



Publications

NY Employer Reminder: 2021 Wage Increases and More

December 14, 2020 – Alerts

As we approach the end of the year, it is critical to remember and implement the new legal requirements that go into effect in New York on December 31, 2020 and shortly thereafter. Failure to comply with these requirements could subject an uninformed employer to substantial financial liability.

Minimum Wage Increases

Effective December 31, 2020, the minimum wage, tip credit and minimum salary levels in New York will increase for many employers. The increases will vary depending upon an employer's location. The good news for employers in New York is that there will be no increases to the minimum wage or minimum salary levels. However, employers elsewhere in the State, will see increases to the minimum wage.

On December 31, the regular, minimum wage rates in New York will be as follows:

Location	Minimum Hourly Wage	Fast Food Minimum Wage	Comment
New York City – Large Employers (11 or more)	\$15.00	\$15.00	No change
New York City – Small Employers (10 or less)	\$15.00	\$15.00	No change
Long Island & Westchester County	\$14.00	\$14.50	
Remainder of State	\$12.50	\$14.50	

As a reminder, 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. In addition, "fast food establishment" is any establishment in New York serving food or drink items:

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;

- Which offer limited service;
- Which is part of a chain; and
- Which is one of 30 or more establishments **nationally**, including:
 - › An integrated enterprise which owns or operates 30 or more such establishments in the aggregate nationally; or
 - › An establishment operating 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, call-in pay and similar non-working time payments that are based on the minimum wage will increase to match the minimum wages outlined above. The specific amount will depend on an employer's location, the number of employees and whether the business is designated as a fast food establishment.

Tip Credits and Other Allowances

In the hospitality industry, the tip credit, meal credit and uniform maintenance allowances also change effective December 31, 2020, for certain employers. The amount varies depending upon the employer's location, and the designation of whether the employee is a "food service worker," "service employee," or non-service employee. Here, too, employers in New York City will not see an increase.

A "food service worker" is:

- Primarily engaged in the serving of food and beverages to guests, patrons and customers, other than a delivery employee;
- Customarily and regularly receives tips from such guests, patrons and customers; and
- Does not spend more than two (2) hours in any day or more than 20% of their time performing work in which tips are not customarily received.

A "service employee" regularly and customarily receives tips for the work they perform and is *not* a food service worker or a fast food employee. A non-service employee is any, non-exempt employee other than a food service worker, service employee or fast food employee.

Before New York employers can take a tip credit, they must inform the employee in writing in English and the employee's native language if not English that the employer is taking a tip credit and the amount of the tip credit. Specifically, the employer must provide to the employee the following information in writing in order to take the tip credit:

- The employee's regular rate of pay;
- The employee's overtime rate of pay;
- The employee's regular payday;
- Advise the employee that if the cash wages they receive, plus the employees tips, do not equal the regular minimum wage for all hours worked, the employer will pay the employee the difference; and
- Notify the employee that the employer will not take any tips received by the employee except those that are contributed to a valid tip pooling or tip sharing arrangement.

With these parameters in mind, effective December 31, 2020, the tip credit and cash wage that must be paid to such employees is as follows:

Location	Food Service Workers	Service Workers	Comment
New York City – Large Employers (11 or more)	Minimum Wage: \$15.00 Cash Wage: \$10.00 Cash Overtime Wage: \$17.50 Tip Credit: \$5.00	Minimum Wage: \$15.00 Cash Wage: \$12.50 Cash Overtime Wage: \$20.00 Tip Credit: \$2.50 Tip Threshold: \$3.25	No Change
New York City – Small Employers (10 or less)	Minimum Wage: \$15.00 Cash Wage: \$10.00 Cash Overtime Wage: \$17.50 Tip Credit: \$5.00	Minimum Wage: \$15.00 Cash Wage: \$12.50 Cash Overtime Wage: \$20.00 Tip Credit: \$2.50 Tip Threshold: \$3.25	No Change
Long Island & Westchester County	Minimum Wage: \$14.00 Cash Wage: \$9.35 Cash Overtime Wage: \$16.35 Tip Credit: \$4.65	Minimum Wage: \$14.00 Cash Wage: \$11.65 Cash Overtime Wage: \$18.65 Tip Credit: \$2.35 Tip Threshold: \$3.05	
Remainder of State	Minimum Wage: \$12.50 Cash Wage: \$8.35 Cash Overtime Wage: \$14.60 Tip Credit: \$4.15	Minimum Wage: \$12.50 Cash Wage: \$10.40 Cash Overtime Wage: \$16.65	

Tip Credit: \$2.10
Tip Threshold: \$2.70

In order 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

Where employers covered by New York's Hospitality Industry Wage Order require employees to maintain their uniforms, unless they are "wash and wear" clothing that do not require any special treatment (i.e. dry cleaning, pressing, repairs), they must provide such employees with uniform maintenance pay. Effective December 31, 2020, under the Hospitality Industry Wage Order, the uniform maintenance pay shall increase for all but large employers in New York City and shall be:

Location	Work Week More Than 30 Hours	Work Week Between 20 Hours and 30 Hours	Work Week of 20 Hours or Less	Comment
New York City – Large Employers (11 or more)	\$18.65	\$14.75	\$8.90	No Change
New York City – Small Employers (10 or less)	\$18.65	\$14.75	\$8.90	No Change
Long Island & Westchester County	\$17.40	\$13.75	\$8.30	
Remainder of State	\$15.55	\$12.30	\$7.45	

Meal Credit

Pursuant to the New York's Hospitality Industry Wage Order, 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," it must include each of the following: (1) fruits or vegetables; (2) grains or potatoes; (3) eggs, meat, fish, poultry, dairy or legumes; and (4) tea, coffee, milk or juice. Effective December 31, 2020, the meal credit under New York's Hospitality Industry Wage Order shall increase for all but large employers in New York City and shall be:

Location	Food Service Workers	Service Employees	All Other Employees	Comment
New York City – Large Employers (11 or more)	\$3.60	\$4.15	\$5.15	No Change
New York City – Small Employers (10 or less)	\$3.60	\$4.15	\$5.15	No Change
Long Island & Westchester County	\$3.45	\$3.90	\$4.80	
Remainder of State	\$3.15	\$3.45	\$4.30	

New York Minimum Salary Levels

Effective January 1, 2020, the minimum salary thresholds for employees to be exempt from overtime under federal law is \$684.00 per week (\$35,568 annualized based on 52 weeks) for exempt executive, administrative and professional employees (other than bona fide teachers and

practitioners of law or medicine, for whom there is no minimum). For exempt highly compensated employees, the minimum annual salary is \$107,432.00. These salary thresholds are not changing.

However, for New York employees, the federal minimum salary threshold is generally irrelevant, as in most cases New York requires employers to pay exempt employees a minimum weekly salary that is higher than the federal minimum. The major exception is professional employees (other than those in teaching, law or medicine), for whom federal law sets a minimum salary threshold but New York does not. Note that receiving at least the minimum salary is only one of several requirements for an employee to be exempt under both federal and New York law.

Effective December 31, 2020, the minimum salary threshold in New York for exempt executive and administrative employees shall increase for those employers outside of New York City; the salary threshold for New York City employers is not changing:

Location	Weekly Minimum Salary	Comment
New York City – Large Employers (11 or more)	\$1,125.00 (\$58,500.00 annualized)	No Change
New York City – Small Employers (10 or less)	\$1,125.00 (\$58,500.00 annualized)	No Change
Long Island & Westchester County	\$1,050.00 (\$54,600.00 annualized)	
Remainder of State	\$937.50 (\$48,750.00 annualized)	

Notice of Rate of Pay

Pursuant to New York's Wage Theft Prevention Act (WTPA), New York employers must provide a "Notice of Pay" form to all employees at the time of hire **and upon a change in their rate of pay**. For all employers outside of the hospitality industry, the New York State Department of Labor (NYDOL) has opined that, as long as the new rate of pay is referenced in the employee's next pay stub, employers do not need to provide a new Notice of Pay as a result of the increase in the minimum wage.

Unfortunately, hospitality employers are not so lucky. The language of the Hospitality Industry Wage Order specifically states that employers must provide a new Notice of Pay form to those employees who are affected by the increase to the minimum wage (including all tipped employees) on or prior to December 31, 2020. 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, i.e., \$15.00, \$14.00 or \$12.50, depending on employer's location, beginning on December 31, 2020.
- 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, e.g., \$22.50, \$16.35 or \$14.60 (for food service workers), depending on employer's location, beginning on December 31, 2020.
- 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. As noted above, employers must provide employees with written notice containing specific information before they may lawfully take a tip credit.

NYDOL has issued sample Notice of Pay forms that employers may use. In addition, the notice must be provided in both English and the employee's native language (if not English), provided

NYDOL has created a Notice of Pay form in the employee's native language. Currently, NYDOL has issued forms in English, Spanish, Chinese, Haitian Creole, Italian, Korean, Polish and Russian. The NYDOL sample forms can be obtained from [NYDOL's website](#). However, the Notice of Pay forms provided by NYDOL do not contain all of the required notices necessary for an employer to take a tip credit. It is advisable to consult with counsel on how to best revise the Notice of Pay form to include the required language.

Paystubs

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

- Dates of work covered by the paycheck;
- Name of the employee;
- Name, address and phone number of the employer;
- 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;
- Detailed listing of deductions;
- Listing of any allowances claims as part of the minimum wage; and
- Net wages.

In addition, with the passage of the New York State Sick Leave Law (NYSSL) earlier this year, pay stubs must also contain:

- The amount of sick leave provided to each employee to be included on the employee's pay statement.

Furthermore, New York City's Earned Safe and Sick Time Act (ESSTA) requires that (1) the amount of safe/sick time accrued and used during a pay period and (2) an employee's total balance of accrued safe/sick time shall be included on the employee's pay statement or other form of written documentation provided to the employee each pay period.

Remember, it is the responsibility of the employer to ensure that their paystubs are accurate. Do not blindly trust your payroll service to ensure that the paystubs are compliant. Rather, you should consult with counsel to ensure that your paystubs are compliant with New York law.

New York State Sick Leave Law

New York enacted NYSSL, and we have previously detailed the stipulations of the law in prior alerts:

- [NY Department of Labor Proposes Regulations for New Paid Sick Leave Law](#) (12/11/20)
- [NYC Employers: Act Now to Comply with New Sick Leave Requirements](#) (10/30/20)
- [New York State Enacts Paid Sick Leave Requirements](#) (4/6/20)

Under the new paid sick leave requirements, employees can begin accruing leave time since September 30, 2020. On January 1, 2021, employees may begin to take any leave they have accrued under the law. The amount of paid sick leave under NYSSL that employers will be required to provide depends on the number of employees that they have during each calendar year:

- **Employers with four (4) or fewer employees and a net income of \$1 million or less** in the prior tax year shall provide employees with a minimum of **five (5) days of *unpaid* sick leave** each calendar year.
- **Employers with four (4) or fewer employees and a net income greater than \$1 million** in the prior tax year shall provide employees with a minimum of **five (5) days of *paid* sick leave** each calendar year.
- **Employers with five (5) to 99 employees shall provide employees with a minimum of five (5) days of *paid* sick leave** each calendar year.
- **Employers with 100 or more employees shall provide employees with a minimum of seven (7) days of *paid* sick leave** each calendar year.

COVID-19 Leave

In March 2020, the federal government enacted the Families First Coronavirus Response Act (FFCRA), which, among other things, requires some employers to provide paid sick leave to employees impacted by COVID-19. Specifically, the FFCRA requires most private employers with fewer than 500 employees and all public employers to provide:

- Up to 80 hours (2 weeks) of paid sick leave for a qualifying reason related to the COVID-19; and
- FMLA leave of up to 12 weeks of job-protected leave to employees who are unable to work (or telework) due to need to care for a minor child whose school or place of care has been closed or if the child's care provider is unavailable or due to an emergency with respect to COVID-19 declared by a federal, state or local authority.

Larger employers with 500 or more employees are excluded from these elements of FFCRA. However, the FFCRA has a sunset provision of December 31, 2020. Therefore, unless Congress takes additional action, employers will not be required to provide FFCRA leave in 2021.

However, in March 2020, New York passed its own COVID-19 Leave Law, which does not have a sunset provision and will remain in effect as long as there is a designated COVID-19 public health emergency. Under this law, New York employers must provide sick leave for any "employee who is subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to COVID-19."

The amount and type of leave that must be provided depends on the number of employees an employer had as of January 1, 2020 and, for small employers, their 2019 net income:

- Employers who had **10 or fewer employees as of January 1**, and a **2019 net income of less than \$1,000,000** must provide **unpaid** sick leave and any other benefit as provided by any other provision of law to an employee under quarantine or isolation until the termination of any order of quarantine or isolation. During quarantine or isolation, employees will be eligible for New York State Paid Family Leave (PFL) and short-term disability benefits.
- Employers who had **10 or fewer employees as of January 1**, and a **2019 net income greater than \$1,000,000**, must provide at least **five days of paid sick leave**, and unpaid leave until the termination of any order of quarantine or isolation. After five days, the employee is eligible for PFL and short-term disability benefits.
- Employers who had **between 11 and 99 employees as of January 1**, must provide at least **five days of paid sick leave**, and unpaid leave until the termination of any order of quarantine or isolation. After five days, the employee is eligible for PFL and short-term disability benefits.
- Employers with **100 or more employees as of January 1**, must provide at least **14 days of paid sick leave**.

Sick leave required by this law must be provided **without** loss of an employee's accrued sick leave. That is, this leave required for quarantined employees must be provided on top of any other sick leave already provided by an employer.

Employees are **not** entitled to New York COVID-19 leave if:

- The employee is deemed asymptomatic or has not yet been diagnosed with any medical condition and is physically able to work while under a mandatory quarantine through remote access or other means.
- The employee is subject to quarantine because:
 - › The employee returned to the United States after traveling to a country for which the CDC has issued a level two or three health notice and such travel was not at the direction of the employer;
 - The employee returned from a State or Territory within the United States that is on New York's COVID-travel ban list and such travel was not at the direction of the employer.

For more information about this alert, please contact Carolyn D. Richmond at 212.878.7983 or crichmond@foxrothschild.com, Glenn S. Grindlinger at 212.905.2305 or ggrindlinger@foxrothschild.com or any other member of the firm's Labor & Employment Department.

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