

2023 Risks For New York Employers

FEATURED ATTORNEY



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From the desk of Rachel Demarest Gold

Welcome to January – the month when W2s are distributed, emergency contact information is updated, and Handbooks need to be reviewed and revised. The past year has seen a number of additions to the compliance landscape taking effect NOW. Here are a few of them that Employers need to pay attention to as they get their operations in order for the new year.

THIS MONTH:

- **Artificial Intelligence Audits:** Starting January 1st, all NYC employers who use artificial intelligence in their hiring decisions – algorithms for candidate screening, for example – were supposed to both conduct audits for bias and notify candidates that the tool is used in the selection process. Regulations are still winding their way through the process, and enforcement has been delayed until April, but there is more about the Law and the anticipated rules, here:
 - <https://www.nyc.gov/site/dca/about/new-laws-rules.page#:~:text=December%202022%20Update%3A%20The%20Department,144%20until%20April%20>
 - <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9&Options=ID%7CText%7C&Search=>
- If you have employees who are started at the **Minimum Wage**, note that Employers in Westchester, NYC, and Long Island will have no changes to reconcile. The minimum wage remains at \$15.00 per hour for most employees (***Home Health Aides must now be paid \$17.00 per hour in those regions***), and the exempt salary threshold will remain at \$1,125.00 per week. Upstate, however, both are changing, and employees are entitled to \$14.20 hourly to satisfy the minimum wage, and a threshold of \$1,064.25 per week, if they are salaried. You can read more about both of those changes here:

- <https://dol.ny.gov/news/new-york-state-department-labor-announces-minimum-wage-increase-home-care-aides>
- https://dol.ny.gov/system/files/documents/2022/09/proposed_regulatory_text_2022.pdf

COMING SOON: WHAT TO WATCH FOR

- **Salary Transparency:** Late last year, New York City implemented a law requiring that salary ranges be listed in employment postings. You can learn more about that here: https://www.linkedin.com/posts/rachel-demarest-gold-553a7625_potential-issues-with-nycs-salary-transparency-activity-6996118886861398018-SAuu?utm_source=share&utm_medium=member_desktop

Late last month, the State followed suit and **all employers statewide will soon** be required to disclose salary ranges in its job solicitations. The Law takes effect in September, and the Labor Department has been charged with developing regulations. In the meantime, you can read the language of the Law here: <http://public.leginfo.state.ny.us/navigate.cgi?NVDTO:>

- **Just Cause Termination:** In New York City, a law has been introduced that would require Employers to demonstrate “just cause” in terminating an employee – essentially eliminating “at-will employment”. The bill is controversial and only in Committee, but for now Employers should make sure that they have a written review and disciplinary policy in place. Though not required yet, such steps are part of the proposal and in any event serve to protect against allegations of discrimination in disciplinary decisions. It is worth putting some time into that **now**. You can learn more about the proposed legislation here: <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=5958217&GUID=44D72CEC-FE82-4A43-BA31-4BB15FBC15EB>
- **Non-Disclosure Agreements and On-Boarding:** Many Employers include confidentiality and NDAs in their Employment Agreements. A Federal law now prohibits their application to allegations of sexual harassment. More about the Speak Out Act here: <https://www.congress.gov/bill/117th-congress/senate-bill/4524/text>
- Looking into next month, note ***February 19, 2023*** if you have a ‘no fault’ attendance policy, offer attendance bonuses, or use absence in your employees’ evaluations in any way. As of that Sunday (which is the one before the Presidents’ Day Holiday), an amendment to the State Retaliation Laws prohibits Employers from using absences that are part of legal leaves (FMLA, Paid Family Leave, e.g.) as criteria in Employee Evaluations. You can learn more about that Law here: <https://www.nysenate.gov/legislation/bills/2021/S1958>
- **Mandatory IRAs:** A State law that took effect last year requires Employers to notify and enroll all employees in a State-run IRA program. Though the law was signed in 2021 and meant to take effect in 2022, the program has not yet been opened and as a result, though this should be on all Employers radars (and you may hear about it from your payroll services), the clock has not yet started ticking. You can monitor its progress here: <https://www.securechoice.ny.gov>

COMING AT YOU: RECENT DEVELOPMENTS and HIGH RISK ALERTS

There are two issues that have come across my desk in the past few weeks that Employers need to note: **Frequency of Pay Lawsuits** and **Website ADA Compliance**. There will be more on both of these coming soon, but in the meantime here's what you need to know now.

1. Most employees **MUST** be paid **EVERY WEEK**. The standard is whether the worker spends 25% or more of their time doing "manual labor", which includes standing on one's feet. Up until a couple years ago, a violation of the law cost Employers a minimal penalty, and they had to change their practice. More recently, courts have upheld a private right of action that comes with extensive damages – including having to pay all wages delayed by the week again – even if employees were already paid in full just one week later. Learn the basics here: <https://dol.ny.gov/frequency-pay>
2. Your website is probably a public accommodation. That means it is subject to the American with Disabilities Act and the lawsuits that come with failure to comply. You can learn more about the requirements here: <https://www.ada.gov/resources/web-guidance/>

While all these risks need to be on every Employer's radar, how they should be implemented for each business and location must be individually assessed. We will keep you posted on tremors and trends throughout 2023, but please let us know if we can be helpful in the meantime. This is provided for informational purposes only and is not legal advice.