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Employment Compliance Concerns: Keeping a Step Ahead

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»» Today's Speaker



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- » Discrimination and harassment litigation
- » Wage and hour compliance
- » Investigations and disputes

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»» Agenda

- » **USDOL Wage and Hour Audits and Investigations**
- » **Social Media Law Updates**
- » **EEOC Initiatives**
- » **NYS Labor Law Updates**

»» Wage & Hour Audits

- » What is a USDOL Audit?
- » Why is an employer subject to an audit?
- » What is the DOL looking for?
- » What are the risks associate with audit?
- » What is a 14(c) / WIOA audit?
- » How can I minimize potential exposure?

»» Wage and Hour Audits

- » What is a USDOL Audit?
 - › Essentially an inspection of employer payroll records for the past two years by reviewing records of both current and former employees to ensure that the employees are being paid properly
 - › Usually goes back two years to three years

»» Wage and Hour Audits

- » Which agencies conduct audits?
 - › United States Department of Labor (“USDOL”)
 - Wage & Hour Division (WHD)
 - › New York State Department of Labor (“NYSDOL”)

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»» Wage and Hour Audits

- » Why is an employer selected for an investigation?
 - › The USDOL conducts investigations for a number of reasons—all having to do with enforcement of the laws and assuring an employer’s compliance. WHD does not typically disclose the reason for an investigation
 - Complaints from current or former workers, which are confidential
 - Some industries have been targeted
 - › Nursing homes, restaurants, Horse trainers

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»» Wage and Hour Audits

- » What is the USDOL looking for?
 - › Proper payment of wages
 - Satisfy minimum wage and overtime
 - Timesheets maintained and matchup with payroll
 - › Tracking of hours worked
 - › Tracking of overtime
 - › Proper classification of employees (employee versus independent contractor)

»» Wage and Hour Audits

- » What does the USDOL examine?
 - › Business records
 - › Payroll and time records
 - › Interviews with certain employees in private
 - Purpose is to verify the employer's payroll and time records, to identify workers' particular duties in sufficient detail
 - Interviews are normally conducted on the employer's premises

»» Wage and Hour Audits

- » What is the investigation procedure followed by USDOL?
 - › Investigator collects and reviews records and conducts interviews
 - › Once complete, investigator will ask to meet with the employer and inform whether violations have occurred and, if so, what they are and how to correct them.

»» Wage and Hour Audits

- » What are the risks associated with an audit?
 - › Back wages
 - › Liquidated damages
 - › Civil money penalties
 - › Other injunctive relief

»» Wage and Hour Audits

- » Potential areas of violation
 - › Proper tracking of hours worked
 - › Payment of minimum wage
 - › Overtime issues
 - › Bonuses—discretionary versus non-discretionary
 - › Classification of workers as salaried exempt

»» What is Section 14(c) of the FLSA?

- » Unique to agencies providing services to individuals with disabilities
- » Section 14(c) of the FLSA authorizes employers, after receiving a certificate from the Wage and Hour Division, to pay subminimum wages - wages less than the Federal minimum wage - to workers who have disabilities for the work being performed

»» What are subminimum wages?

- » Subminimum wages must be commensurate wage rates - based on the worker's individual productivity, no matter how limited, in proportion to the wage and productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the geographic area from which the labor force of the community is drawn
- » Based on careful calculation that must be consistently reevaluated by employer

»» What is WIOA?

- » Employers that hold 14(c) certifications also have to comply with Section 511 of the Rehabilitation Act—referred generally to Workforce Innovation and Opportunity Act (“WIOA”)

»» What are WIOA's requirements?

- » WIOA requires 14(c) holders to meet two key requirements:
 - › **Career counseling, information and referrals (CCIR) training**
 - › **Information on training opportunities**

»» What are WIOA's requirements?

- » **CCIR Training:**
 - › Employee must receive CCIR training every six months during the first year of employment, and annually thereafter.
 - › CCIR is performed by Designated State Unit (DSU). DSU is typically the state Vocational Rehabilitation (VR) agency

»» What are WIOA's requirements?

» Training Opportunities:

- › Employers must provide 14(c) employees with *information* about **local self-advocacy, self-determination, and peer mentoring training opportunities** every six months during the first year of employment, and annually thereafter
- › *Note: Employers don't actually have to conduct the training—common source of confusion*

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»» Subminimum Wage Under Scrutiny

- » Biden Administration has been critical of the program
- » September 2020 the U.S. Commission on Civil Rights released a report arguing that the program was not properly supervised by USDOL and other agencies and called for the elimination of the law
- » Reaction → Increase in compliance investigations by USDOL

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»» What is unique about a 14(c) audit?

- » In a 14(c) investigation, the USDOL may ask for payroll records to see that time worked is being properly tracked as in a typical wage and hour audit, **but they are also looking to verify the CCIR training intervals and information on training opportunities was properly distributed.**
- » Also will examine time studies and prevailing wage studies conducted by employer to determine the subminimum wage

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»» What are the consequences of 14(c) audits?

- » Failure to comply with the either requirement means that the agency is no longer entitled to pay that individual at subminimum wage for the period of non-compliance
- » Employer is responsible for the difference between the subminimum wage and the federal minimum wage

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»» 14(c) Audit Trends

- » Generally, USDOL taking hard stance on compliance
- » Common sense versus strict compliance debate
- » USDOL wants to see that the employer is fulfilling responsibilities—rather than relying on the DSU
 - › For example, USDOL is skeptical of agencies that rely on the DSU to provide information for training opportunities

»» 14(c) Audit Trends

- » USDOL wants to see documentation prepared by the agency/employer on training opportunities
- » Want assurance that the agency has collected the information on the opportunities
- » Wants proof that the information was delivered to the individuals at particular dates and times

»» Best Practices

- » More documentation of the steps taken to comply with the law—the better
- » Consult counsel on requirements of the law
- » If in doubt, either pay minimum wage for a brief period of time or put the individual on pause while the non-compliance is sorted out

»» New York's Social Media Law

- » Legislature recently passed a law to restrict employers from requesting or gaining access to employees' and applicants' personal social media accounts
- » Went into effect in March of 2024

»» New York's Social Media Law

- » Employers cannot ask employees or applicants to:
 - › Give their log ins for personal social media accounts;
 - › Access those accounts in your presence; or
 - › Reproduce content from those social media accounts.

»» New York's Social Media Law

- » Employers still may lawfully access public social media or other information about the employee generally available without any required log-in information
- » Exceptions for company-owned devices

»» Social Media Concerns Generally

- » What can employers do in response to problematic employee social media posts?
- » Employers are somewhat limited in steps they can take to address employee's private use of their own social media

»» Social Media Concerns Generally

- » Key issues to be aware of:
 - » National Labor Relations Act (NLRA) protects employees from discrimination for using social media for the purposes of collective bargaining
 - » New York state law protects employees from discrimination regarding their participation in legal recreational or political activities outside of work hours. This may apply to both social media activity itself, as well as other activities discussed on social media

»» Social Media Concerns Generally

- » Areas where employers may be safe to discipline based on social media use:
 - › Releasing the employer's trade secrets or other confidential information
 - › Making discriminatory comments about managers or co-workers online
 - › Posts indicating the employee lied to his or her manager about sick time
 - › Posting about another job offer

»» Social Media Concerns Generally

- » Case-by-case basis where employers should proceed with caution before engaging in discipline
- » Employers should also consider having a policy making it clear that employees cannot speak on behalf of their employer

»» EEOC Initiatives

- » Equal Employment Opportunity Commission (EEOC) is the federal agency established to administer and enforce the civil rights laws against workplace discrimination
- » Every four years, the EEOC releases Strategic Enforcement Plan (SEP), designed to focus EEOC efforts on specific priorities
- » Often indicator of issues to be aware of in the coming months and years

»» EEOC Initiatives

1. Eliminating Barriers in Recruitment and Hiring
2. Protecting Vulnerable Workers and Persons from Underserved Communities from Employment Discrimination
3. Addressing Selected Emerging and Developing Issues

»» EEOC Initiatives

4. Advancing Equal Pay for All Workers
5. Preserving Access to the Legal System
6. Preventing and Remediating Systemic Harassment

»» NYS Labor Law Updates

- » NYS Minimum Wage Compliance
- » NYS Salary Threshold Exemption
- » NYS Wage Theft Prevention Act
- » NYS Human Rights Law
- » NYS Freelance Isn't' Free Law
- » NYS Pay Transparency Law
- » Reminder on Spread of Hours

»» NYS Minimum Wage Compliance

- » Recent increases to NYS minimum wage based on location

Location	Minimum Wage as of 12/31/2022**	Minimum Wage as of 01/01/2024**
New York City	\$15.00	\$16.00
Long Island & Westchester	\$15.00	\$16.00
Remainder of New York State	\$14.20	\$15.00

»» NYS Minimum Wage Compliance

- » Minimum wage is based on where an employee performs work
- » Workers must be paid the minimum wage rate for their work location regardless of where the main office of their employer is located
- » If an employee works in two different wage regions, an employer may pay the highest rate for all hours worked, or pay each hour worked in each region at the applicable minimum wage rate for that region

»» NYS Salary Threshold Exemption

- » As of January 1, 2024, NYS increased the salary threshold necessary to exempt employees from overtime
- » *Why does this matter?*

»» NYS Salary Threshold Exemption

- » Refresher on exempt vs. nonexempt from overtime
- » In order to properly exempt from overtime, must satisfy two primary criteria:
 - › Meet the income threshold (pay employees a high enough salary)
 - PLUS
 - › Administrative, executive or professional employee

»» NYS Salary Threshold Exemption

- » Federal threshold is currently set at \$684.00 per week (\$35,568.00 per year)—NYS has a higher threshold that must be satisfied
- » NYS former threshold was \$900.00 per week or (\$46,800 per year)

»» NYS Salary Threshold Exemption

- » Effective January 1, 2024, new salary thresholds for NYS:

	New York City, Westchester, and Long Island	The Rest of New York State
2024	\$1,200.00/week (\$62,400.00/year)	\$1,124.20/week (\$58,458.40/year)
2025	\$1,237.50/week (\$64,350.00/year)	\$1,161.65/week (\$60,405.80/year)
2026	\$1,275.00/week (\$66,300.00/year)	\$1,199.10/week (\$62,353.20/year)

»» NYS Salary Threshold Exemption

- » Overtime exemption duties test
- » Based on the type of work performed by the employee and level of independence and expertise

»» NYS Salary Threshold Exemption

- » **Administrative**
 - › Office or non-manual field work directly related to management policies or general operations
 - › Exercise discretion and independent judgment
 - › Requires specialized knowledge and training
- » **Executive**
 - › Management of enterprise
 - › Directs work of other employees
 - › Discretion over hiring and firing
 - › Exercises discretionary powers
- » **Professional**
 - › Knowledge of field of science or learning from prolonged study
 - › Creative in a field of artistic endeavor

»» NYS Wage Theft Prevention Act

- » NYS Wage Theft Prevention Act (WTPA) requires employers to give written notice of wage rates to each new hire.

»» NYS Wage Theft Prevention Act

- » **WTPA notice must include:**
 - Rate or rates of pay, including overtime rate of pay (if it applies)
 - How the employee is paid: by the hour, shift, day, week, commission, etc.
 - Regular payday
 - Official name of the employer and any other names used for business (DBA)
 - Address and phone number of the employer's main office or principal location
 - Allowances taken as part of the minimum wage

»» NYS Wage Theft Prevention Act

- » WTPA Notice must be provided as a standalone form
- » Notices may be given electronically but there must be an employee acknowledgement system
- » Notices must be retained for 6 years
- » If you change an employee's compensation, you should issue a new form 7 days prior to such change.

»» NYS Wage Theft

- » *Recent Update to Law: Criminal Larceny Penalties*
- » Legislature amended the penal law to make wage theft a form of criminal larceny

»» NYS Wage Theft

- » “A person obtains property by wage theft when he or she hires a person to perform services[,] the person performs such services and the person does not pay wages . . . to said person for work performed.”

»» NYS Wage Theft

- » Non-payments can be aggregated
- » Law permits prosecutors to aggregate an employer’s non-payments or underpayments of wages from a workforce into one prosecution—even if the non-payments or underpayments occurred in multiple counties
- » Any offenses involving at least \$1,000 are considered felonies

»» NYS Human Rights Law

- » *Recent update to Human Rights Law*
- » Statute of limitations to file with the Division of Human Rights for all claims extended from 1 to 3 years
- » Applies to incidents occurring after February 14th

»» NYS Freelance Isn't Free Law

- » New law that provides protections for freelance workers / independent contractors
- » Takes effect May 20, 2024

»» NYS Freelance Isn't Free Law

- » Requires a business memorialize the terms of the relationship with freelance worker in a written contract if (i) the cost of a single project is equal to or exceeds \$800, or (ii) the freelance worker has provided multiple services to the business within a 120-day period that equals or exceeds \$800 in the aggregate

»» NYS Freelance Isn't Free Law

- » **Contract must include:**
 1. The names and mailing addresses of the freelance worker and the hiring party
 2. An itemized accounting of the services to be performed
 3. The rate of pay
 4. The payment date
 5. The date by which the freelancer worker must submit to the hiring party a list of services rendered under the contract to enable the hiring party to meet any internal processing deadlines to ensure timely payment.
- » Freelance workers must be compensated on or before the date when compensation is due under the terms of the written contract, but no later than 30 days after the completion of the freelancer's services.

»» NYS Freelance Isn't Free Law

- » Freelance workers may file a complaint with the NYSDOL for alleged violations
- » Alternatively, a freelance worker may file a civil action for damages, including for non-payment or retaliation.
- » Freelance workers must bring such lawsuits within six years of the alleged non-payment or retaliatory act.

»» NYS Pay Transparency Law

- » As of September 17, 2023, employers are required to provide a range of pay in a job postings
- » Applies to all job, promotion or transfer opportunities that will be physically performed, at least in part, in New York State.
- » Also applies to opportunities performed outside New York State that report to a supervisor or office in New York State

»» NYS Pay Transparency Law

- » Pay range must include a minimum and maximum annual salary or hourly rate of compensation that the employer in good faith believes to be accurate
- » If the employer does not plan to offer a range, but instead plans to offer a single fixed rate, the fixed rate must be listed
- » Pay range cannot be open-ended. For example, “\$20+ an hour” is not allowed

»» NYS Spread of Hours Law

- » **Basic Rule under New York Law**
 - » **Where an hourly employee’s workday takes place over the course of more than 10 hours or employees work a “split shift” they are entitled to an extra hour's pay**
 - » The 10 hours includes any off-duty time and time between shifts.
 - » A split shift is a daily schedule in which working hours are not consecutive (break is greater than 1 hour)

»» NYS Spread of Hours Law

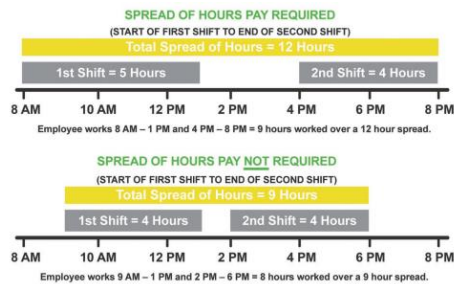
> Example

- Morning shift of work from 5 am to 11 am
- Afternoon shift from 2 pm to 6pm
- Work day spans over 10 hours (5 am to 6 pm) and the working hours are non-consecutive, so employee entitled to extra hour at minimum wage

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»» NYS Spread of Hours Law

- » 10+ hour day/split shift
- » **Spread of hours or split shift should be noted on a paystub separately**
- » Extra hour of minimum wage
 - > Not counted in overtime calculations



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