

New Year, New Rules for Employers Doing Business in New York in 2023

Article By:

Sean J. Kirby

Last year New York state and local legislatures implemented a number of employment laws and ordinances that are set to take effect in 2023. This update summarizes these new legal requirements to help New York employers prepare for 2023.

Paid Family Leave

2023 will see some important changes to New York's Paid Family Leave program because New York has greatly expanded the family members covered under the program. Beginning January 1, 2023, the law now includes siblings in the definition of family members covered under Paid Family Leave. Siblings are defined to include biological, adopted, half-siblings and stepsiblings.

New York will also see changes to the rate paid for Paid Family Leave. Like 2022, employees who take Paid Family Leave will receive 67% of their average weekly wage. This rate is capped at 67% of the New York State Average Weekly Wage ("NYSAWW"). The NYSAWW is increasing in 2023 to \$1,688.19, which will increase the maximum weekly benefit under Paid Family Leave to \$1,131.08.

At the same time, New York has also reduced payroll deductions for employee contributions to fund New York State Paid Family Leave. For 2023, employees will contribute 0.455% of their gross wages to the Paid Family Leave fund. This contribution is also capped as a percentage of the NYSAWW at \$399.43 annually.

Paid Vaccination Leave

New York State has extended its paid vaccination leave law through December 31, 2023. The vaccination leave law applies to all private employers and select public employers, and requires that employers provide employees "a sufficient period of time" to receive COVID-19 vaccination. The leave may not exceed four hours at a time for each dose. During this paid vaccination leave, employers must pay employees at their regular rate. This leave may not be charged or deducted from other forms of leave for which an employee may be eligible.

Protected Absences

Beginning February 20, 2023, employers are expressly prohibited from taking any disciplinary action against an employee for using any form of leave legally protected by any federal, state or local law. Examples of protected leave in New York may include paid family and sick leave, jury duty leave, voting leave, domestic violence leave, and any leave under federal law such as Family and Medical Leave Act (FMLA) leave.

This is particularly important for employers with no-fault attendance policies as the law expressly prohibits “assessing any demerit, occurrence, any other point, or deductions from an allotted bank of time, which subjects or could subject an employee to disciplinary action.” While this does not prohibit the use of no-fault attendance policies, protected leaves may not be counted.

New York City Preemployment Screening

As we have [previously reported](#), enforcement of the [New York City Automated Employment Decision Tools Law](#) has been delayed until April 15, 2023. Under this law, employers in New York City will face new restrictions on the use of “automated employment decision tools” (“AEDT”) to make employment decisions.

Technology covered as AEDT under this law includes “any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons.”

Employers will be prohibited from using any such process unless they complete a “bias audit” within the one year prior to the AEDT’s use, and make the results of that bias audit publicly available. Employers must also notify each employee or candidate:

- That an AEDT will be used in the assessment of that employee or candidate;
- What qualifications or characteristics the AEDT will use in assessing the employee or candidate; and
- What type of data will be collected for use with the AEDT and its source.

Additionally, employers must allow employees and candidates to request other alternative processes for evaluation or an accommodation.

Minimum Wage Increase

[New York’s Minimum Wage Act](#) sets forth annual increases to the minimum wage that take effect on December 31 each year until the minimum wage reaches \$15.00 state-wide. Currently, the minimum wage in New York City, Long Island, and Westchester County has attained that \$15.00 level. On September 30, 2022, the New York Commissioner of Labor [issued an order](#) for the rest of New York State, increasing the minimum wage from \$13.20, to \$14.20 per hour.

Service Worker Wage Increase

In New York, the minimum wage that must be paid for employees in the hospitality industry may be reduced for the tips earned by employees. The New York Commissioner of Labor publishes rates for these so-called “tip credits,” as well as the minimum cash wages for tipped employees. Employers outside New York City, Westchester, or Long Island operating in the hospitality industry should be aware of upcoming changes to these tip credits as well as the minimum cash wages.

Beginning on December 31, 2022, for tipped food service workers operating outside of New York City, Westchester and Long Island, the minimum hourly cash wage will increase to \$9.45 and the hourly tip credit will increase to \$4.75. For tipped service employees operating outside of New York City, Westchester and Long Island, the minimum hourly cash wage will increase to \$11.85 and the hourly tip credit will increase to \$2.35.

Salary Basis Test

Under New York law, executive and administrative employees are exempt from overtime laws if they meet a number of requirements. One such requirement is that the employee, whether executive or administrative, is paid a salary on a weekly basis that meets or exceeds an established threshold. Much like the minimum wage, December 31, 2022, will bring an increase to the salary threshold for both executive and administrative employees working outside of New York City, Westchester and Long Island. This threshold will increase to \$1,064.25 per week, up from \$990.00 in the previous year. Employers should pay particular attention as this date approaches to ensure that weekly salaries for employees they intend to keep exempt meet or exceed this threshold.

New York State Wage Transparency Bill

In addition to pay transparency laws that took effect in New York City and Westchester County during 2022, the New York State legislature passed [a statewide wage transparency bill](#) that is still currently awaiting Governor Kathy Hochul’s signature. Once signed, the law would become effective 270 days later. The State law is similar to New York City’s law, but there are some important distinctions.

- The law would require employers to disclose: the actual salary, the minimum and maximum starting salary, or hourly wage for a posted position that the employer “believes in good faith to be accurate at the time of posting” for any posted “job, promotion, or transfer opportunity that can or will be performed, at least in part, within the State of New York.” Given this broad wording, it is possible the law would apply to remote positions that could be filled by a New York resident.
- Unlike the New York City law, the New York State law would create an obligation for employers to keep records of “the history of compensation ranges for each job, promotion or transfer opportunity and the job descriptions for such positions, if such descriptions exist.”
- Postings must include a job description if one already exists at the time of posting, but does not require employers to create new job descriptions for postings.

While the New York State wage transparency law is not certain to become law in 2023, employers should be aware of the possible changes and plan accordingly.

Wolfram Ott also contributed to this article.

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