

# Fall 2021 New York Employment Law Update

*A Wild Ride Continues*

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# Topics

- ▶ Minimum Wage Increases
- ▶ Marijuana FAQs
- ▶ Workplace Safety Committees
- ▶ Vaccine Mandates



# NYS Minimum Wage 2022

Location	12/31/20	12/31/21
NYC - Large Employers (of 11 or more)	\$15.00	<b>\$15.00</b>
NYC - Small Employers (10 or less)	\$15.00	<b>\$15.00</b>
Long Island & Westchester	\$14.00	<b>\$15.00*</b>
Remainder of New York State	\$12.50	<b>\$13.20*</b>

\*Beginning 12/31/21

# NYS Overtime Exemption Salary Threshold 2022

Location	12/31/20	12/31/21
NYC - Large Employers (of 11 or more)	\$1,125	\$1,125
NYC - Small Employers (10 or less)	\$1,125	\$1,125
Long Island & Westchester	\$1,050	\$1,125*
Remainder of New York State	\$937.50	\$990*

\*Beginning 12/31/21

# New York MHRT

- ▶ Signed March 31, 2021
- ▶ Legalized “recreational” marijuana use (with some limits)
- ▶ Protections for employees who use marijuana outside of work



# Lawful Activities (21+)

- ▶ Possessing, displaying, purchasing, obtaining, or transporting up to 3 ounces of cannabis and up to 24 grams of concentrated cannabis.
- ▶ Transferring, without compensation, to a person 21 years of age or older, up to 3 ounces of cannabis and up to 24 grams of concentrated cannabis.
- ▶ Using, smoking, ingesting, or consuming cannabis or concentrated cannabis (unless otherwise prohibited by state law).
- ▶ Possessing, using, displaying, purchasing, manufacturing, transporting, or giving to any person 21 years of age or older cannabis paraphernalia or concentrated cannabis paraphernalia.
- ▶ Assisting another person who is 21 years of age or older, or allowing property to be used, in any lawful acts listed above.

# Employee Protections

- ▶ NY Labor Law Section 201-d protects employees' off-duty use of lawful consumable products (e.g., alcohol and tobacco)
- ▶ Now also specifically includes use of “cannabis in accordance with state law”
- ▶ Protects use (a) outside of work hours, (b) off the employer's premise, and (c) without the use of the employer's equipment or other property



# Section 201-d Exceptions

- ▶ The employer's actions were required by state or federal law.
- ▶ The employee is impaired by the use of cannabis.
- ▶ The employer's actions would require such employer to commit any act that would cause the employer to be in violation of federal law or would result in the loss of a federal contract or federal funding.

# Impairment

Employee manifests specific articulable symptoms that:

- decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or
- interfere with an employer's obligations to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety and health law

# NYS DOL FAQs

- ▶ Workplace Use
- ▶ Impairment
- ▶ Drug Testing



# Specific Articulate Symptoms

- ▶ Specific articulable symptoms are “objectively observable indications”
- ▶ Caution that such symptoms could alternatively indicate a protected disability
- ▶ Example: operation of heavy machinery in unsafe and reckless manner
- ▶ Observable signs of cannabis use that don’t indicate impairment can’t be relied on as “specific articulable symptoms” of impairment

# Drug Testing

- ▶ Cannot be used to demonstrate impairment
- ▶ Employers cannot test for cannabis unless an exception to Labor Law 201-d applies
- ▶ Example: drug testing for drivers where required by state or federal law

# HERO Act

- ▶ Airborne Infectious Disease Exposure Prevention Plans in effect through at least October 31
- ▶ Doesn't cover employers subject to OSHA regulations
- ▶ Workplace Safety Committee provisions take effect November 1

# Workplace Safety Committees

- ▶ NY Labor Law § 27-d
- ▶ Applies to private employers with at least 10 employees in New York
- ▶ Covered employers must “permit” employees “to establish and administer a joint labor-management workplace safety committee”
- ▶ Not more than 1 WSC per worksite

# WSC Composition

- ▶ Comprised of both employee and employer designees; at least 2/3 non-supervisory
- ▶ Employee designees selected by and among non-supervisory employees
- ▶ Co-chaired by representative of the employer and of non-supervisory employees
- ▶ “Where there is a collective bargaining agreement in place, the [union] shall be responsible for the selection of employees to serve as members of the committee.”





# Committee Activities

- ▶ Raise health and safety concerns, hazards, complaints, and violations to which the employer must respond
- ▶ Review any policy put in place in the workplace required by the NY Labor Law relating to occupational safety and health and provide feedback to such policy in a manner consistent with any provision of law
- ▶ Review the adoption of any policy in the workplace in response to any health or safety law, ordinance, rule, regulation, executive order, or other related directive
- ▶ Participate in any site visit by any governmental entity responsible for enforcing safety and health standards
- ▶ Review any report filed by the employer related to the health and safety of the workplace
- ▶ Regularly schedule a meeting during work hours at least once a quarter that shall last no longer than two hours

# Employee Protections

- ▶ “No employer shall interfere with the selection of employees who shall serve on such committee or who serve as the workplace safety designee or with such employee’s performance of the duties authorized under this section.”
- ▶ “Any employee who participates in the activities or establishment of a workplace safety committee shall not be subject to retaliation for any actions taken pursuant to their participation.”

# Guidance and Regulations

- ▶ DOL issued FAQs in September
- ▶ Originally suggested covered employers would be required to establish workplace safety committees, but now says “allow”
- ▶ Indicates DOL will provide guidance on WSCs before Nov. 1<sup>st</sup>
- ▶ Check <https://dol.ny.gov/ny-hero-act>



# President's Action Plan

- ▶ All employers with 100+ employees must require vaccination or weekly testing
- ▶ Mandatory vaccination for health care workers
- ▶ Mandatory vaccination for federal workers and contractors
- ▶ Paid time off to get vaccinated

# Federal Contractors

- ▶ Executive Order applies to most federal contractors (not grantees)
- ▶ Triggered by new contract, including extensions, renewals, and exercise of option beginning as early as October 15, 2021
- ▶ Vaccination deadline: December 8, 2021
- ▶ Safer Federal Workforce Taskforce can modify requirements during life of contracts

# Covered Employees

- ▶ Applies to employees of federal contractors and subcontractors (unless subcontractor is only providing products)
- ▶ All employees working in connection with a covered contract or at a covered workplace
- ▶ Disability and religious accommodations are available

“The Department of Labor’s Occupational Safety and Health Administration (OSHA) is developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. OSHA will issue an Emergency Temporary Standard (ETS) to implement this requirement. This requirement will impact over 80 million workers in private sector businesses with 100+ employees.”

Source: <https://www.whitehouse.gov/covidplan/>



# Status of OSHA Rule

- ▶ Submitted to White House OMB on Oct. 12
- ▶ Litigation planned to block enforcement
- ▶ Business groups asking for delay until 2022



# Religious Accommodations

- ▶ Employees and applicants must ask for due to a sincerely held religious belief, practice, or observance
- ▶ Title VII requires employers to consider requests for religious accommodations but does not protect social, political, or economic views, or personal preferences of employees who seek exceptions to a COVID-19 vaccination requirement
- ▶ Employers that demonstrate “undue hardship” are not required to accommodate an employee’s request for a religious accommodation

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# Questions?



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