



LABOR & EMPLOYMENT BRIEFING SERIES  
**Tending to Your Business 2016**

**It's Hard to be an Employer in the City**  
**Labor & Employment Law Developments**  
**for New York Employers**

New York, New York  
May 4, 2016





# Presenters

**Jon Israel**

[jisrael@foley.com](mailto:jisrael@foley.com)

212.338.3610

**Anne Sekel**

[asekel@foley.com](mailto:asekel@foley.com)

212.338.3417

**Bennett Epstein**

[bepstein@foley.com](mailto:bepstein@foley.com)

312.832.5193

**Sara Madavo**

[smadavo@foley.com](mailto:smadavo@foley.com)

212.338.3582



# Who Are We

- **Foley & Lardner's Labor & Employment Practice Group**
  - **Breadth and Depth**
    - 54 attorneys across the U.S. and worldwide
    - 20 offices
    - New York (and New Jersey too)
    - Multi-disciplinary experience and skills



# Four Objectives

- Identify issues that impact you
- Communicate with you in person
- Provide a snapshot of legal landscape
- Practically Assess: How do you operate/best practices?



# HOT TOPICS

- **Minimum Wage (Fed dead/NY very much alive)**
- **FLSA proposed (and soon final) regulations**
- **Worker Misclassification**
- **Interns**
- **Joint Employer**
- **NYS Women's Equality Act**
- **NYS Paid Leave**
- **NYC Gender Identity/Expression Discrimination**
- **NYC Caregiver Discrimination**
- **NYC Commuter Benefits**
- **NYC Background Check Limitations (Ban the Box/Credit)**
- **NYC Paid Sick Time**



# LABOR & EMPLOYMENT BRIEFING SERIES

## Tending to Your Business 2016

# MINIMUM WAGE





# MINIMUM WAGE

- Federal (2016) = \$7.25 (latest failed effort - \$12 by 2020)
- NY Statewide (2016) = \$9
- New York City (10 or more employees)
  - 2017 = \$11, then \$2 per year until \$15 in 2019
- New York City (less than 10 employees)
  - 2017 = \$10.50, then \$1.50 per year until \$15 in 2020
- New York City Metro Counties (Westchester, Nassau, Suffolk)
  - 2017 = \$10.00, then \$1 per year until \$15 in 2022
- New York State (everywhere else)
  - 2017 = \$9.70, then \$0.70 per year until \$12.50 in 2021
  - Indexed schedule thereafter to \$15
- New York State Tipped Employees
  - Currently \$5, will go to \$7.50 in 2017, increasing to \$10 by 2018/19



# MINIMUM WAGE (cont.)

## ■ Analysis/Impact

- Federal increase after 2016 election? No impact in NYS
- NYC: \$11/hr = 22% wage increase (up \$2)
- Ripple effect on those making more than min wage
- How will it affect your staffing and headcount?
- How will it affect your overtime pay/classifications?





# LABOR & EMPLOYMENT BRIEFING SERIES

## Tending to Your Business 2016

# FLSA REGULATIONS





# FLSA REGULATIONS

- DOL Proposed Changes To Go Final in 2016
- Pending legislation to stop it? Yes, but not likely to succeed



# FLSA REGULATIONS (cont.)

## ■ Refresher

### — White Collar Exemption:

- Be paid on a salary basis and not on an hourly basis (except for certain professionals, e.g., computer)
- Earn more than **\$455/week** (\$23,660 annually)
- Perform primarily executive, administrative, or professional duties



# FLSA REGULATIONS (cont.)

- **Salary basis for executive, administrative, or professional**
  - Current: not less than **\$455/week** (\$23,660/year)
  - New: not less than **\$970/week** (\$50,440/year) (adjustable)
- **Highly Compensated Employee (office/non-manual work + one exempt duty)**
  - Current: **\$100,000/year**
  - New: **\$122,148/year** (adjustable)
- **Duties Test – Primary Duty**
  - Current: not defined
  - New: likely more definition, e.g., at least 50% of time spent on exempt duties
- **Non-discretionary bonus/incentive pay in salary basis calculation**
  - Current: not permitted
  - New: may be allowed
    - capped at 10% of the salary threshold
    - limited to sums paid monthly or more frequently
    - Exclude "commissions"



# FLSA REGULATIONS (cont.)

## ■ Anticipated changes:

- Increase (more than doubling) of the minimum salary requirements for executive, administrative and professional exemptions (“white collar” exemptions)
- Increase of nearly 25% of minimum salary for Highly Compensated Employee
- Changes to “duties” test – specifically re how to determine whether “primary” duties qualify as overtime exempt
- Potential inclusion of non-discretionary and incentive bonus for salary basis test



# FLSA REGULATIONS (cont.)

## ■ Analysis/Impact

### – New York

- White collar exemptions generally track federal exemptions
- Salary basis: already higher than current federal levels  
Not less than \$675/week – \$35,100/year

### – Next Steps

- Operational/Budget Impact
  - Payroll increase
  - Double whammy for low wage jobs (min. wage & OT)
  - Workforce adjustments
  - Administrative burdens (e.g., time-keeping)
  - Policies (e.g., remote work)
- Good Opportunity to Reclassify Employees



# LABOR & EMPLOYMENT BRIEFING SERIES

## Tending to Your Business 2016

# WORKER MISCLASSIFICATION





# WORKER MISCLASSIFICATION

- Remains hot topic at both federal and state levels
- What's at stake if you get it wrong
  - Audits & Agency Proceedings
    - Coordination among agencies
    - Civil penalties – ever increasing
  - Damages
    - Unpaid wages/overtime; benefits
    - Liquidated damages (100%)
    - Federal Statute of Limitations: 2/3 years
    - NY Statute of Limitations: 6 years
  - Individual and Class/Collective Actions
    - Unpaid wages and overtime
    - ERISA and other benefit claims (e.g., 401k, workers' comp)
    - Health Insurance?





# WORKER MISCLASSIFICATION (cont.)

- **Independent Contractor/Employee Tests**
  - Depends on who's looking and what law applies
    - Common law: free from supervision, direction, and control?



# WORKER MISCLASSIFICATION (cont.)

- **NY – Indicia of Employer/Employee Relationship:**
  - Choose when, where, and how worker performs services
  - Provide facilities, equipment, tools and supplies
  - Directly supervise services
  - Set hours of work
  - Require exclusive services (e.g., non-compete/other restrictions)
  - Set rate of pay
  - Require attendance at meetings and/or training sessions
  - Ask for oral or written reports
  - Reserve right to review and approve work product
  - Evaluate job performance
  - Require prior permission for absences
  - Right to hire and fire



# WORKER MISCLASSIFICATION (cont.)

## ■ NY– Indicia of Independent Contractor

- Has established business (e.g., not integral to employers business)
- Advertises in electronic and/or print media
- Buys ad in Yellow Pages
- Uses business cards, stationery and billheads
- Carries insurance
- Keeps a place of business and invests in facilities, equipment, and supplies
- Pays own expenses
- Assumes risk for profit or loss
- Sets own schedule
- Sets or negotiates own pay rate
- Offers services to other businesses (competitive or non-competitive)
- Free to refuse work offers
- May hire help



# WORKER MISCLASSIFICATION (cont.)

- **DOL/Economic reality: economically dependent on employer or in business for self?**
  - Extent work is an integral part of employer's business;
  - Opportunity for profit/loss depending on managerial skill;
  - Relative investment of employer and worker;
  - Whether work requires special skills and initiative;
  - Permanency of the relationship; and
  - Degree of control exercised or retained by employer



# LABOR & EMPLOYMENT BRIEFING SERIES

## Tending to Your Business 2016

# INTERNS





# INTERNS

## ■ Potentially applicable tests (must satisfy all factors):

US DOL	NY DOL	
<ol style="list-style-type: none"> <li>1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment.</li> <li>2. The internship experience is for the benefit of the intern.</li> <li>3. The intern does not displace regular employees, but works under close supervision of existing staff.</li> <li>4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded.</li> <li>5. The intern is not necessarily entitled to a job at the conclusion of the internship.</li> <li>6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.</li> </ol>	<ol style="list-style-type: none"> <li>1. The training, even though it includes actual operation of the employer's facilities, is similar to training provided in an educational program.</li> <li>2. The training is for the benefit of the intern.</li> <li>3. The intern does not displace regular employees, and works under close supervision.</li> <li>4. The activities of trainees or students do not provide an immediate advantage to the employer. On occasion, operations may actually be impeded.</li> <li>5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period and are free to take jobs elsewhere in the same field.</li> <li>6. The trainees or students are notified, in writing, that they will not receive any wages and are not considered employees for minimum wage purposes.</li> </ol>	<ol style="list-style-type: none"> <li>7. Any clinical training is performed under the supervision and direction of people who are knowledgeable and experienced in the activity.</li> <li>8. The trainees or students do not receive employee benefits.</li> <li>9. The training is general, and qualifies trainees or students to work in any similar business. It is not designed specifically for a job with the employer that offers the program.</li> <li>10. The screening process for the internship program is not the same as for employment, and does not appear to be for that purpose. The screening only uses criteria relevant for admission to an independent educational program.</li> <li>11. Advertisements, postings, or solicitations for the program clearly discuss education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment.</li> </ol>



# INTERNS (cont.)

## ■ Courts not buying DOL tests – more lenient:

### – *Glott v Searchlight Picture*

- Pls in college program/1 grad
- Court rejected DOL 6-factor test (i.e., that all must be satisfied)
- **Primary Beneficiary Test** (was worker primary beneficiary)?
- Non-exhaustive list to be considered
- “**Economic Reality**”: what did the worker get in exchange for work
- Interplay with intern’s formal education

### – *Gawker Bloggers*

- In conjunction with journalism college course
- Published blogs and 2 long form articles
- Given considerable mentorship
- Held: economic reality - he got a lot out of experience



# INTERNS (cont.)

- NY MTA CASE
  - I didn't learn nothing





# INTERNS (cont.)

## ■ Can I still hire/utilize interns?

- Use appropriate agreement (and include arbitration and class action waiver)
- Develop and implement program that benefits the intern
- Consider paid internship if you can't create the program and it is just work
  - Minimum wage will suffice



# JOINT EMPLOYER

## ■ NLRB (BROWNING-FERRIS DECISION (Aug. 2015))

- Rejected 30-year-old standard: actual exercise of direct control over another business' employees
- New Standard: mere “right to control” employment terms even if not actually exercised or the indirect control through intermediaries
- Impact on primary employer:
  - May be required to bargain with the secondary employer's employees
  - May be liable for unfair labor practices of secondary employer
  - May be liable for unlawful terminations by the secondary employer



# JOINT EMPLOYER (cont.)

- U.S. Department of Labor (WHD Administrative Interpretation - January 20, 2016)
  - Horizontal joint employment
    - Two employers are responsible for each others violations through joint use of the same employees
    - Determining factors:
      - Common owners and/or managers
      - Shared control over hiring and firing
      - Coordination of hours and scheduling
      - Joint supervision of employees
      - Use of same payroll system
  - Vertical joint employment
    - Two employers are responsible for each others violations because of the control the “primary” employer exercises over the employees of an “intermediary employer” such as a contractor or staffing agency:
    - Determining factors (economic reality):
      - Does the potential joint employer, control or supervise the work performed by the employee?
      - Does the potential joint employer control the employment conditions of the employee?
      - Does relationship with the potential joint employer appear permanent without any specific end to the duration?
      - Is the work to be performed with the potential joint employer repetitive?
      - Is the employee’s work integral to the potential joint employer’s business?
      - Will the work be performed physically at the potential joint employer’s premises?
      - Will the employee perform administrative functions commonly performed by the potential joint employer?



# JOINT EMPLOYER (cont.)

## Embracing Joint Employer Concept

- If you want and need to retain control of third party employees then you should try to manage the relationship
  - Giving up “a little control” will not likely avoid joint employer liability, so there is little reason to give away any ability to control secondary employees
  - May make sense to increase level of control to make sure that intermediary employer is not doing anything to create liability
  - Negotiate the best possible indemnity language you can under the circumstances with intermediary employer

## Avoiding Joint Employer Liability

- If you want to try to avoid joint employer liability:
  - Do not play a role in hiring, firing, or supervising of intermediary employers’ employees
  - Do not set employees’ wages or benefits
  - Do not discipline employees or give them performance reviews
  - Do not provide intermediary employer or intermediary employees with written rules, employee handbooks, employment application

# NYS WOMEN'S EQUALITY ACT

## PAY EQUITY



- Section 194 of NY Labor Law prohibits discrimination in pay based on sex
- Amended effective January 19, 2016
  - Expands geography for comparison: “geographic region” no larger than same county
  - Employer justification for pay differential – affirmatively demonstrate one of following:
    - Seniority system
    - Merit system
    - System measures earnings by quantity or quality of production
    - Bona fide factor other than sex such as education, training, or experience
  - Employers may not prohibit employees from asking about, discussing, or disclosing wage information
  - Liquidated damages for willful violations are 300% wages found due
- Next steps
  - Review and revise practices/policies (e.g., confidentiality/employment agreements; arbitration agreements with class action waivers)
  - Train supervisors and HR
  - Make a written record: document business rationale/reasons for comp decision/disparity
  - Conduct an audit



# NYS WOMEN'S EQUALITY ACT OTHER COMPONENTS

- Small employers (fewer than 4 employees) now covered in sexual harassment cases
- Attorneys' fees recoverable in employment/credit discrimination based on sex
  - For plaintiffs if successful
  - For defendants if claim proves frivolous
- Family status now a protected characteristic (see below NYC law)
- Pregnancy accommodation (already covered by NYC law)
- Next Steps
  - Review/revise policies and practices
  - Train managers and HR staff
  - Watch out small employers



# NYS PAID FAMILY LEAVE

- Just passed into law – coming to NYS in 2018
- 12 weeks of paid leave to:
  - Care for new child
  - Care for family member with serious health condition
  - Relieve pressure when family member is called to active military service
- Employers do not directly fund, but may have costs to administer
  - Funded by weekly payroll tax of about \$1 per employee to be deducted from employee paychecks
- How much? Leave and pay amounts to be phased in
  - 2018: 8 weeks of leave; 50% of statewide average weekly pay – currently about \$648
  - 2019: 10 weeks; 55% of statewide average weekly pay
  - 2020: 10 weeks; 60% of statewide average weekly pay
  - 2021: 12 weeks; 67% of statewide average weekly pay



# NYC

## GENDER IDENTITY/EXPRESSION DISCRIMINATION

- NYC Human Rights Law prohibits gender discrimination
- Gender broadly defined - protections extend to those with gender and self-image that do not fully accord with the legal sex assigned to them at birth
- Legal Enforcement Guidance – NYCCHR (December 2015)
  - Simplified definition of discrimination: treating someone “less well than others on account of gender”
  - Provide definitions of different types of gender and gender-related terms, e.g.:
    - “cisgender”: self-identity conforms with biological sex
    - “inter-sex”: reproductive or sexual anatomy/chromosomal pattern does not fit typical male/female definitions
  - Describes 8 distinct types of gender discrimination with practical suggestions for avoiding violations of the NYCHRL





## NYC GENDER IDENTITY/EXPRESSION DISCRIMINATION (cont.)

- Guidance: 8 categories/examples of discrimination
  - Failing to use an individual's preferred name or pronoun
  - Refusing to allow individuals to use single-sex facilities and programs consistent with their gender
  - Sex stereotyping
  - Imposing different uniforms/grooming standards based on sex or gender
  - Providing employee benefits that discriminate based on gender
  - Considering gender when evaluating requests for accommodations
  - Engaging in discriminatory harassment
  - Engaging in retaliation



# NYC

## GENDER IDENTITY/EXPRESSION DISCRIMINATION (cont.)

### ■ Best practices identified in Guidance

- Review the guidance and make sure managers know it  
<http://www.nyc.gov/html/cchr/html/law/gender-identity-legalguidance.shtml>
- Ask all employees to provide their preferred gender pronoun (including ze/hir) and allow employees to self-identify their name and gender
- Provide single-occupancy restrooms/private spaces in multi-user facilities
- Post that all individuals have the right to use single-sex facilities consistent with gender identity/expression
- Adopt gender neutral dress codes and grooming policies
- Provide health benefit plans that include comprehensive coverage for transgender individuals



# NYC CAREGIVER DISCRIMINATION

- As of today, “caregivers” are a protected class under the NYCHRL
- Who is a “caregiver”?
  - A person who provides direct and ongoing care for a minor child or care recipient
  - The definition of care recipient includes disabled members of the caregiver’s close family, as well as any disabled person who lives in the caregiver’s home
  - The definition excludes non-family-member caregivers or home companions employed to work or live in the home
  - The definition does not explain “direct and ongoing”



# NYC

## CAREGIVER DISCRIMINATION (cont.)

- What conduct is prohibited?
  - Discrimination on the basis of caregiver status (or perceived status) in hiring, compensation or the terms and conditions of employment
- Next steps
  - Review handbooks and disciplinary, employment and recruiting policies for compliance and consider how current policies may impact caregivers
  - Review supervisor decisions to ensure that caregiver status was not taken into account
  - Carefully consider requests for accommodations/leave
    - The amendment does not require “flexible scheduling” to accommodate caregivers but comments made during legislative process touched on the issue and NYCHRL mandates broad constructions of its provisions
  - Watch for enforcement guidance from the NYCCHR



# NYC COMMUTER BENEFITS

- Effective January 1, 2016
- Applies to all NYC for-profit and non-profit employers (20 or more full-time non-union employees)
- Provide opportunity to use pre-tax income (up to \$255) to buy qualified transportation fringe benefits
- Key details:
  - No penalties for non-compliance until after July 1, 2016
  - 90-day cure period for any violation before penalty imposed
  - Written notice must be given (and kept for 2 years)
  - Employees who work occasionally in NYC qualify for benefit
  - If employer already provides its employees a transit pass at its own cost, no offer of additional commuter benefits is needed unless the value of the transit pass is less than the maximum dollar amount allowed under federal law for pre-tax purchases of qualified transportation fringe benefits



# NYC

## BAN THE BOX/BACKGROUND CHECK

- Fair Chance Ordinance – effective on October 27, 2015
- Imposes restrictions/obligations on consideration of job applicant's criminal history
- Key Details:
  - Inquiry/Investigation Timing (either in writing or verbally)
    - Only after conditional employment offer has been extended unless federal, state or local law requires a background check for employment purposes
  - Written notice/analysis of action must be given to applicant
    - Interplay with Article 23-A of the NY Corrections Law
  - Requirements are in addition to Fair Credit Reporting Act notice requirements
  - Per se discrimination – request alone enough for unlawful discrimination



# NYC STOP CREDIT DISCRIMINATION IN EMPLOYMENT ACT ("SCDEA")

- The SCDEA – effective September 3, 2015
- Prohibits employers from requesting or using consumer credit history of an applicant or an employee for the purpose of making any employment decisions
- Key details:
  - Intended by City Council to be “strongest bill of its type in the country”
  - Per se discrimination: even if no adverse employment action results from the request for credit history, the request alone is unlawful discriminatory practice
  - No categorical exception for jobs in financial services industry but positions involving responsibility for more than \$10,000 are exempt, as are positions regulated by a self-regulatory organization that requires a credit check



# NYC PAID SICK LEAVE

- NYC Paid Sick Leave Law – effective April 1, 2015
- Requires employers with 5 or more employees to provide 40 hours of paid sick leave to employees
- Key details:
  - New employees must be given written notice of paid sick leave on their first day of work
  - Sick leave policies may require documentation from a health care provider after an employee uses three consecutive workdays as sick leave
  - If an employer front-loads annual sick leave, that should be explained in the written sick leave policy





# QUESTIONS

**Jon Israel**

[jisrael@foley.com](mailto:jisrael@foley.com)

212.338.3610

**Anne Sekel**

[asekel@foley.com](mailto:asekel@foley.com)

212.338.3417

**Bennett Epstein**

[bepstein@foley.com](mailto:bepstein@foley.com)

312.832.5193

**Sara Madavo**

[smadavo@foley.com](mailto:smadavo@foley.com)

212.338.3582