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Off the Clock: Quarterly NY Wage & Hour Update

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2 | Takeaways from New Jersey’s Recent Appellate Court Decision

3 | Meal Periods and Timekeeping Practices

4 | AI Expansion and its Impact on the Administrative Exemption

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New Jersey’s Independent Contractor Test

New Jersey’s Rule on Independent Contractor Status

- The New Jersey Department of Labor and Workforce Development (NJDOL) adopted on May 5, 2026, final regulations codifying its interpretation of the “ABC Test,” which governs whether workers are classified as employees or independent contractors under multiple New Jersey statutes.

- Significantly tilts the balance in favor of employee status.

- The new regulations are scheduled to take effect on **October 1, 2026**.

The ABC Test

A. The worker has been and will continue to be **free from control or direction over the performance of services**, both under the worker's contract of service and in fact;

B. The work performed is either **outside the usual course of the business** for which the work is being performed, **<u>or</u> the work is performed outside all the places of business of the enterprise**; and

C. The worker is customarily engaged in an **independently established trade, occupation, profession <u>or</u> business**.

The burden falls entirely on the putative employer to provide IC status under all three prongs.

Failure to satisfy any single prong results in employee classification.

Prong A: Control

The rules list nine factors for evaluating control, each of which, if present, suggests employee status:

1. Required to work set hours or jobs
2. Employer controls details and means of performance
3. Services must be rendered personally
4. Employer negotiates for and acquires the services
5. Rate of pay fixed by employer
6. Individual bears no risk of loss
7. Required to be on call or standby
8. Employer limits performance for other parties
9. Employer provides training

Prong A: Control Continued

N.J.A.C. 12:11-1.3(f) — Compliance with Law as Evidence of Control

- As originally proposed, any control exercised to comply with a law or regulation was to be given “equal weight” to any other control — meaning legally mandated supervision counted against the employer.

- On adoption, the language was softened: actions taken “solely” to comply with law shall not, “standing alone,” be considered evidence of control.

Prong B: “Usual Course of Business” or “Places of Business”

- “Usual course of business” is defined broadly to include “activities that the putative employer regularly engages in to generate revenue or develop, produce, sell, market, or provide goods or services.”

- “Places of business” extends beyond physical plants to anywhere the employer "conducts an integral part of its business."

- This expansive reading makes it extremely difficult for any worker performing core or revenue-generating services to satisfy Prong B.

Prong C: “Independently Established” Now Requires Actual Success

- Having multiple employers does not equate to having an independently established business.
- Working full-time or part-time for another entity does not alone satisfy Prong C.
- Professional licensure (nurse, attorney, etc.) is not alone sufficient.
- Proof of business registration (sole proprietorship, LLC, etc.) is “not alone sufficient” to meet Prong C.

Industries at Greatest Risk

- **Insurance & Financial Services**: Regulatory supervision counts as control; UCL exemptions do not extend to WPL/WHL/ESLL; IC agreements devalued.
- **Trucking & Transportation**: Broad “places of business” definition (vehicles as places of business); FAAAA preemption argument rejected by Department.
- **Gig Economy / App-Based Platforms**: Control over details and means broadly defined; “flexibility” argument rejected.
- **Staffing & Professional Services**: Non-compete/non-solicitation clauses treated as control; licensure alone insufficient for Prong C.
- **Freelancers & Consultants**: Must demonstrate actual (not potential) work for multiple clients; short-term/low-value engagements fully subject to ABC test.
- **Construction**: Business entity formation treated as potentially cosmetic; East Bay Drywall framework embedded throughout.

Recent NJ Appellate Division Decision

Martinez v. T. Slack Environmental Services Inc., et al.

- **Background**: The plaintiff, a former hourly laborer, alleged that his employer failed to: (1) pay proper prevailing wages, (2) calculate overtime using blended rates when employees performed different types of work at different rates, (3) compensate certain off-the-clock work, and (4) properly calculate paid sick leave. He sought relief on behalf of himself and other similarly situated employees.

- **Holding: Representative Actions Do Not Require Class Certification**
  - Representative actions under the WHL and PWA are independent of New Jersey's class action rule.
  - Plaintiffs need not satisfy traditional class action requirements such as numerosity, commonality, or predominance to proceed on behalf of similarly situated employees.
  - The court rejected arguments that plaintiffs must produce evidence from other employees before pursuing representative relief.

Meal Periods

Basic Requirements under New York Labor Law § 162

- For work periods that are or exceed six (6) hours and begin before 11 am and 2 pm, a half hour unpaid meal break sometime between 10 am and 2 pm is required.

- Persons employed for shifts starting before 11 am and continuing after 7 pm must be allowed an additional 20-minute meal period between 5 pm and 7 pm.

- Every person employed for a period or shift of more than six hours starting between the hours of 1 pm and 6 am, must be allowed at least 45 minutes for a meal period "at a time midway" in the shift.

Bona fide Meal Periods must meet three conditions…

30-minute	uninterrupted	break
(1) the period must be 30 minutes or longer;	(2) the employee must be completely relieved of his or her duties for the purpose of eating a regular meal; and	(3) the employee must be allowed to leave his or her workstation, and substantially relieved from his or her work duties

Common Issues

- Lunch time is auto-deducted but the employee works through the meal period.

- Not continuous or completely uninterrupted.

Can an employee have the option of taking a meal break or leaving work early at the end of a shift?

- If the request to do so is on a long-term basis - no, the NYSDOL will not allow employers to eliminate a meal period in exchange for ending a shift early.
- If the request is only on an occasional basis and due to the employee’s needs and benefits – then ok.
- Be mindful of Fair Workweek Obligations.
- Rule of thumb: an employee cannot waive their right to a meal period.

Is Waiver Ever Permissible?

What about scenarios where it is not practicable to take a 30-minute uninterrupted break?

- Employers may apply for shorter meal period permits provided certain requirements are met.

- **One-Employee Shift Exception**
  To apply, employee must voluntarily consent, in writing, and the meal period must be paid.

Are Meal Periods Ever Compensable?

General Rule: meal periods that meet the statutory requirements are not require to be counted as “hours worked” and therefore are <u>not required</u> to be paid.

Short duration breaks running between 5-20 minutes are compensable and must be counted as work time under federal and state law.

Meals

Whenever the Labor Law requires a meal period, employers have to, either:

1. Allow employees to bring their own food, OR

2. Furnish a meal to the employees at a cost no greater than the applicable meal credit in the amount set forth in the Hospitality Wage Word.

Timekeeping

- Employers only are responsible for keeping track of all “hours worked” under the law.
  - How do meal breaks fit in?

- Best practice: contemporaneous punches whenever work starts and stops

- Next best is to have a system in place for employees to report deviations for correction
  - Consider time reporting policies and signed acknowledgments
  - Readily available correction forms
  - Training

To Deduct or Not to Deduct? That is the Question

- **Automatic Deductions for Meal Breaks**: common practice, where employee works 8 am to 5 pm, with one-hour unpaid lunch, and clocks in at 8 am, and out at 5 pm, and system auto-deducts the hour for the lunch

- OK provided the employee isn’t working through lunch, never shortens their lunch time, or is otherwise interrupted by working during their lunch break.

- Keep it mind it is the <u>Employer’s burden</u> to prove accuracy.

Timekeeping

Accuracy is important. Audit your practices.

Considerations to keep in mind:

- If AI is being used (for timekeeping or productivity metrics), is it accurate?
- Rounding? Is the rounding favorable to one-side?

Private Enforcement?

There is no private right of action for a meal break violation, but this obligation should not be overlooked by employers.

Why?

- Potential to snowball into overtime and straight time claims, which may be privately enforced and are often brought on a class or collective basis.
- Employees can submit a complaint directly with the NYS DOL (potential for civil monetary penalties).

NYS DOL Enforcement

- May audit meal break policies and practices
- Possibility of civil fines for violations

The Expanding Use of AI and Its Impact on the Administrative Exemption

The Administrative Exemption

To qualify for the administrative employee exemption, the employer must ensure all of the following requirements are met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than the standard salary level required by 29 CFR 541.600;

- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

How Does AI Fit In Here?

- Increased reliance on AI may create wage-hour misclassification risk for employers by undermining a key requirement of the FLSA's administrative exemption: the employee's exercise of discretion and independent judgment on matters of significance.

- Identify where tools are used to analyze information, generate recommendations, or support decisions.

- If duties have materially changed, consider whether exempt status remains supportable

Questions?

Thank You

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