



HR FORUM: Specific Employment Law Updates and Trends in New York and New Jersey

April 2023

Seyfarth Shaw LLP

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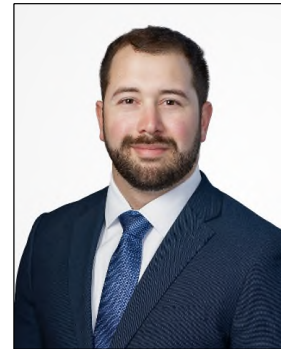
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Enforcement of NYC Earned Safe and Sick Time Act

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NYC Department of Consumer and Worker Protection

- Who are they? The Department of Consumer and Worker Protection (formally called the NYC Department of Consumer Affairs) enforces the NYC Earned Safe and Sick Time Act.
- What else do they enforce? Enforcement of the NYC Earned Safe and Sick Time Act represents the largest portion of the agency's enforcement work, but the Department is also responsible for enforcing:
 - The NYC Fair Workweek Law
 - The NYC Artificial Intelligence in Hiring Law
- Are they strict with enforcement? Yes, the Department is very aggressive in its enforcement of the law and rarely allows exceptions.



Statistics

Table A1. Office of Labor Policy & Standards (OLPS) Staffing, 2017-2021

	2017	2018	2019	2020	2021
Staff	37	39	31	25	33
Investigators	10	12	10	11	13
Attorneys	13	12	12	7	10
Researchers	2	4	4	3	4
Intake, Operations, and Navigation	7	7	4	3	5
Outreach and Advocacy	5	4	1	1	1

Notes: 1) Staff counts are as of December 31 of each year. 2) OLPS Outreach and Advocacy staff includes the Paid Care Advocates. 3) Staff in the External Affairs Division do outreach for the Agency, as well.

Table A2. Worker Protection Intakes and Outreach Events, 2017-2021

	2017	2018	2019	2020	2021
Intakes	2,779	3,089	3,232	16,474	7,638
OLPS Hotline	2,779	3,089	3,232	4,177	3,841
Worker Protection Hotline	-	-	-	12,297	3,797
Outreach Events	445	292	191	199	244

Notes: 1) Worker Protection Hotline was discontinued after July 2021. 2) Intakes consist of complaints or information requests received by DCWP. 3) OLPS – Office of Labor Policy & Standards.

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Table A3. Worker Protection Enforcement Volumes, 2017-2021

	2017	2018	2019	2020	2021
Complaints Received	522	1,028	1,119	789	565
Paid Safe and Sick Leave	382	324	327	254	247
Fair Workweek	3	181	151	48	50
Retail	1	28	44	19	15
Fast Food	2	149	100	26	30
Freelance Isn't Free	128	543	671	488	276
Commuter Benefits	9	3	1	3	4
Investigations Opened	531	872	1,004	715	515
Paid Safe and Sick Leave	392	285	284	196	218
Fair Workweek	10	93	83	34	31
Retail	2	29	42	16	15
Fast Food	8	64	41	18	16
Freelance Isn't Free	128	530	671	490	273
Commuter Benefits	9	2	1	1	2
Investigations Closed	427	882	899	560	777
Paid Safe and Sick Leave	319	386	255	194	237
Fair Workweek	1	48	83	32	38
Retail	0	19	31	18	21
Fast Food	1	29	52	14	17
Freelance Isn't Free	95	483	596	341	512
Commuter Benefits	10	1	2	0	2
Cases Filed	48	35	28	13	14
Paid Safe and Sick Leave	48	31	28	12	14
Fair Workweek	1	8	6	2	2
Retail	0	3	3	1	0
Fast Food	1	5	3	1	2
Commuter Benefits	0	1	0	0	0
Days to Resolution (All Investigations)	169	138	120	210	213
Paid Safe and Sick Leave	211	258	254	231	328
Fair Workweek	0	126	203	341	397
Retail	0	103	131	287	383
Fast Food	0	141	247	411	415
Freelance Isn't Free	39	37	62	194	158
Days to Resolution (Complaints)	172	131	111	209	213
Paid Safe and Sick Leave	216	250	226	229	328
Fair Workweek	0	126	203	341	397
Retail	0	103	131	287	383
Fast Food	0	141	247	411	415
Freelance Isn't Free	39	37	62	194	158

Notes: 1) Totals reflect all DCWP worker protection laws, including those not shown individually. If a complaint or enforcement action encompasses multiple laws, it is included in the statistics for each law. 2) A small number of complaints do not have a law identified. These are included in the total but not in the breakdown by law. A small number of Fair Workweek complaints do not have industry identified. These are included in the Fair Workweek total but not in the breakdown by Retail or Fast Food. Though not shown separately, totals for Fair Workweek include Utility Safety Worker, and Fast Food includes Fair Scheduling and Just Cause complaints or enforcement. 3) Cases Filed excludes prosecutions limited to procedural violations by the employer, such as failure to respond to document demands.



Statistics Continued

Table A6. Summary of Paid Safe and Sick Leave Enforcement, Restricted to Complaints and Enforcement Actions where Paid Safe and Sick Leave was the only DCWP Worker Protection Law Implicated, 2017-2021

	2017	2018	2019	2020	2021
Complaints Received	382	303	300	249	239
Investigations Opened	384	247	247	188	208
Investigations Closed	319	370	217	185	224
Settlement	189	232	140	99	101
Decision	2	6	2	1	2
Administrative Closure	151	132	75	86	120
Cases Filed	47	26	22	10	12
Restitution	\$2,067,339	\$1,705,279	\$1,612,953	\$430,842	\$2,832,464
Workers Receiving Restitution	6,147	6,250	5,575	744	7,687
Penalties	\$497,447	\$397,879	\$297,481	\$111,302	\$150,450

Notes: 1) Cases Filed excludes prosecutions limited to procedural violations by the employer, such as failure to respond to document demands.
2) Investigations are considered administratively closed if DCWP concludes that there is insufficient evidence to proceed with enforcement or if it consolidates multiple investigations into one non-investigative.

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Table A7. Paid Safe and Sick Leave Complaints Received, by Allegation, 2017-2021

	2017	2018	2019	2020	2021
Complaints Received	382	324	327	254	247
Did not pay for use	191	178	189	133	76
Did not provide notice	183	151	141	74	27
Failed to maintain adequate policy	194	73	153	133	45
Retaliated (includes threats)	114	106	138	59	55
Did not allow use	106	115	90	43	49
Required documentation	26	33	44	20	13
Did not provide correct accrual	20	18	19	11	10
Restricted use	5	35	93	47	20
Did not provide correct carryover	15	49	24	6	2
Required employee to find replacement	14	7	10	3	4
Interfered with use	0	20	44	40	6
Paid incorrect rate	7	12	13	3	2
Did not provide adequate notice	8	10	13	3	3
Required employee to make up time	11	7	4	2	0
Required or disclosed medical information	10	4	3	3	5
Required unreasonable notice	5	5	1	0	2
Did not allow use to care for family	0	4	12	3	2
Failed to maintain records	0	4	8	3	3
Paid late	1	2	1	1	4
Required use	1	2	0	0	0
Did not reinstate safe or sick time	1	3	1	0	1
Did not transfer accrual with job	2	1	1	1	1
Did not frontload correctly	1	2	0	0	0
Failed to provide reasonable accommodation	0	1	4	1	0
Required or disclosed safe leave information	0	0	0	0	1

Notes: Complaints may include multiple Paid Safe and Sick Leave allegations. Some complaint records may not indicate any specific allegation. These are included in Complaints Received but are not reflected under any allegation category.



Cumulative Worker Protection Restitution and Penalties (\$, in millions)



Note: This chart shows restitution and penalties resulting from DCWP enforcement. As the Agency mandate grew, restitution for workers grew.

Key Points and Takeaways from Enforcement Actions

- **Written Policy:** Ensure that your NYC Earned Safe and Sick Time policy is up-to-date.
- **Documentation:** Keep copies of all documentation, including:
 - Notice of Employee Rights
 - Current and past NYC Earned Safe and Sick Time policies
 - Payroll records that show the date and time of each instance of safe and sick leave and the amount paid for such leave
 - Payroll records that show the hours worked by each employee each week
 - Employment records that show the name, address, phone number, start/end date of employment, rate of pay, and whether the employee is exempt under the FLSA
- **Be Proactive:** Get Seyfarth involved early on in an audit/investigation.



Updates to New York New-Hire Notice and Posting Requirements

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Updates to New York New-Hire Notice and Posting Requirements

Notice of Electronic Monitoring

- Effective May 7, 2022, employers must give written notice to all employees at hiring if the employer engages in monitoring or intercepting, by any electronic device or system, any of an employee's:
 - Telephone conversations or transmissions.
 - Email or transmissions.
 - Internet access or usage.
- The law also requires employers to obtain the employees' signed acknowledgment of receipt.
- Applicable to all private employers within the state, regardless of size or entity type.
- Notice must also be provided more generally, in a “conspicuous place” viewable by all employees.



Updates to New York New-Hire Notice and Posting Requirements

Veterans' Benefits & Services Poster

- Effective January 1, 2023, all public and private New York State employers with more than 50 full-time employees are required to display the Veterans' Benefits & Services poster in a conspicuous place accessible to employees in the workplace.
 - Link to model poster can be found [here](#).



Updates to New York New-Hire Notice and Posting Requirements

How Do We Handle Notice and Posting Requirements in a Hybrid Environment?

- The U.S. Department of Labor (DOL) provided guidance from the Wage and Hour Division (WHD) on complying with its notice and posting requirements when employees are working remotely:
 - **Continuous Postings**
 - Several statutes and their corresponding regulations administered by WHD, such as the FLSA, and FMLA, require employers to “post and keep posted” or require the posting of a notice “at all times” and, thus do not permit employers to meet their notice obligations through a direct mailing or other single notice to employees.
 - If a statute and its regulations require a notice to be continuously posted at a worksite, in most cases, WHD will only consider electronic posting an acceptable substitute for the continuous posting requirement where (1) all of the employer’s employees exclusively work remotely, (2) all employees customarily receive information from the employer via electronic means, and (3) all employees have readily available access to the electronic posting at all times.



How Do We Handle Notice and Posting Requirements in a Hybrid Environment?

– Individual Notices

- Where particular statutes and regulations permit delivery of notices to individual employees, the notice requirements may be met via email delivery (or another similar method of electronic delivery), only if the employee customarily receives information from the employer electronically.
- This is consistent with WHD's existing regulations, which permit electronic delivery of required communications only where employees already regularly use such electronic communications.

Updates to New York New-Hire Notice and Posting Requirements

How Do We Handle Notice and Posting Requirements in a Hybrid Environment?

– Access

- If an employer seeks to meet a worksite posting requirement through electronic means, such as on an intranet site, internet website, or shared network drive or file system posting, the electronic notice must be as effective as a hard-copy posting.
- As a practical matter, a determination of whether affected individuals can readily see an electronic posting depends on the facts. For instance, the affected individuals must be capable of accessing the electronic posting without having to specifically request permission to view a file or access a computer.
- Consistent with its existing regulations, WHD will not consider electronic posting on a website or intranet to be an effective means of providing notice if an employer does not customarily post notices to affected employees or other affected individuals electronically.



New York Sexual Harassment Policy Update

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New York Sexual Harassment Policy Update

- On April 11, 2023, the New York State Department of Labor (“NYDOL”) released updated versions of its sexual harassment model policy and training materials.
 - An employer that does not adopt the model policy must ensure that the policy that they adopt meets or exceeds the minimum standards set forth by the NYDOL in its model policy.
 - New York employers must still provide employees at the time of hiring and annually during training with a copy of the policy.

New York Sexual Harassment Policy Update

Policy Revisions

- a detailed explanation of gender diversity including definitions of cisgender, transgender and non-binary persons.
- additions to the legal standard:
 - sexual harassment does not need to be severe or pervasive to be illegal; it can be any harassing behavior that rises above petty slights or trivial inconveniences;
 - whether conduct is considered petty or trivial will be viewed from the standpoint of a “reasonable victim of discrimination with the same protected characteristics.”;
 - intent “does not neutralize a harassment claim” and lack of intent to harass is not a defense.
- an updated, non-exhaustive list of examples of sexual harassment and retaliation; (repeated requests for dates, gift giving, and asking employees to take on traditionally gendered roles)
- a new emphasis on the remote workplace, stating that harassing behavior can occur in virtual meetings, on personal cell phone apps, and extends to virtual workspaces and can include having such materials visible in the background of one’s home during a virtual meeting.

New York Sexual Harassment Policy Update

Policy Revisions

- Additional language in the section regarding “Supervisory Responsibilities” instructing supervisors to be mindful of the impact that harassment and a subsequent investigation has on victims.
- Brand new section on bystander intervention, which explains “five standard methods of intervention” that can be used if employees witness harassment or discrimination: (These are already likely being covered by your annual training, but now must be included in your policy.)
 - A bystander can interrupt the harassment by engaging with the individual being harassed and distracting them from the harassing behavior;
 - A bystander who feels unsafe interrupting on their own can ask a third party to help intervene in the harassment;
 - A bystander can record or take notes on the harassment incident to benefit a future investigation;
 - A bystander might check in with the person who has been harassed after the incident, see how they are feeling and let them know the behavior was not ok; and
 - If a bystander feels safe, they can confront the harassers and name the behavior as inappropriate.

New York Sexual Harassment Policy Update

Policy Revisions

- Include information on the state's confidential hotline for complaints of workplace sexual harassment,
- The new model policy adds a "Conclusion" section stating that while the focus of the policy is on sexual harassment and gender discrimination, the New York State Human Rights Law protects against discrimination in other protected classes. We have always advised your policy in the past to include these categories.

New York Sexual Harassment Policy Update

- Link to the new model policy
 - The updated model policy can be found [here](#).
- The State's model training video has also been updated.
 - The new training video can be found [here](#).
 - The video meets all New York State training requirements except for being interactive; however, the New York Department of Labor provides employers with a method for meeting this requirement.



New Jersey Temporary Worker Bill of Rights

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The Highlights

Notice (Effective May 7, 2023)

- The name of the temporary laborer
- The name, address, and telephone number of: (a) the temporary help service firm, or the contact information of the firm's agent facilitating the placement; (b) its workers' compensation carrier; (c) the worksite employer or third-party client; and (d) the Department of Labor and Workforce Development
- The name and nature of the work to be performed as well as a description of the position and whether it will require specialized training/equipment
- The wages offered
- The name and address of the assigned worksite
- The terms of transportation/meals offered to the temporary laborer, if applicable, and cost of the same
- Length of Assignment
- Amount of Sick Leave



The Highlights *(continued)*

Rate of Pay/Equity

- The law provides that any temporary worker must be paid the same average rate of pay and equivalent benefits (or equivalent cash payment thereof) if the temporary worker performs the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.



The Highlights *(continued)*

Elimination of Certain Deductions

- The law provides that any temporary worker must be paid the same average rate of pay and equivalent benefits (or equivalent cash payment thereof) if the temporary worker performs the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

- Whenever a temporary help service firm agrees to send a person to work as a temporary laborer in a designated classification placement, the temporary help service firm shall provide the temporary laborer, at the time of dispatch, a statement, in writing in English and in the language identified by the employee as the employee's primary language, containing over a dozen points of information
- In the event of a change in the schedule, shift, or location of an assignment for a multi-day assignment of a temporary laborer in a designated classification placement, the temporary help service firm shall provide notice of the change not less than 48 hours in advance to the temporary laborer, when possible



What Kind of Jobs Are Covered?

- “Designated classification placement” means an assignment of a temporary laborer by a temporary help service firm to perform work in any of the following occupational categories as designated by the Bureau of Labor Statistics of the United States Department of Labor:
 - Other Protective Service Workers;
 - Food Preparation and Serving Related Occupations;
 - Building and Grounds Cleaning and Maintenance Occupations;
 - Personal Care and Service Occupations;
 - Construction Laborers;
 - Helpers, Construction Trades;
 - Installation, Maintenance, and Repair Occupations;
 - Production Occupations;
 - Transportation and Material Moving Occupations;
 - Any successor categories as the Bureau of Labor Statistics may designate.



Who is In? Who is Out?

Who is In?

- Security Guards
- Hairdressers, Hairstylists, and Cosmetologists
- Drivers/Sales Workers
- Cooks
- Dishwashers
- Construction Trades
- Bakers
- Butchers
- Machinists
- Welders

vs.

Who is Out (For Now)?

- Secretaries and Administrative Assistants
- Data Entry and Information Processing Workers
- Computer User Support Specialists
- Software Developers
- Librarians
- Financial Clerks



[The Temporary Worker Bill of Rights] is a bill that is limited in scope in terms of temporary workers to those folks that are low waged primarily industrial warehouse workers, this is not a bill for those that are viewing this that is your person filling in at the reception desk or the person filling in as an accountant during tax season.”

-Sen. Joseph Cryan on NJ Spotlight News



Standard Issues

A Law Like “All Other(s)”

- Personal Care and Service Workers, All Other (39-9099)
 - All personal care and service workers not listed separately.
- Production Workers, All Other (51-9199)
 - All production workers not listed separately. Excludes “Packers and Packagers, Hand” (53-7064).
- Material Moving Workers, All Other (53-7199)
 - All material moving workers not listed separately.



1

of 285



STANDARD OCCUPATIONAL CLASSIFICATION MANUAL

United States, 2018

285 Pages!

EXECUTIVE OFFICE OF THE PRESIDENT
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The Challenges of the New York Law

What the SOC Cautions Against

What the Law Says

reasons. ²“Designated classification placement” means an assignment of a temporary laborer by a temporary help service firm to perform work in any of the following occupational categories as designated by the Bureau of Labor Statistics of the United States Department of Labor: 33-90000 Other Protective Service Workers; 35-0000 Food Preparation and Serving Related Occupations; 37-0000 Building and Grounds Cleaning and Maintenance Occupations; 39-0000 Personal Care and Service Occupations; 47-2060 Construction Laborers; 47-30000 Helpers, Construction Trades; 49-0000 Installation, Maintenance, and Repair Occupations; 51-0000 Production Occupations; 53-0000 Transportation and Material Moving Occupations; or any successor categories as the Bureau of Labor Statistics may designate.²

- **Not Built For This:** The SOC was designed solely for statistical purposes.
 - Cautions against use in any administrative, regulatory, or tax program.
 - Under the SOC system, workers are classified into occupations based on their job duties, not their job titles.
 - When workers in a single job could be coded in more than one occupation, they should be coded in the occupation that requires the highest level of skill (alternatively, the most time)
- **It is Intentionally Vague:** If an occupation is not included as a distinct detailed occupation in the structure, it is classified in an appropriate “All Other” occupation. When workers in a single job could be coded in more than one occupation, they should be coded in the occupation that requires the highest level of skill. If there is no measurable difference in skill requirements, workers should be coded in the occupation in which they spend the most time.

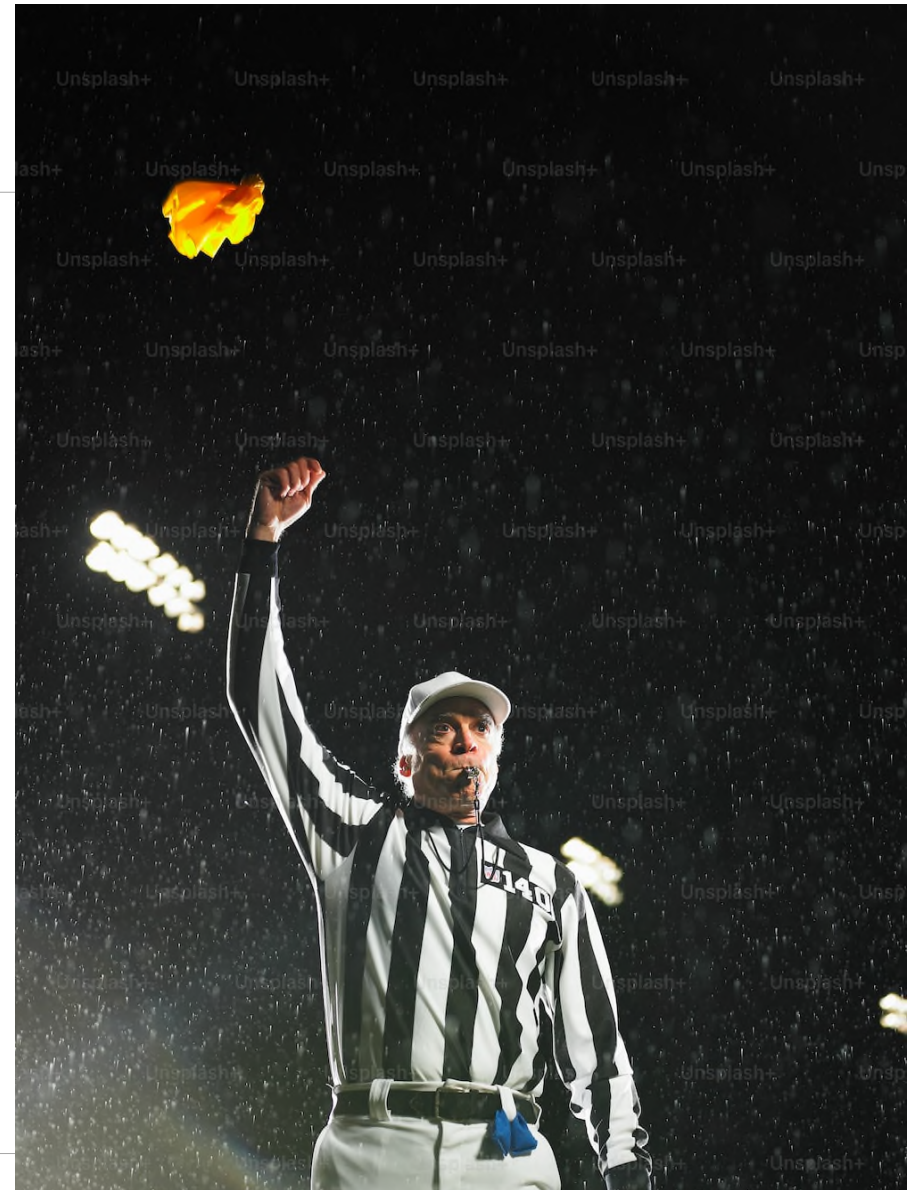
Context Driven Analysis Required

- Example: IT Worker
- (Covered) 49-2011 Computer, Automated Teller, and Office Machine Repairers:
 - Repair, maintain, or install computers, word processing systems.
- (Not Covered) 15-1232 Computer User Support Specialists:
 - Provide technical assistance to computer users. May provide assistance concerning the use of computer hardware and software, including printing, installation, word processing, electronic mail, and operating systems.



Penalties

- Joint Liability
 - Section 7 includes a joint liability provision. Section 7 covers interference with permanent placements, wage statement requirements, and pay equity provisions.
 - “If a **third-party client** leases or contracts with a temporary help service firm for the services of a temporary laborer in a designated classification requirement, the third-party client shall be, with the temporary help service firm, **jointly and severally responsible for any violation of this section.**”
 - Important to review contractual provisions and indemnification provisions.
 - Review job descriptions and tasks and ensure temporary workers are being paid appropriately.



**thank
you**