- The NYLL also provides a cause of action for the employee to recover the misappropriated tips. NYLL § 196-d. Examples of violations:
    - Employer requires employees to pool tips, and requires them to include owners or managers in the tip pool.
    - Employer requires employees to pool tips, and requires them to include people in the tip pool who don't serve customers in the tip pool (e.g., kitchen staff, custodian). The Hospitality Wage Order contains a list of categories of employees who are normally eligible to participate in an employer-mandated tip pool.
    - Employer provides banquet service and collects a 20% gratuity or service charge that the customers believe are the tips (or a charge in lieu of the tips), and employer then retains a portion of the 20% charge.
- The FLSA probably does not provide the worker a remedy to recover the stolen tips.

5. Deductions

- Lawful: deductions for taxes, meals, lodging, employee contributions to benefit plans, etc.

[6] Merely informing an employee that she will receive a wage plus tips is not sufficient. *See Copantitla v. Fiskardo Estiatorio*, 788 F.Supp.2d 253 (S.D.N.Y. 2011).

- Unlawful: deductions for shortages, cost of broken equipment, fines, cost of uniform maintenance or other tools or supplies needed for work. It is also unlawful to require the employee to pay for these things by separate transaction, or an "unlawful kickback."
- New York State law allows employees to sue to recover these unlawful deductions directly from the employer. Under FLSA, unlawful deductions are actionable only to the extent they bring an employee's wages below the statutory minimum or required overtime.

B. OVERTIME

- Under both FLSA and NYLL employees are entitled to time and a half their "regular rate" for hours worked over 40 hours per week. 29 U.S.C. § 207; 12 N.Y.C.R.R. 142-2.2; 12 N.Y. Comp. Codes R. & Regs. 138-2.2.
    - NYLL explicitly adopts the FLSA standards and exemptions on overtime, with only a couple of exceptions. *See* 12 N.Y.C.R.R. 142.22.

- Exemptions[7]. A *non-exhaustive* list of exemptions from FLSA and NYLL overtime coverage includes:
    - Domestic Workers who reside in Household. 29 U.S.C. § 213(b)(21).
    - U.S. Government employees (most). 29 U.S.C. § 203(e)(2)(A).
    - New York State Government employees (most). 29 U.S.C. § 203(e)(2)C).
    - **Executive, Professional** or **Administrative** Workers. 29 U.S.C. § 213(a)(1).
    - Employees excluded under Special Certificate or Order by the Secretary of Labor. 29 U.S.C. § 213(a)(7) (apprentices, students, disabled).
    - Casual Babysitters and persons providing "Companionship Services." 29 U.S.C. § 213(a)(15).[8]
    - Employees Under the Motor Carrier Act. 29 U.S.C. § 213(b)(1).
    - Railroad Employees. 29 U.S.C. § 213(b)(2).
    - Local Delivery Drivers. 29 U.S.C. § 213(b)(11).
    - Certain Agricultural Workers. 29 U.S.C. § 213(b)(12).
    - Taxi drivers are exempt from the overtime requirements. 29 U.S.C. § 213(b) (17).

- What is the regular rate?
    - The regular rate is the hourly rate a worker is paid for their non-overtime hours, or the first 40 hours they work. This is true regardless of whether the worker is paid by the hour, shift, day, week, piece or some other basis.
    - If an employee is paid an hourly wage below the minimum wage, the regular rate to be used for calculating overtime is the highest applicable minimum wage.

[7] Exemptions under the NYLL are almost identical to those under the FLSA. One notable exception is that NYLL has different rules for domestic workers.

[8] *See infra* regarding the scope of the companion exemption and new federal regulations narrowing the scope of the exemption.

- Salaried workers. Many workers think they may not be entitled to overtime pay because they receive a salary rather than a minimum wage, however they are entitled to overtime pay if they work more than 40 hours in a workweek and they are not covered by any of the exemptions. The challenge may be to determine how much overtime pay is owed when there is no clear regular hourly rate of pay.
    - Fixed # of Weekly Hours. If the employer and employee have an agreement that the salary pays for a fixed number of hours each week, divide the salary by the number of hours to determine the regular rate. The employee is owed half of the regular rate for all hours worked over 40 (a "half time premium").
    - Fluctuating Hours. When the number of hours worked varies from week to week, and there is no agreement between the employer and employee regarding overtime pay, there is a presumption that the weekly salary covers only the first 40 hours. To determine overtime owed, divide the weekly salary by 40 to determine the regular rate of pay. Then multiply that rate by 1.5 for all overtime hours worked to determine how much overtime is owed.
- A federal regulation provides that when state law provides a higher minimum wage rate, that rate is used as the "regular rate" for purposes of calculating overtime under FLSA. 29 C.F.R. § 778.5.
- For tipped workers, the correct overtime rate is 1 ½ the full minimum wage minus the permitted tip credit amount. 29 C.F.R. § 531.60. Some employers improperly just multiply the regular rate (the rate after deducting a tip credit from the minimum wage) by one and a half. That method produces an unlawfully low overtime rate.

C. WHAT COUNTS AS WORK TIME

- An employee must be paid for all "hours worked." Compensable time includes all work *suffered or permitted* by the employer, including work the employer failed to prevent. 29 U.S.C. § 203(g); 29 C.F.R. § 785.11, 785.13. Below is a quick summary of typical issues that arise:

- ***Waiting and on-call time***: this largely depends on whether the employee can use the time effectively for her own purposes. 29 C.F.R. §§ 785.16(a) and 785.17. Workers who are "engaged to wait" must be paid – but workers "waiting to be engaged" do not need to be paid.

- ***Travel time*****:** regular commuting time is not compensable. 29 U.S.C. § 254(a). But time spent traveling from one job site to another during the course of the work day is compensable work time. 29 C.F.R. §§ 785.38 and 790.7(c).

- ***Meals and breaks***: meals that are at least 30 uninterrupted minutes are not compensable as work time. 29 C.F.R. § 785.19. Breaks that are less than 20 minutes DO count as compensable work time. 29 C.F.R. § 785.18. Note, FLSA does not include any requirement that breaks or meals actually be provided – it only addresses whether employees must be paid for those periods. By contrast, state law does require provision of meals and breaks – depending on the shift length and industry. NYLL § 162.

- ***Meetings and training***: these must be compensated unless totally voluntary and outside normal working hours. 29 C.F.R. §§ 785.27 and 785.28.

D. SPECIAL RULES APPLICABLE TO DOMESTIC WORK

1. FLSA coverage - Generally

- General Rule: Domestic workers are entitled to FLSA's minimum wage and overtime protections.
- Exemption for Live-In Workers and Casual Babysitters: The FLSA explicitly exempts domestic workers who reside in their employer's home and persons who provide "casual babysitting" from overtime requirements. *See* 29 U.S.C. § 213(a)(15) (exempting casual babysitters) and § (b)(21) (exempting live-in domestic workers).
- Exemption for Companions. The term "companionship services" means the provision of **fellowship** and **protection** for an elderly person or a person with an illness, injury, or disability who requires assistance in caring for himself or herself.[9] Employees providing companionship services are exempt from both the minimum wage and overtime requirements under the FLSA. *See* 29 U.S.C. § 213(a)(15) (minimum wage exemption); 29 U.S.C. § 213(a)(15) (overtime exemption). However, the exemption has been narrowed by new regulations, discussed immediately below.
- New Rules Affecting the Exemptions for Live-In and Companion Workers. The Department of Labor recently promulgated new final rules governing "companionship services" to narrow the scope of the minimum wage and overtime exemptions for live-in workers and companions. Under the new rules, third party employers of direct care workers (such as home care staffing agencies) are not permitted to claim either the exemption for companionship services or the exemption for live-in domestic service employees. Third party employers may not claim either exemption even when the employee is jointly employed by the third party employer and the individual, family, or household using the services. However, the individual, family, or household may claim any applicable exemption. *See* http://www.dol.gov/whd/regs/compliance/whdfsFinalRule.pdf for more information about the new rules and the companionship exemption. The regulations were challenged in Court and although that challenge ultimately failed, the effective date of the regulations has been delayed. It is expected that the rules will go into effect in late 2015 or early 2016.

[9] A person providing "companionship services" is "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by the Secretary [of Labor])." 29 U.S.C. 213(a)(15). The DOL defines "companionship services" as those services that provide "fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs." 29 C.F.R. § 552.6. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: *Provided, however,* That such work is incidental, *i.e.,* does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse. While such trained personnel do not qualify as companions, this fact does not remove them from the category of covered domestic service employees when employed in or about a private household." 29 C.F.R. § 552.6.

Minimum Wage coverage before and after the passage of the 2010 Domestic Workers Bill of Rights	
BEFORE NOVEMBER 29, 2010	**AFTER NOVEMBER 29, 2010**
Covered: • Domestic workers, including full-time baby-sitters, housecleaners, etc. • Live-out companions – all, whether employed by household or agency • Live-in companions if agency/ 3rd party is the sole employer and client is not an employer	**Covered:** • Domestic workers, including all babysitters who work on other than a casual basis • Live-out and live-in companions employed by the householder and/or by an agency.
Exempt: • Part-time babysitters working in employer's home • Live-in companions who live in "the home of *an* employer"	**Exempt:** • Part-time babysitters employed on a casual basis
Changes: The law takes out the exemption for live-in companions, and narrows the exemption for part-time babysitters to casual, part-time babysitters.	

Overtime Rates before and after the passage of the Bill of Rights	
BEFORE NOVEMBER 29, 2010	**AFTER NOVEMBER 29, 2010**
• Live-out domestic workers = 1½ x regular rate after 40 hours in a week • Live-in domestic workers = 1½ x MW after 44 hrs • Live-out companions employed by private householder or agency = 1½ x MW after 40 hours • Live-in companions employed solely by agency = 1½ x MW after 44 hours	• Live-out domestic workers = 1½ x regular rate after 40 hours in a week • Live-in domestic workers = 1½ x regular rate after 44 hrs • Live-out companions employed by private householder = 1½ x regular rate after 40 hours • Live-out companions employed by agency = 1½ x MW after 40 hours • Live-in companions employed by private householder = 1 ½ x regular rate after 44 hours • Live-in companions employed solely by agency = 1½ x MW after 44 hours
Exempt: Live-in companions employed by private householder	No exemptions from overtime provision
Changes: • Live-in domestic workers now get 1½ times their regular hourly rate after 44 hours in a week as opposed to 1½ times the MW after 44 hours • Live-in companions employed by the private household now receive 1½ times their hourly rate after 44 hours in a week; they were previously exempted • Live-out companions employed by the private household now receive 1½ times their regular hourly rate after 40 hours in a week; previously they received 1½ the MW after 40 hours in a week	

Sleeping Time

- There are special rules for domestic workers. See 29 C.F.R. § 552.99. Under New York law, for live-in domestic workers, working time generally does not include time sleeping even if the employee is "on-call" during the sleeping hours. 12 N.Y.C.R.R. § 142-3.1(b).

E. RELATIONSHIP BETWEEN FEDERAL AND STATE LAW

- Employers must comply with both federal and state law if both are applicable. When the minimum wage is lower under one, it is not an excuse to fail to pay minimum wage under the other. For any period when the state's minimum wage exceeded that of federal law, the state law requirement controls.

- Federal law requires that overtime be paid at a rate of at least one and a half times the minimum wage under federal or state law, whichever is higher. 29 U.S.C. § 218.

F. EMPLOYEE VERSUS INDEPENDENT CONTRACTOR

- The wage and hour laws apply to employees and not independent contractors.
- Many employers try to classify workers as independent contractors to avoid their obligations under the labor and tax laws. What the worker is called, however, is not determinative of whether they are an employee or independent contractor. Courts look to the economic realities to determine whether there is an employment relationship.
- Factors typically include:
    - the amount of control the employer exerts over the worker
    - If the "employer" has the power to hire and fire the purported contractor
    - If the employer supervises and controls employee work schedules or conditions of employment
    - If the worker performs a task integral to the employer's business
    - If the employer determines rate and method of payment
    - If the employer maintains employment records
    - whether the worker is in business for herself
    - If the employer owns equipment necessary for the job
    - The degree of skill required for a job (the more skilled, the more likely someone is an independent contractor)
    - and other factors

G. WHO IS LIABLE?

- FLSA has two types of coverage:
    - *Individual coverage* applies where an employee "in any workweek is engaged in commerce or in the production of goods for commerce…" 29 U.S.C. § 206(a); 29 U.S.C. § 203(s)(1)(A)(i).
    - *Enterprise coverage* applies where someone is "employed in an enterprise engaged in commerce or in the production of goods for commerce…" 29 U.S.C. § 203(s)(1)(A)(ii). In

order for an employer to constitute an enterprise under federal law, it must have annual revenues of at least $500,000. In general, most businesses in NYC will meet this requirement.

- FLSA has broad language of who is an employer and who is an employee
    - Definitions:
        - "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee..." 29 U.S.C. § 203(d).
        - "[T]he term 'employee' means any individual employed by an employer." 29 U.S.C. § 203(e).
        - "'Employ'" includes to suffer or permit to work." 29 U.S.C. § 203(g).
    - This broad language has been limited by caselaw developing the "economic reality" test, which focuses on various forms of economic and other control. *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).
        - A non-exhaustive list of factors under the test includes: if the "employer" has the power to hire and fire the purported contractor; if the employer supervises and controls employee work schedules or conditions of employment; if the worker performs a task integral to the employer's business; if the employer determines rate and method of payment; if the employer maintains employment records; if the employer owns equipment necessary for the job; and the degree of skill required for a job (the more skilled, the more likely someone is an independent contractor). *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058 (2d Cir. 1988).
        - What an employer calls its workers has no impact on determining whether they are an employee or independent contractor.
    - Still broader than common law
- NYLL has similarly broad language.
    - Definitions:
        - The term "employee" is defined as "any individual employed or permitted to work by an employer in any occupation." NYLL § 651(5).
        - The term "employer" is defined as "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer." NYLL § 651(6).
    - Like the FLSA, the NYLL test for employee status focuses on the supposed economic realities of the relationship. *Bynog v. Cipriani Group, Inc.*, 770 N.Y.S.2d 692 (N.Y. 2003).
- Multiple employers possible
    - A worker can also have "joint employers," that is, two or more individuals or entities which are each its employer under the economic realities test, each of whom is jointly and severally liable for minimum wage and overtime violations. 29 C.F.R. § 791.2.
- Broad individual liability
    - Piercing the corporate veil generally unnecessary

- Individual directors, shareholders and officers can be personally liable for violations of the FLSA in certain circumstances based on the FLSA's definition of "employer." The Second Circuit has held individuals liable through the application of an "economic reality" test used to determine whether the individual possessed "the power to control the workers in question." For a good discussion of the applicable standards, *see Irizarry v. Catsimatidis*, 722 F.3d 99 (2d. Cir. 2013). Ownership interest not necessary for an individual to be held liable as an employer. *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 387 (2d Cir. 1989) (citing *Donovan v. Sovereign Security Ltd.*, 726 F.3d 55, 59 (2d Cir. 1984)); *Saigon Grill*, 2008 U.S. Dist. LEXIS 86300 at *63 (holding manager with no ownership interest liable as employer under FLSA and New York law); *Tuber v. Continental Grain Co.*, 1984 WL 1326 (S.D.N.Y. 1984). And the fact of ownership alone is not sufficient to create individual liability. *See Copantitla v. Fiskardo Estiatorio*, 788 F.Supp.2d 253 (S.D.N.Y. 2011).New York Business Corporation Law Section 630 and Limited Liability Company Law Section 609 provide that the ten largest owners of privately held New York business corporations, and the ten largest members of New York LLC's, can be jointly and severally liable for wages owed to employees. Before an employee can pursue claims against the shareholders, these statutes require that the employees notify the owners/shareholders within 180 days of their last day of employment, get a final judgment against the corporation and attempt to execute on the judgment against the corporation.

H. RECORD-KEEPING

- Both federal and New York law require employers to keep detailed records of hours and wages. The record keeping requirements are discussed by the Southern District in the case of *Moon v. Kwan*, 248 F.Supp.2d 201, 218-19 (S.D.N.Y. 2002). As the Court explained, "these requirements are not mere technicalities, but substantive obligations that are 'fundamental underpinnings' of FLSA and critical to ensuring the statute's effectiveness, for an employer's 'failure to keep accurate records can obscure a multitude of minimum wage and overtime violations.'" *Id*. at 218 (quoting *Wirtz v. Mississippi Publishers Corp*., 364 F.2d 603,607 (5th Cir. 1966).
    - Failure to maintain records indicating that an individual received minimum wage and overtime may also be evidence of a failure to pay overtime. *See Jacobsen v. Stop & Shop Supermarket Co.,* No. 02 Civ. 5915, 2003 U.S. Dist. LEXIS 7988, at *2 (S.D.N.Y. May 15, 2003).
- Example of record-keeping requirements – Fair Labor Standards Act:

    (1) The employee's full name as used for Social Security recordkeeping purposes and, on the same record, the employee's identifying symbol or number if such is used in place of the name on any time, work, or payroll records.

    (2) The employee's home address, including zip code.

    (3) The employee's date of birth, if under 19 years of age.

    (4) The employee's sex and occupation in which employed, (the records may show the employee's sex by use of the prefixes Mr., Mrs., Miss, or Ms.).

    (5) The time of day and day of the week on which the employee's workweek begins.

    (6) The regular hourly rate of pay for any workweek in which overtime compensation is due; an explanation of the basis of pay showing the monetary amount

paid on a per hour, per day, per week, per piece, commission on sales, or other basis; and the amount and nature of each payment that is excluded from the regular rate under Section 7(e) of the Act.

(7) The hours worked each work day and the total hours worked each workweek.

(8) The total daily or weekly straight-time earnings or wages due for hours worked during the work day or workweek, exclusive of premium overtime compensation.

(9) The total premium paid over and above straight-time earnings for overtime hours.

(10) The total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments.

(11) The total wages paid each pay period.

(12) The date of payment and the pay period covered by the payment.

I. PAY STUBS AND OTHER NOTICES OF EMPLOYEE RIGHTS

- NYLL's rules on record keeping, pay stubs, and wage notices were updated on April 9, 2011 and then amended again last year to take effect on February 28, 2015.
- Notice: Employers must give pre-employment notices of wage rates, including the regular and overtime rates of paid, allowances to be claimed, etc. NYLL § 195. The notice must be in the worker's primary language if the DOL has provided a translation in that language.
    - From April 9, 2011 until 2014, the notice was required to be provided *annually* before February 1 of each year, and any time information contained in it changed (unless the changes are reflected on the pay stub).
    - The annual notice requirement from the Wage Theft Prevention Act (WTPA) was repealed effective in 2015, but employers must provide the same information to employees at the time of hire, and anytime an employee's wage changes. The 2014 Amendments to the WTPA increased penalties for noncompliance as follows:
        - An employee who does not receive a wage notice within the first ten (10) days of employment can recover damages of $50 for each day of work up to a total of $5000. N.Y. Labor Law § 198.
- Pay stubs: Since 2011, pay stubs must now also contain more detailed information, including the address and phone of the employer.
    - A worker who does not receive a wage statement with every payment of wages can recover $250 for each workday the violations occurred or continued to occur up to a total of $5000. N.Y. Labor Law § 198.

- Employer's responsibility to post wage/hour notices
    - Employers must post notices of employee rights under FLSA and NYLL. This notice must be posted in conspicuous places in every establishment where such employees are employed, so as to allow them to readily observe a copy.
    - In addition to any civil penalties that the Department of Labor might assess, failing to post notice has been held to be a grounds for equitable tolling of the statute of limitation. *Ke v. Saigon Grill*, 595 F. Supp 2d. 240 (S.D.N.Y. 2008).

J. NO WAIVER OF RIGHTS UNLESS SUPERVISED BY COURT OR DOL

- FLSA: Employees cannot legally waive their rights to minimum wage or overtime pay and settlements must either be entered in to by the USDOL or approved by a court or the release/waiver may not be binding. NYLL rules on release are less strict.

K. REMEDIES

- Actual Damages
    - Underpayment of minimum wage or overtime
    - Misappropriated tips
- Liquidated damages
    - FLSA – 100% of the amount of unpaid wages (unless the employer meets the high standard of its affirmative defense that it acted in good faith and had a reasonable basis for its conduct). 29 U.S.C. § 216(b); *Reich v. S. New England Telecom. Corp.,* 121 F.3d 58, 71 (2d Cir. 1997).
    - NYLL – 100% of the amount of unpaid wages unless employer can establish affirmative defense of good faith. NYLL §§ 198(1-a) and 663(1). Prior to April 9, 2011, liquidated damages under NYLL were 25%.
    - Some courts have held that workers can recover liquidated damages under both FLSA and NYLL for the same violations recognizing that the two provisions serve "fundamentally different purposes" because the remedy is considered compensatory under federal law and punitive under New York law. *See Ke v. Saigon Grill*, 595 F. Supp. 2d 240 (S.D.N.Y. 2008). *See also D'Arpa v. Runway Towing Corp*., No. 12-CV-1120, 2013 WL 3010810 (E.D.N.Y. Jun. 18, 2013) (noting that authority on plaintiffs' entitlement to double liquidated damages is mixed, however majority of courts allow for "simultaneous recovery").
- Attorneys' fees are recoverable under both FLSA and NYLL. 29 U.S.C. § 216(b); NYLL §§ 198(1-a) and 663(1). The potential recovery of attorneys' fees to a prevailing plaintiff often provides significant leverage in settlement negotiations. Fees are available even if the representation was pro bono.
- Interest. Under New York Law, prejudgment interest is generally recoverable at a rate of 9% per annum simple interest. *See* NY CPLR § 5001 et seq. However, interest cannot be awarded on the same damages that liquidated damages are awarded under the FLSA as the remedies are considered duplicative.
- Statute of Limitations
    - FLSA – 2 or 3 years. 29 U.S.C § 255.
        - If the violation is "willful," the statute of limitations extends to 3 years. The standard for determining willfulness is whether "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988). *See also Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132 (2d Cir. 1999); *Moon v. Kwon*, 248 F.Supp.2d 201, 231 (S.D.N.Y. 2002) (defendant's violation was willful because defendants knew they had violated wage and hour laws).
    - NYLL – 6 years. NYLL §§ 198(3) and 663(3)

- Note that the statute of limitations runs week-to-week for wage/hour claims so that each workweek, in effect, gives rise to its own cause of action.
    - There is no continuing violation theory whereby more recent violations preserve violations that fall outside of the statute of limitations.
- Equitable tolling: In some *extraordinary* cases, courts have invoked the equitable tolling doctrine to permit plaintiffs to assert claims going back beyond the statute of limitations. "The relevant question is not the intention underlying defendants' conduct, but rather whether a reasonable plaintiff in the circumstances would have been aware of the existence of a cause of action." *Veltri v. Bldg. Serv. 32B-J Pension Fund,* 393 F. 3d 318, 323 (2d Cir. 2004).
    - In determining how to apply the equitable tolling principle, the Second Circuit has noted that, as a general matter, equitable tolling is an "extraordinary measure" and "applies only when plaintiff is prevented from filing despite exercising that level of diligence which could reasonably be expected in the circumstances." *Veltri*, 393 F.3d at 322. *Accord Phillips v. Generations Family Health Ctr.*, 723 F. 3d 144, 149-150 (2d Cir. 2013).

L. IMMIGRATION STATUS – RELEVANCE AND DISCOVERY

- Immigration status is generally irrelevant in a claim for wage violations. *See, e.g.*, *Liu v. Donna Karan International, Inc.*, 207 F.Supp.2d 191 (S.D.N.Y. 2002).
- Protective Orders. It is common in wage-hour cases for employers to seek discovery of the workers' immigration status, even though the immigration status is unlikely to be relevant to the case. Such discovery requests may be considered an attempt to harass the workers and discourage them from pursuing their claims. Courts routinely issue protective orders barring employers from taking discovery on immigration status in wage cases due to their harassing nature and *in terrorem* effect. *See, e.g.*, *Trejos v. Edita's Bar and Restaurant, Inc.*, 2009 WL 749891 (E.D.N.Y. March 17, 2009) (no discovery of immigration status allowed; not relevant to determine whether workers were employees or independent contractors) (Gold, M.J.); *EEOC v. First Wireless Group, Inc.*, 2007 WL 586720 (Feb. 20, 2007 E.D.N.Y) ("In most cases . . . the *in terrorem* effect of the proposed inquiry outweighs the probative value of the discovery."); *EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404 (E.D.N.Y. 2004) (Seybert, J.); *Topo v. Dhir*, 210 F.R.D. 76 (S.D.N.Y. 2002); Flores v. Amigon, 233 F.Supp.2d 462 (E.D.N.Y. 2002); *Liu v. Donna Karan Int'l, Inc.*, 207 F.Supp.2d 191, 192 (S.D.N.Y. 2002).
- One decision on point is *Rengifo v. Erevos Enterprises*, No. 06 Civ. 4266 (SHS) (RLE), 2007 WL 894376 (S.D.N.Y. Mar. 20, 2007). In that case, Plaintiff brought an action against his former employer under FLSA and New York Labor Law. *Id*. at *1. After the employer sought discovery relating to Rengifo's immigration status, Rengifo moved for a protective order; the employer opposed the motion on the basis that Rengifo's immigration status was relevant to his claims as well as his credibility. *Id*. Magistrate Judge Ellis granted the motion for a protective order due to the risk that not doing so would deter workers' from pursuing their rights.

M. OPTIONS FOR PURSUING WAGE CLAIMS

There are several options available to workers with wage claims. In some cases, claims can be resolved through a lawyer's letter (or "demand letter") to the employer and negotiation of a settlement. If not successful, several other options are available, each with advantages and disadvantages:

- U.S./NY Departments of Labor: less resource-intensive for overburdened legal services offices but the advocate and worker have much less control over the pace of the investigation. DOL investigators typically do not share the wage calculations submitted to the employer with the worker or the worker's advocate. The backlog and delay of investigations often mean claims drag on for years.
- New York Attorney General: The AG's office aggressively investigates and prosecutes cases. However, they accept few cases per year.
- Kings County Office of the District Attorney: The Brooklyn DA's office investigates and prosecutes cases. However, they accept few cases per year.
- Small claims court: The process is slow and not worker friendly. Employers often default but then successfully reopen cases. The limit on claims is low – just $5,000. Enforcing judgments is difficult.
- State court: courts are not involved in the discovery stage of a case unless there is a request for judicial investigation and motion practice. Thus, cases tend to move more slowly in state court. State court judges are usually less familiar with wage and hour laws or arguments that immigration status is irrelevant during discovery.
- Federal court: cases are slow and often lengthy, but federal court is generally the preferred venue over state court. Some Federal judges, however, don't like to see "small" cases on their docket and view them as an annoyance – i.e., cases involving a small number of people or small amount of money.

N. WHERE TO SEND SOMEONE FOR HELP

- LEAP coalition members – but check with the LEAP member before referring someone to confirm the type of referrals that can be accepted and the intake process.
- Nonprofit legal services: www.lawhelp.org
- Private attorneys:
    - NELARS attorney referral service, run by the National Employment Lawyers Association/NY: (212)819-9450.
    - The City Bar Association Referral service: (212) 626-7373 0r 7374 (Spanish)
- Organizing Groups. Consider referring workers to grass roots group who are organizing workers. Examples include: Domestic Workers United, Chinese Staff and Workers' Association,

VI. New York City Paid Sick Law

The Earned Sick Time Act officially became law on June 27, 2013 and took effect on April 1, 2014. The Earned Sick Time Act provides paid sick time to working New Yorkers when they or their family members are ill, and will ensures that workers-even in the smallest of businesses- cannot be fired for taking a sick day.

	Employers with five or more employees who are employed for hire more than 80 hours a

	calendar year in New York City must provide paid sick leave.
	Employers with fewer than five employees must provide unpaid sick leave. Employers with one or more domestic workers who have worked for the employer for at least a year and who work more than 80 hours a calendar year must provide paid sick leave.

- Key Provisions of the Law:
    - Most employees who work more than 80 hours a calendar year in New York City are covered by the law. The law covers:

        - Full-time employees
        - Part-time employees
        - Temporary employees
        - Per diem and "on call" employees
        - Transitional jobs program employees
        - Undocumented employees
        - Employees who are family members but not owners
        - Employees who live outside of New York City but work in New York City

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    - Workers earn one hour of sick time for every 30 hours worked, up to a maximum of 40 hours of sick leave per calendar year.
    - Workers begin earning sick time as soon as they are hired but will have to work for 120 days before they are able to use this time.
    - Part-time works workers are covered by the bill and earn paid sick time based on hours worked.
    - Paid or unpaid sick time can be used to care for a worker's own health needs or to care for the health needs of a worker's spouse, domestic partner, child, parent, or the child or parent of a worker's spouse or domestic partner.
    - The law is enforced by the N.Y.C. Department of Consumer Affairs, which take complaints, investigates, and assess fines and damages for violations of law.

    For more information, see http://www1.nyc.gov/site/dca/about/paid-sick-leave-FAQs.page

VII. Family and Medical Leave Act (FMLA)

This checklist is a shorthand method for the initial evaluation of common issues under the FMLA (there is no NY counterpart to the FMLA) and should not be a substitute for a more thorough analysis

before filing suit. *See* 29 U.S.C. § 2601 *et seq.*, 29 C.F.R. § 825.100 *et seq.*; 5 U.S.C. § 6381, 29 C.F.R. § 630.100 (federal employees).

1. Is the Employer Covered?

- Public employer;
- 50 or more employees per workday for 20 calendar weeks in current or preceding year at employee's work site or within 75 mile radius of employee's worksite; or
- Secondary employer jointly employing FMLA-covered employees.

2. Is the Employee Eligible? (All Three Required)

- Employer employs 50 or more workers within 75 mile radius of worker's worksite;
- Employee worked at least 12 months (need not be consecutive) for the employer in question; and
- Employee worked at least 1,250 hours for the employer in the previous 12 months.

3. Is It FMLA-Protected Leave?

- Birth or adoption of new child;
- Caring for serious health condition of son, daughter, spouse, or parent; or
- Healing from employee's own serious health condition renders her unable to perform functions of position.

4. Is It a Serious Health Condition?

- Inpatient hospital, hospice or residential medical facility;
- More than 3 consecutive calendar days of incapacity and either treatment on at least two occasions by health care provider or one occasion of treatment by health care provider with continuing treatment under her supervision;
- Incapacity for pregnancy or prenatal care;
- Incapacity for long-term untreatable illness (e.g., Alzheimer's, severe stroke, terminal illness);
- Incapacity for multiple treatments for condition that would require more than 3 days of absence if left untreated (e.g., cancer treatment, restorative surgery after accident, dialysis); or
- Substance abuse treatment.

5. Has the Employer Violated the FMLA? (Possible Violations)

- Has employer wrongfully counted FMLA-qualified absences under progressive absenteeism policy?
- Has employer miscalculated eligibility for FMLA leave by:
  i. Failing to designate a 12-month leave period?
  ii. Failing to give notice of applicability of FMLA within 2 business days?
- Has employer failed to post required FMLA notices?
- Has employer failed to maintain health benefits during leave?
- Has employer harassed an employee for requesting or taking FMLA leave?

- Has employer denied employee's request for FMLA-qualifying leave?
- Has employer fired employee while on FMLA leave or upon return from FMLA leave?
- Has employer fired or discriminated against employee for asserting her rights under FMLA?
- Has employer fired, harassed, or discriminated against an employee for taking or attempting to take FMLA leave?

VIII. Retaliation Prohibited

- Almost all labor laws prohibit retaliation against employees who have complained about perceived violations of the labor law.
- Future employers and third parties may be prohibited from retaliating against someone because of their complaints. For example, it is unlawful for an employer to refuse to hire someone because they previously filed a claim for overtime violations against a different employer.
- Damages may include backpay, frontpay, reinstatement, punitive damages, emotional distress. NYLL also now includes liquidated damages of up to $10,000 paid to workers for each incident of retaliation.
- Retaliation against employees who collectively complain about labor violations also may violate the National Labor Relations Act, which prohibits retaliation against employees who engage in "protected concerted activity." Employees who suffer violations of the NLRA can pursue claims at the National Labor Relations Board but must do so within 180 days of the adverse employment action.

IX. Statutes of Limitation

CAUSE OF ACTION	STATUTE OF LIMITATIONS	
	AGENCY	COURT
FLSA	2 years; 3 years if willful; possibility of equitable tolling	2 years; 3 years if willful; possibility of equitable tolling
NY Labor Law	6 years	6 years; filing a claim at NY DOL may toll the statute of limitations while the claim is pending
Title VII	300 days; 30 days from terminated state proceedings	90 days from right-to-sue letter; back pay limited to 2 years prior to charge
ADA	300 days; 30 days from terminated state proceedings	90 days from right-to-sue letter; back pay limited to 2 years prior to charge
ADEA	300 days; 30 days from terminated state proceedings	90 days from right-to-sue letter; back pay limited to 2 years prior to charge
Equal Pay Act	2 years; 3 years if willful; possibility of equitable tolling	2 years; 3 years if willful; possibility of equitable tolling
NYS H.R. Law	1 year	3 years
NYC H.R. Law	1 year	3 years
FMLA	2 years; 3 years if willful	2 years; 3 years if willful
Unemployment Insurance	ASAP; all benefits lost after 1 year from job loss (possibly earlier unless there is earnings eligibility in applicable base period)	n/a
OSHA	Must be current employee affected by health and safety hazard; 30 days for discrimination due to OSHA complaint	n/a
Workers' Compensation	2 years from injury; **written notice must be given to employer within 30 days of injury** (may be excused if employer had actual notice or no prejudice)	n/a
Disability Benefits	26 weeks from beginning of disability; if file more than 30 days after injury no benefits for disability period more than 2 weeks before claim is filed	n/a
NLRA	180 days	n/a