

MSF CLIENT ALERT

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Year End Employment Law Updates

As the end of the year approaches, New York employers should prepare for changes in wage and hour obligations that go into effect on December 31, 2022 and comply with additional recent changes in the law impacting employer obligations. Many other states will see similar wage and hour changes in 2023. While considering the impact of these changes, employers should ensure their pay notices and paystubs are updated to comply with legal requirements. Failure to comply with the new and existing requirements could subject a non-compliant employer to significant financial liability.

December 5, 2022

New York Minimum Salary Levels for Exempt Employees

On December 31, 2022, the minimum salary to qualify for overtime exemptions in New York, outside of New York City, Long Island and Westchester, increases. In addition to meeting the duties requirements for the exemptions, an executive/managerial or administrative employee must be paid a minimum salary as follows:

Location	Weekly Minimum Salary Level
New York City	\$1,125.00 (\$58,500.00 annually)
Long Island & Westchester	\$1,125.00 (\$58,500.00 annually)
Remainder of NY State	\$1,064.25 (\$55,341.00 annually) ¹

Minimum Wage Increases

The minimum wage in upstate New York also increases on December 31, 2022. Effective December 31, 2022, the regular minimum wage and fast-food minimum wage in New York are as follows:

Location	Regular Minimum Wage	Fast Food Minimum Wage ²
New York City	\$15.00	\$15.00
Long Island & Westchester	\$15.00	\$15.00
Remainder of NY State	\$14.20	\$15.00

¹ While the minimum wage of \$14.20 referenced under the Section Minimum Wage Increases has been formally approved, the other rates regarding the "Remainder of NY State" throughout this alert are proposed rates and have not yet been formally approved. We anticipate the rate for the "Remainder of NY State" will be approved prior to December 31, 2022.

² A "fast food employee" is any individual working in a fast food establishment whose job duties include at least one of the following: customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning, or routine maintenance.

A "fast food establishment" is any establishment in New York serving food or drink items:

1. where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out or delivered to the customer's location;
2. which offers limited service;
3. which is part of a chain; and
4. which is one of 30 or more establishments **nationally**, including:
 - a. an integrated enterprise which owns or operates 30 or more such establishments in the aggregate nationally; or
 - b. an establishment operated pursuant to a franchise where the franchisor and the franchisee(s) of such franchisor own or operate 30 or more such establishments in the aggregate nationally.

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The rate for spread of hours pay and similar non-working time payments (e.g., sick leave, vacation, training) that are based on the minimum wage also increase to match the applicable geographic minimum wage outlined above.

Tip Credits and Other Allowances

Tip Credit – Hospitality Industry Only³

Before a hospitality employer can take a tip credit pursuant to the Hospitality Industry Wage Order, they (i) must inform the employee in writing, in English and in the employee’s primary language (if not English and New York State publishes a notice of pay in the primary language), that the employer is taking a tip credit and the amount of the tip credit (ii) must advise the employee that if the cash wages they receive, plus the employee’s tips, do not equal the regular minimum wage for all hours worked, the employer will pay the employee the difference; and (iii) must notify the employee that the employer will not take any tips received by the employee except to the extent the tips are contributed to a valid tip pooling or tip sharing arrangement and distributed by the employer among tip eligible employees. In addition, the regular minimum wage and tip credit taken must be noted on an employee’s pay stub. If an employer fails to provide this information, it cannot take the tip credit.

Employers may take the tip credit for employees who perform both tipped and non-tipped work, so long as they meet the federal and New York requirements. Under federal law enacted last year, employers may take the tip credit only when the tipped employee performs tip-producing work or performs work that directly supports tip-producing work at least 80% of the time and if the non-tipped work does not exceed 20% of the employee’s *weekly work* and no such non-tipped work exceeds 30 continuous minutes. New York employers also must ensure that employee’s non-tip-producing work does not exceed 20% of their *shift* or exceed a total of 2 hours in any given day in order to take the tip credit. Please refer to our prior alert for more information on this topic, which be found [here](#).

With these parameters in mind, effective December 31, 2022, including the changes for upstate employers, the tip credit taken by the employer plus the cash wage that must be paid to such employees is as follows:

Food Service Workers

Pursuant to the Hospitality Industry Wage Order, a “food service worker” is one who:

- is primarily engaged in serving food and beverages to guests, patrons, and customers, other than delivery employees; and
- customarily and regularly receives tips from such guests, patrons, and customers.

Location	Minimum Wage	Tip Credit	Cash ⁴ Wage	OT Wage	Cash ⁵ Tipped OT Wage
New York City	\$15.00	\$5.00	\$10.00	\$22.50	\$17.50
Long Island & Westchester	\$15.00	\$5.00	\$10.00	\$22.50	\$17.50
Remainder of NY State	\$14.20	\$4.75	\$9.45	\$21.30	\$16.55

³ As a reminder, the Miscellaneous Industries Wage Order eliminated the tip credit for employers covered by that order as of December 31, 2020.

⁴ Cash Wage refers to the minimum wage less the tip credit, which is the amount paid by the employer to the employee.

⁵ Cash Tipped OT Wage refers to the overtime wage less the tip credit, which is the amount paid by the employer to the employee for overtime hours.

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Service Employees

A “service employee” in the hospitality industry is one who regularly and customarily receives tips for the work they perform and who is not a food service worker or a fast-food employee. An individual working coat check is an example of a service employee.

Location	Minimum Wage	Tip Credit	Tip Threshold* Restaurants & All Year Hotels	Tip Threshold* Resort Hotels	Cash Wage	OT Wage	Cash Tipped OT Wage
New York City	\$15.00	\$2.50	\$3.25	\$8.40	\$12.50	\$22.50	\$20.00
Long Island & Westchester	\$15.00	\$2.50	\$3.25	\$8.40	\$12.50	\$22.50	\$20.00
Remainder of NY State	\$14.20	\$2.35	\$3.05	\$7.95	\$11.85	\$21.30	\$18.95

*Tip Threshold - To take the tip credit for service employees, the employee must meet the tip threshold. This means that the employee’s average weekly tips must meet the minimum amount listed in the chart above per hour worked.

Uniforms

Unless uniforms are “wash and wear” clothing that do not require any special treatment (i.e., dry cleaning, pressing, repairs), where employers require employees to maintain their uniforms, they must provide such employees with uniform maintenance pay. The weekly uniform maintenance pay will increase for upstate employers on December 31, 2022 and the statewide rates shall be as follows:

Location	Work Week Over 30 Hours	Work Week < 20 Hours but > 30 Hours	Work Week of 20 Hours or Less
New York City	\$18.65	\$14.75	\$8.90
Long Island & Westchester	\$18.65	\$14.75	\$8.90
Remainder of NY State	\$17.65	\$14.00	\$8.45

Meal Credit

An employer who provides a qualifying meal to an employee may consider that meal to be part of the employee’s wages and take a credit against the employee’s wages for providing that meal. In order to qualify as a “meal,” each of the following food categories must be included: (1) fruits or vegetables; (2) grains or potatoes; (3) eggs, meat, fish, poultry, dairy or legumes; and (4) tea, coffee, milk or juice. The meal credits for upstate employers will change on December 31, 2022 and that statewide rates shall be as follows:

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Miscellaneous Industries and Occupations

Location	All Employees
New York City	\$5.15
Long Island & Westchester	\$5.15
Remainder of NY State	\$4.90

Hospitality Industry – Restaurants and All Year Hotels⁶

Location	Food Service Workers	Service Employees	All Other Employees
New York City	\$3.60	\$4.15	\$5.15
Long Island & Westchester	\$3.60	\$4.15	\$5.15
Remainder of NY State	\$3.60	\$3.90	\$4.90

Notice of Rate of Pay

New York's Wage Theft Prevention Act ("WTPA") requires that all New York employers provide a "Notice of Pay" form to all employees at the time of hire. Employers covered by the Hospitality Industry Wage Order also must provide a Notice of Pay⁷ upon a change in their rate of pay. If the wage rates or allowances (i.e., uniforms or meal credits) in an employer's geographic area are changing effective December 31, 2022, Notice of Pay must be completed on or before that date.

The notice must contain the following information:

- The employee's normal rate(s) of pay and the basis thereof (e.g., hourly, shift, weekly, salary);
 - If an employer is taking a tip credit for an employee, the employer should note the full minimum wage as the employee's hourly rate of pay, rather than the cash wage.
- If applicable, the employee's overtime rate of pay;
 - If an employer is taking a tip credit for an employee, the employer should note the full overtime wage, rather than the cash overtime wage.
- The employee's regular pay day;
- Any allowances claimed against the minimum wage (e.g., tip credit, meal credit, lodging allowance, etc.);
- The name of the employer (including any "doing business as" name);
- The address of the employer's main office and a mailing address (if different); and
- The employer's telephone number.

The written notice must be signed by both the employer and the employee and must be retained by the employer for at least six years.

⁶ The meal credit for resort hotels differs from those outlined and vary based upon geographic location, whether the employee resides on the premises, and how many meals per day the employee is provided.

⁷ Employers outside the hospitality industry need not provide a Notice of Pay upon a change to the rate of pay so long as the new rate of pay is referenced on the employee's next pay stub.

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The New York State Department of Labor (“NYSDOL”) has issued sample Notice of Pay forms that employers may use, which can be found [here](#). Although employers are not required to use the NYSDOL forms, it is recommended that they do so to ensure full compliance with New York law. **However, hospitality employers should not use the notice of pay designated for the hospitality industry. Although prepared by the NYSDOL, it is not compliant with the law. Please contact one of the below attorneys at MSF if you need a compliant form.** The Notice of Pay must be provided in both English and the employee’s primary language (if not English), provided the NYDOL has created a Notice of Pay form in the employee’s native language. Failure to provide the notice can result in penalties up to \$5,000 per employee.

Paystubs

In addition to providing employees with the Notice of Pay, New York employers must continue to provide their employees with detailed paystubs that contain the following information:

- The dates of work covered by the paycheck;
- The name of the employee;
- The name, address and phone number of the employer;
- The rates of pay (regular and overtime) and basis of pay (i.e. whether the employee is paid by the hour, shift, day, week, salary, piece, commission, or other method);
- Gross wages;
- A detailed listing of deductions;
- A listing of any allowances claims as part of the minimum wage, including the tip credit; and
- Net wages.

New York City employers must also ensure that their paystubs include sick leave/vacation/PTO accrual, use and balances to comply with the legal requirements of the New York City Earned Safe and Sick Leave Act.

As a reminder, it is the employer’s responsibility to ensure that paystubs are accurate. Employers should not rely solely on their payroll company to ensure that paystubs are compliant. We recommend consulting with counsel to review all paystubs to ensure that they meet the legal requirements. Failure to provide compliant paystubs can result in penalties up to \$5,000 per employee.

New York Paid Family Leave⁸

In addition to the previously discussed wage and hour obligations, there are several changes to New York Paid Family Leave for 2023. The list of family members for whom eligible employees can take New York Paid Family Leave has expanded to include siblings with a serious health condition. This includes biological siblings, adopted siblings, stepsiblings and half siblings. New York Paid Family Leave policies should be amended to reflect this change.

Also, although the maximum annual employee contribution actually *decreases* from \$423.71 to \$399.43, the weekly benefit cap increases from \$1,068.36 to \$1,131.08. Employees should ensure their payroll is updated to reflect these changes.

⁸Wage deductions for New Jersey Family Leave Insurance changes to 0.06% of an employee’s first \$156,800 in covered wages in 2023 with a maximum annual deduction of \$94.08.

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Sexual Harassment Statute Compliance

All employers must continue to ensure that they comply with the sexual harassment laws enacted by New York State and New York City. All employers should have a compliant sexual harassment policy in place and New York City employers must post the required workplace poster and distribute the required notice to all employees. Employers in New York must provide annual sexual harassment training for all employees.

Wage Transparency Laws

As discussed in greater detail in our prior alert found [here](#), New York City's wage transparency law went into effect on November 1, 2022, Westchester County's similar law went into effect on November 6, 2022 and we anticipate that New York State's wage transparency law will go into effect in 2023. Under these laws, employers are required to include a good faith minimum and maximum compensation range for all jobs, promotions or transfer opportunities it advertises or posts internally.

New EEOC Poster

On October 19, 2022, the United States Equal Employment Opportunity Commission released its "Know Your Rights" poster, updating and replacing the EEOC's prior "EEO is the Law" poster. Employers must post the new poster at all work sites. Employers without physical locations should distribute the poster to employees electronically to meet the posting requirement. Copies of the poster, in multiple languages, can be found [here](#).

Minimum Rate of Pay for NYC App-Based Food Delivery Workers

Based upon legislation passed by the New York City Council in 2021 requiring the establishment of a minimum hourly rate of pay for app-based delivery workers, the New York City Department of Consumer and Worker Protection proposed a minimum hourly rate of \$17.87 as of January 1, 2023. This rate will increase incrementally to \$23.82 by April 1, 2025. A public hearing on the proposal is scheduled for December 16, 2022. If approved, these rates will likely be challenged by the delivery platforms in court – similar to the legal challenges they filed when New York City implemented a cap on the commissions that apps can charge restaurants using their platforms. This required rate of pay in concert with the cap on commissions that the apps can charge could see these businesses leave the New York City market, shifting the burden of delivery, and employing delivery workers, back to restaurants.

Wage Increases Outside of New York

New York is not the only state with upcoming minimum wage increases. As of the date of publication, the following states⁹ will also see increases as follows:

State	Current Minimum Wage	New Minimum Wage	Date Change Goes into Effect
Alaska	\$10.34	\$10.85	January 1, 2023
Arizona	\$12.80	\$13.85	January 1, 2023
California – 26 or more employees	\$15.00	\$15.50	January 1, 2023
California – 25 or fewer employees	\$14.00	\$15.50	January 1, 2023

⁹ Various municipalities have their own wage and hour laws with higher minimum wages than shown above and may have their own increases which are higher than those minimum wages identified herein and several states have yet to confirm their upcoming minimum wage increase.

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Colorado	\$12.56	\$13.65	January 1, 2023
Connecticut	\$14.00	\$15.00	June 1, 2023
Delaware	\$10.50	\$11.75	January 1, 2023
Florida	\$11.00	\$12.00	September 30, 2023
Hawaii	\$12.00	\$14.00	January 1, 2024
Illinois	\$12.00	\$13.00	January 1, 2023
Maine	\$12.75	\$13.80	January 1, 2023
Maryland – 15 or more employees	\$12.50	\$13.25	January 1, 2023
Maryland – 14 or fewer employees	\$12.20	\$12.80	January 1, 2023
Massachusetts	\$14.25	\$15.00	January 1, 2023
Minnesota – large employer	\$10.33	\$10.59	January 1, 2023
Minnesota – small employer	\$8.42	\$8.63	January 1, 2023
Missouri	\$11.15	\$12.00	January 1, 2023
Montana	\$9.20	\$9.95	January 1, 2023
Nebraska	\$9.00	\$10.50	January 1, 2023
Nevada – Offering Statutory Health Benefits	\$9.50	\$10.25	July 1, 2023
Nevada – Not Offering Statutory Health Benefits	\$10.50	\$11.25	July 1, 2023
New Jersey – small and seasonal employers	\$11.90	\$12.93	January 1, 2023
New Jersey – all other employers	\$13.00	\$14.13	January 1, 2023
New Mexico	\$11.50	\$12.50	January 1, 2023
Ohio ¹⁰	\$9.30	\$10.10	January 1, 2023
Rhode Island	\$12.25	\$13.00	January 1, 2023
South Dakota	\$9.95	\$10.80	January 1, 2023
Virginia	\$11.00	\$12.00	January 1, 2023
Washington	\$14.49	\$15.74	January 1, 2023

In anticipation of these changes, employers should review their current payroll practices to ensure that they are prepared to (i) comply with the new minimum wages, salary levels, and associated changes to wage and hour requirements, (ii) enact the decreased employee contribution for benefits pursuant to the New York Paid Family Leave Law and update their policy to reflect coverage for siblings; (iii) ensure that their paystubs track sick leave accrual, use and balances;; and (iv) post the new EEOC poster in the workplace. Hospitality employers also should review whether there are changes in pay or allowances which require the issuance of an updated Notice of Pay.

Please contact an attorney in MSF's Employment Group if you need assistance with respect to this information.

¹⁰ The minimum wage for employers with annual gross receipts of \$323,000 or less per year is the federal minimum wage.

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