

**RAO** | **ONGARO**  
BURTT & TILIAKOS LLP

Avoiding Common Mistakes of New York  
Employment Law

Anthony J. Rao and Michael Tiliakos  
Brooklyn Chamber of Commerce  
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# Minimum Hourly Rates and Paydays

- \$7.15 per hour for THREE MORE DAYS
- \$7.25 per hour as of July 24, 2009 because the Federal minimum hourly wage rate increases from \$6.55 to \$7.25 effective July 24, 2009
- Paid semi-monthly

# Internships and Externships

- Internship similar to training given in vocational school
- Training primarily must be for benefit of intern, not employer
- Intern must not displace any regular employee, and must work under close supervision
- No immediate advantage to the employer, operations may be impeded by the training
- Intern not entitled to a job upon completion
- Understanding that intern receives no pay

# Internships and Externships – Best Practices

- Intern should receive school credit in an establish course
- Close supervision
- General (not job specific) training
- No pay or benefits
- Not for employer's benefit and may hinder employer
- No regular full or part-time employee displaced
- No promise of job upon completion

# Training Time

- Attendance is outside the employee's regular working hours
- Attendance is entirely voluntary
- The course, program, lecture or meeting is not directly related to the employee's job
- The employee does not perform any productive work during the training
- If you do not satisfy all four prongs, best practice is to consider the time compensable

# Uniforms

- Employee making minimum wage may not be charged to supply, maintain, or launder required uniforms (ordinary clothing such as black trousers and white shirts are not uniforms)
- If you do not launder or maintain uniform, you must pay, in addition to minimum wage
  - \$8.90 per week if works 30 hours or more per week, \$7.00 if works 20-30 hours, \$4.25 if works less than 20 hours
- Best practice is to maintain and launder required uniforms if it is less than paying additional wages. Employees consider it a perk

# Off-The-Clock Work

- Typical duties completed before or after the shift such as clean up, paperwork, turning on/off computers, checking emails and messages, review memos, inputting time, inspecting equipment
- Working from home on weekends, texting on bus or subway, working on vacation or on unpaid sick leave
- Work that is integral and indispensable part of typical duties is compensable
- Best practice is to pay for all integral and indispensable work and counsel/discipline policy violations

# Travel Time

- All in One Day:
  - Normal commute time not compensable
  - Travel to distant out-of-town location is compensable
  - Travel between work locations is compensable
- For out-of-town overnight travel, travel during normal work hours is compensable
- Best practice is to utilize clear written policy and mandate tracking of hours (integral texting during normal commute is compensable, but most likely a violation of your policy)

# Meal Periods - BONUS

- If employee works a 6 hour shift starting before 11 am and continuing until 2 pm, he gets a 30 minute lunch period between 11 am and 2 pm.
- If employee works before 11:00 am and continues later than 7:00 pm, he gets an additional 20 minute meal period between 5:00 pm and 7:00 pm.
- If employee works more than 6 hours starting between 1:00 pm and 6:00 am, he gets a 45 minute lunch a midway point
- Exceptions if only one person on duty or in a category

# Overtime and Compensatory Time Off

- You cannot simply give one hour off for every overtime hour worked and not pay overtime
- You can give time and one-half compensatory time off in a two week pay period.
  - If an employee on a 40 hour schedule works 41 hours in one week, change the next week's schedule to 38.5 hours. The 38.5 hour week accounts for the prior week's overtime pay (1½ hours pay for one hour of overtime)

# Overtime Exemptions - BONUS

- Executive
- Administrative
- Professional
- Outside Sales
- See <http://www.dol.gov/elaws/esa/flsa/screen75.asp>

# Show Up Pay - BONUS

- Employees who report for duty must receive, regardless of whether any work is assigned:
  - 3 hours of minimum wage pay for any one shift (or actual hours of the regularly scheduled shift, whichever is less)
  - 6 hours for two shifts totaling 6 hours or less (or actual hours of the regularly scheduled shift, whichever is less)
  - 8 hours for three shifts totaling 8 hours or less (or actual hours of the regularly scheduled shift, whichever is less)

# Spread of Hours – BONUS

- Minimum wage employees who work 10 hours in a day receive one hour of minimum wage in addition to their regular wages
- Includes split shifts, time off for meals and off duty time
- NYDOL (contrary to case law) states an additional hour is not due for employees earning sufficiently above the minimum wage
- Best practice is to pay spread of hours until conflict is resolved

# Reducing Hourly Wages and Salary

- You may prospectively change an employee's hours or wages, ideally on written notice, prior to the start of a new pay period
- Must comply with minimum wage or salary basis test for exempt employees (\$536.10 per week)
- For exempt employees, cannot fluctuate salary or hours due to employer's fluctuating business needs. Changes should be long-term
- Best practice is to make changes to entire organization or unit

# Non-Exempt Employee Deductions - BONUS

- Cannot deduct for walk outs, spoilage or breakage, cash shortages or losses, lost tools, fines or penalties for being late, acting up, or quitting without notice
- Can deduct for overpayments and loans with written consent and for employee's benefit. If you wait more than one week, you can recover only 10% of gross wages per week. Cap on total deductions is minimum wage
- Best practice is to obtain written consent

# Non-Exempt Furloughs

- An unpaid leave of absence which can be voluntary or mandatory, and occur during a defined, temporary period of time
- Furloughs may be taken in full weeks, or on one or more days per week
- New York State Shared Work Program provides for partial unemployment insurance for full-time employees whose weekly hours have been reduced
- Best practice is to apply furloughs to all non-exempt employees or whole units

# Exempt Furloughs

- Employees can be furloughed without pay in week-long increments
- During furlough, performing even a minimum amount of work, such as checking emails or receiving phone calls, mandates payment of the employee's full weekly salary
- No ability to participate in Shared Work program (requires weekly hours be reduced no more than 60%). Instead, employees can apply for regular unemployment benefits
- Best practice is to apply furloughs to all exempt employees or whole units

# New York WARN

- 50 or more employees
- Must give written notice if at least 25 employees will experience certain “employment losses,” including a reduction in hours of more than 50% for each month of a six-month period or a layoff lasting more than six months
- 90 days’ written notice
- NY WARN does not apply if furlough or reduction in hours is carried out as part of a Shared Work plan through the NY Department of Labor

# Reducing Hours May Trigger COBRA

- If benefit plans cover full-time employees, reducing an employee's hours to less than full-time may trigger a loss of benefits
- Loss of group health insurance due to a reduction in hours is a "qualifying event" under COBRA requiring notice
- Employers participating in the NY Shared Work Program may not reduce employee benefits

# Independent Contractors

- Taxes: withholdings for taxes, unemployment insurance and social security, and Medicare are deducted for employees. It is presumed an individual providing services is an employee
- Workers' Compensation: an injured worker may challenge his characterization to obtain workers' compensation benefits
- Other Statutes: agencies administering state law, as well as the FLSA, Title VII, the ADA, and the ADEA analyze relationships to ensure employers are not evading the statutes

# Eight Different Tests for Contractors

- There is no bright-line test (NLRA, FLSA, IRS, unemployment, ERISA, Title VII, tort, workers' compensation use different tests)
- Fact specific analysis
- Existence of a written agreement is not controlling
- Past practice and industry custom are not controlling
- Control over the manner and means of work is often the major focus

# Independent Contractor Best Practices

- Negotiate a written independent contract agreement
- Train supervisors to treat contractors differently than employees
- Pay on an output basis
- Contractors should not perform the services employees perform
- Focus on the result, not the means and method employed
- Do not provide tools, supplies, equipment, or materials for free
- Allow contractors to subcontract

# Performance Termination Disguised as a Layoff

- Layoffs eliminate positions, not people
- Performance management fosters accountability, actively involves the employer in improving an employee's performances, and creates a record in case there is a lawsuit
- When an employer gives a false separation explanation, its ability to defend itself in a lawsuit is hindered. If employer changes its story, it loses credibility



Any Questions?