

Wage and Hour Changes for NYS Employers, plus a New Form I-9

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Salary Thresholds for Exempt Employees Increased for NY Employers

Although the increase in the minimum salary required for employees to be exempt from overtime pay under federal law has been put on hold by a federal court in Texas, employers in New York should be aware that the minimum salary required for employees in certain locations to be exempt under state wage and hour laws has increased. As of December 31, 2016, to maintain the exemption from overtime pay under New York State wage and hour laws (other than as to employees who are exempt as “professional” employees), employers must now pay an increased salary as follows:

- NYC—Large employers (with 11 or more employees), \$825 per week (\$42,900/year)
- NYC—Small employers (with ten or fewer employees), \$787.50 per week (\$40,924/year)
- Long Island and Westchester (all employers), \$750 per week (\$39,000/year)
- Remainder of New York State (all employers), \$727.50 per week (\$37,830/year)

The minimum salaries required to be exempt under New York State law will continue to increase each year until they reach \$1,125 per week (\$58,500 per year) in New York City, Long Island and Westchester, or \$937.50 outside of these locations. Minimum wage rates also increased at varying levels throughout New York State and will continue to increase each year until they reach \$15.00 per hour.

NY Requirements for Pay by Direct Deposit and Payroll Debit Cards [Revoked]

Effective as of March 7, 2017, employers in New York who wish to pay certain employees by direct deposit (to a financial institution selected by the employee) or payroll debit card would have been required to follow new procedures (discussed below). These requirements would not have applied to employees employed in a bona fide executive, administrative, or professional capacity whose earnings exceed \$900 per week or employees working on a farm not connected with a factory. However, on February 16, 2017, the New York State Industrial Board of Appeals held that the regulations are invalid and revoked the entire regulation. The NYS Department of Labor (NYS DOL) may appeal the decision.

Under the regulation (which is no longer effective pending any appeal), employers who wish to use direct deposit or payroll debit cards for employee pay must provide employees with a written notice that identifies the following:

- A plain language description of all of the employee’s options for receiving wages
- A statement that the employer may not require the employee to accept wages by payroll debit card or direct deposit
- A statement that the employee may not be charged any fees for services that are necessary for the employee to access his wages

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- If offering employees the option of receiving payment via payroll debit card, a list of locations where employees can access and withdraw wages at no charge to the employees within reasonable proximity to their place of residence or work

Employers must also obtain written consent from employees who will be paid by direct deposit or payroll debit card. Such employers must ensure that they obtain such consent without coercion or fear of adverse action, and that payment by direct deposit or payroll debit card is not a condition of hire or continued employment. Current employees who are already being paid by direct deposit will need to receive written notices that comply with the new regulation before March 7, 2017, but these employees do not need to provide new consent (assuming they already provided written consent when first being paid by direct deposit).

The written notice and written consent may be provided and obtained electronically so long as an employee is provided with the ability to view and print both the notice and the consent while the employee is at work and without cost to the employee, and the employee is notified of his or her right to print such materials by the employer through such electronic process. The written notice and consent must be provided in English and in the primary language of the employee when a template notice and consent in such language is available from the NYS DOL. The NYS DOL issued two model notice and consent templates. Consent may be withdrawn by employees at any time, in which case the employer will have a reasonable period of time, but no longer than two full pay periods, to implement the change. For payment by direct deposit, employers must retain a copy of the employee consent during the period of the employees' employment and for six years following the last payment of wages by direct deposit. A copy of the employee's written consent also must be provided to the employee. There are additional requirements for payment by payroll debit card, which we have not summarized here.

NY Regulations on Employee Discussion of Wages

New regulations, effective February 1, 2017, restrict New York employers' ability to limit the discussion or disclosure of wages by employees. Employers may provide a written policy electronically, by public posting, or by paper copy to employees describing "reasonable limitations on the time, place and manner" that an employee may discuss or disclose wages. Such restrictions shall not "unreasonably or effectively" prevent inquiry, discussion, or disclosure of wages at the workplace and during work hours. The limitations must also be (i) justified without reference to the content of the speech; (ii) narrowly tailored to serve a significant interest; and (iii) leave open ample alternative channels for the communication of information. Copies of any written policies must be maintained at least six years following the applicability period of the policy. Employers may, however, prohibit employees from discussing or disclosing the wages of another employee without prior verbal or written permission from such employee. Permission is defined as an "express, advance authorization given voluntarily." In addition, employers may limit discussion or disclosure of wage information by employees with access to such wage information as a function of their job.

New York employers should note, however, that the federal National Labor Relations Act generally provides all non-supervisory employees of both union and non-union employers with the right to discuss the wages, terms and other conditions of their employment as part of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Employers Must Start Using Revised Form I-9

Employers are now required to use the revised Form I-9 released by US Citizenship and Immigration Services at the end of last year. The revised Form I-9 is available in printable format and fillable pdf here: <https://www.uscis.gov/sites/default/files/files/form/i-9.pdf>. The instructions for the new Form I-9 are now in a separate document available here: https://www.uscis.gov/system/files_force/files/form/i-9instr.pdf, and must be separately provided to the employee, either in print or electronically. Although the new Form I-9 is available in a format that can be filled online, the Form I-9 is not complete unless it is printed and signed by hand.

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