

The New York State Department of Labor Has Adopted New Regulations

On December 28, 2016, only a few days before New York's minimum wage increases took effect on December 31, 2016, the NYSDOL issued final regulations implementing changes resulting from the increases to the minimum wage. The new minimum wage law, for the first time, fractures the State into three different geographical regions (each with a separate minimum wage), as well as sets different minimum wage rates for employers in New York City that depend on the size of the employer and whether the employer is deemed a fast food employer.

In October, the NYSDOL published proposed Wage Orders in the New York State Register implementing changes that include increases to the salary level requirement for exclusions from the overtime pay requirement for administrative and executive employees under State law. The federal Department of Labor had issued regulations increasing the salary level for exempt employees under federal law, but a Texas federal district court issued a nationwide preliminary injunction enjoining the USDOL from implementing the regulations. The federal salary level (\$913.00 per week) would have exceeded the New York

salary level, making the New York salary level irrelevant for employers covered by federal law. With the federal regulations in limbo, however, employers in New York must ensure compliance with New York State law, which sets salary levels ranging from \$727.50 to \$825.00 per week, depending on where the employee works.

The final regulations adopt the proposed regulations without change. The NYSDOL also published "Frequently Asked Questions" addressing some employer comments and questions. Many other questions remain unanswered.

Where the Work is Performed:

If an employer is located in New York City, but has employees located throughout New York, the NYSDOL explains that the applicable minimum wage is based upon where an employee *performs the work*, not where the employer is located. If an employee works in multiple geographic regions with different applicable minimum wage rates, the employer may pay either the highest rate for all hours worked or the applicable rate for each hour worked in each region.

The FAQs do not explain, however, what rates apply to employees who work less than a full hour in any particular region. For example, an employee may travel from Long Island to Westchester, spending 25 minutes in traveling time in Queens and the Bronx. Must

the employee receive the New York City rate for the short period spent traveling through New York City? The FAQs do not address situations where employees spend short periods of time in geographic regions with a higher minimum wage rate.

New York City “Large”

Employer:

Different minimum wage rates apply in New York City depending on the size of the employer. “Large” employers will be required to pay \$11.00 an hour, and “small” employers must pay \$10.50 an hour.

Whether a New York City-based employer is “large” or “small” will be based on the business as a whole during the current or preceding year, not the number of employees employed only in New York City. According to the FAQs, a “large” employer is any business that employs at least one employee in New York City and has employed more than 10 employees (total of 11) *at any time* during the current or prior calendar year and among all worksites. A “small employer” is any business that employs at least one employee in New York City and has not employed more than 10 employees (total of 11) at any time during the current or prior calendar year among all worksites. Employees of a New York City “large” employer who perform work *outside of New York City*, however, need not be paid the higher minimum wage for

times during which the employee works outside New York City.

If the employer begins the year with fewer than 11 employees, but then reaches the 11-employee threshold during the year, the higher minimum wage rate will apply for the remaining portion of the year and the next calendar year. Further, all employees, whether part-time or full-time, are counted. Finally, there is no exception for seasonal employers, according to the NYSDOL.

Additional Recordkeeping:

Employers who pay different minimum wage rates to the same employee depending on where the work is performed will have additional recordkeeping requirements. The NYSDOL explains that employers must record each hour worked at each rate and identify the rate of pay for the employee on the employee’s pay stub. “Employers may provide separate notices for each region, job site, job title and pay rate, or the employer may include a listing of all rates on a single employee pay notice,” according to NYSDOL.

Employers should ensure all employees are earning the minimum required wage or salary level and that proper notice of any changes to wage rates have been provided.

Please contact Jackson Lewis if you have any questions or need assistance with this or other workplace requirements.

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