

# Spring 2019 Employment Law Update

*Should Your Business Be Concerned?*

Scott P. Horton

Horton Law PLLC

**HORTON**  
Management Law



# Topic Overview

---

## » Federal

- EEO-1 Filing
- Proposed FLSA Regulations

## » New York State

- GENDA
- Paid Voting Leave
- Call-in Pay
- Bereavement Leave
- Local Laws

**EEO-1**

# EEO-1 Filing

---

- Employers with 100+ employees (and some smaller federal contractors) must file EEO-1 reports annually
- Provides counts of employees based on race, ethnicity, gender, and occupational category
- EEOC modified EEO-1 requirements in 2016 to include wage and hours data to begin in 2018
- In 2017, OMB pre-emptively suspended pay data collection pending further review based on burden on employers and privacy concerns
- 2017 and 2018 forms have not included pay data, BUT . . . .

# EEO-1 Filing

---

- Federal judge ruled on March 4, 2019, that new EEO-1 form (with pay data) “shall be in effect”
- 2018 filing period is now open (until 5/31/19), but EEOC hasn’t made new form available yet
- Uncertainty whether and when employers will have to file 2018 pay data
- EEOC has suggested it could collect the data, through a third party, by 9/30/19
- On 4/17/19, judge gave parties until 4/22/19 to submit further papers
- STAY TUNED!

# **Proposed Fair Labor Standards Act Regulations**

# Proposed FLSA Joint Employer Rules

- 4-factor balancing test to replace “not completely disassociated” standard
- Whether the proposed joint employer actually exercises the power to:
  - Hire or fire the employee
  - Supervise and control the employee’s work schedules or conditions of employment
  - Determine the employee’s rate and method of payment; and
  - Maintain the employee’s employment records.
- Comments due by 6/10/19

# Proposed Changes to Overtime Calculations

- U.S. DOL has proposed changes to definition of “regular rate of pay”
- Basis for calculating overtime rate
- Proposal would expressly remove some items from calculation, reducing overtime rates in some cases
- Clarifies some issues regarding paid meal periods, “call back” pay, etc.
- Comments due by 5/28/19



# Proposed Changes to Overtime Calculations

---

Proposed rule would exclude:

- the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;
- payments for unused paid leave, including paid sick leave;
- reimbursed expenses, even if not incurred “solely” for the employer’s benefit;
- reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and that satisfy other regulatory requirements;
- discretionary bonuses;
- benefit plans, including accident, unemployment, and legal services; and
- tuition programs, such as reimbursement programs or repayment of educational debt.

# Proposed FLSA Salary Level Change

---

## » Current

- \$455/wk. (\$23,660 annual)
- Highly compensated employee exemption: \$100,000 annual
- No automatic adjustments

## » Proposed

- \$679/wk. (\$35,308 annual)
- Highly compensated employee exemption: \$147,414 annual
- No automatic adjustments, but plan for DOL to review every 4 years

# Proposed FLSA Salary Level Change

---

## »» 2019 Proposal

- \$679/wk. (\$35,308 annual)
- Highly compensated employee exemption: \$147,414 annual
- No automatic adjustments, but plan for DOL to review every 4 years

## »» 2016 Proposal

- \$913/wk. (\$47,476 annual)
- Highly compensated employee exemption: \$134,004 annual
- Automatic adjustments every 3 years

# Proposed FLSA Exemption Rules

- No proposed changes to duties requirements
- Comments due by 5/21/19
- Litigation over the 2016 rule technically still pending
- DOL likely to finalize new rule this year
- Effective date uncertain, but optimism that DOL will give employers ample notice and convenient transition date (1/1/20?)

# NY Impact of Proposed FLSA Exemption Change

- Less direct impact on private (non-government) employers
- Most New York exemptions already have higher salary than federal proposal
- Technically would affect professional exemption in New York (though many already exceed proposed salary level)
- Most NY public employees subject only to FLSA, not State overtime requirements, so their exemptions may be affected

**New York State**

**What's new . . .**

# New York GENDA

---

- Gender Expression Non-Discrimination Act
- Adds “gender identity or expression” to categories protected from employment discrimination
- Moves transgender protections from regulations to statute
- Creates some arguable ambiguities in laws regarding sexual harassment
- Took effect 2/24/19
- Update anti-harassment/discrimination policies

# NY Paid Voting Leave

---



- Elections laws changed in 2019-20 State budget
- Expands employees' right to take time off from work to vote
- Applies to all employers and employees who are registered voters
- Paid leave!



# Paid Voting Leave

Changes are effective immediately

## Old Law

- Employees could take time off to vote *if they did not have 4 consecutive hours before or after work to vote*
- Eligible employees were entitled to sufficient time off to enable them to vote, *with up to 2 hours paid*

## New Law

- 4-hour criteria eliminated
- Registered voters can take as much time off as necessary to enable them to vote
- Employers must pay for *up to 3 hours*
- Time off at beginning or end of shift, unless both sides agree otherwise

# Paid Voting Leave

## » Employer Notice

Must post notice of employee rights at least 10 days before every election.

## » Employee Notice

Must tell employer at least 2 days in advance that they need time off to vote.

## » Which Elections?

All federal, state, and local public elections being held in New York

# **New York State**

**What's not . . . yet.**

# NY Call-in Pay Rules

---

- NYSDOL proposed rules in both 2017 & 2018 to expand current requirement significantly
- Dropped the proposal at the end of February 2019
- Indicated possible legislative action to address concerns of unpredictable employee scheduling



# Call-in Pay

## » Current Rule (Miscellaneous Wage Order)

“An employee who by request or permission of the employer reports to work on any day shall be paid for at least four hours, or the number of hours of the regularly scheduled shift, whichever is less, at the basic minimum hourly wage.”

# Call-in Pay

---

## » 2018 Proposed Rule

### (a) Call-in pay shall be provided as set forth below. . . .

(1) Reporting to work. An employee who by request or permission of the employer reports for work on any [day] shift shall be paid for at least four hours[, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage] of call-in pay.

(2) Unscheduled shift. An employee who by request or permission of the employer reports to work for any shift for hours that have not been scheduled at least 14 days in advance of the shift shall be paid an additional two hours of call-in pay. Where an employer provides a weekly schedule, 14-day period referenced in this section may be measured from the last day of the schedule.

(3) Cancelled shift. An employee whose shift is cancelled by the employer shall be paid for at least two hours of call-in pay, if the shift is cancelled within 14 days, or for at least four hours of call-in pay if the shift is cancelled within 72 hours, in advance of the scheduled start of such shift.

(4) On-call. An employee who is required by the employer to be available to report to work for any shift shall be paid for at least four hours of call-in pay.

(5) Call for schedule. An employee who is required by the employer to be in contact with the employer within 72 hours of start of the shift to confirm whether to report to work shall be paid for at least four hours of call-in pay.

(b) Calculation of call-in pay. Call-in pay shall be calculated as follows.

(1) Actual attendance. Payments for time of actual attendance shall be calculated at the employee's regular rate or overtime rate of pay, whichever is applicable, minus any allowances permitted under this Part.

(2) Minimum rate. Payments for other hours of call-in pay shall be calculated at the basic minimum hourly rate with no allowances. Such payments are not payments for time worked or work performed and need not be included in the regular rate for purposes of calculating overtime pay.

(3) Offsets. Call-in pay shall not be offset by the required use of leave time, or by payments in excess of those required under this Part.

(4) Shorter work days. The four hours of call-in pay for reporting to work and for cancelled shifts under paragraphs (1) and (3) of subdivision (a) of this section may be reduced to the lesser number of hours that the employee is scheduled to work and normally works, for that shift.

# Call-in Pay

---

## » 2018 Proposed Rule (continued)

(c) Applicability. This section applies to all employees, except as provided below.

(1) This section shall not apply to employees who are covered by a valid collective bargaining agreement that expressly provides for call-in pay.

(2) Paragraphs (2) through (5) of subdivision (a) of this section shall not apply to employees during work weeks when their weekly wages exceed 40 times the applicable basic hourly minimum wage rate.

(3) In addition, paragraphs (2) through (5) of subdivision (a) of this section shall also not apply to employees whose duties are directly dependent on weather conditions, or to employees whose duties are necessary to protect the health or safety of the public or any person, or to employees whose assignments are subject to work orders, or cancellations thereof; provided, however, that such employees also receive weekly compensation that exceeds the number of compensable hours worked times the applicable basic minimum wage rate, with no allowances.

(4) Paragraph (2) of subdivision (a) of this section (unscheduled shift) shall not apply to:

(i) any new employee during the first two weeks of employment; or (ii) any employee who volunteers to cover a new shift or a previously scheduled shift. For purposes of this section, the term "new shift" shall mean the first two weeks of an additional shift that results in a net increase in staffing at a single workplace during the period of time covered by such shift; the term "previously scheduled shift" shall mean a shift that would not have been subject to unscheduled shift call-in pay if worked by the employee who was originally assigned to work that shift; and the term "volunteers" shall mean that the employee may refuse to cover the new or previously scheduled shift.

(5) Paragraphs (2) and (3) of subdivision (a) of this section (unscheduled shift and cancelled shift) shall not apply when an employer responds to weather or other travel advisories by offering employees the option to voluntarily reduce or increase their scheduled hours, so that employees may stay home, arrive early, arrive late, depart early, depart late, or any combination thereof, without call-in pay for unscheduled or cancelled shifts.

(6) In addition, paragraph (3) of subdivision (a) of this section (cancelled shift) shall also not apply when an employer cancels a shift at the employee's request for time off, or when operations at the workplace cannot begin or continue due to an act of God or other cause not within the employer's control, including, but not limited to, a state of emergency declared by federal, state, or local government.

(d) Safe Harbor. For purposes of paragraph (4) of subdivision (c) of this section, there shall be a rebuttable presumption that an employee has volunteered to cover a new or previously scheduled shift if the employer provides a written good faith estimate of hours to all employees upon hiring, or after the effective date of this section for previously hired employees, which may be amended at the employee's request or upon two weeks' notice by the employer, and if the request to cover a new or previously scheduled shift is either: (i) made by the employee whose shift would be covered; or (ii) made by the employer in a written communication to a group of employees requesting a volunteer from among the group and identifying a reasonable deadline for responses. If no employee volunteers prior to the deadline, the employer may assign an employee to cover the shift without the additional call-in pay required for unscheduled shifts.

# Call-in Pay

---

## **New York Department of Labor:**

“Based on extensive feedback in the subsequent comment period, it was clear the Department's initial intent to support workers while being fair to businesses was viewed as a one-size-fits-all approach that was not appropriate for every industry. Comments on the revised rules, issued in late 2018, indicated that significant issues remained, and the revisions did not achieve the balance of certainty and flexibility for either workers or businesses.

At this time, due to the constraints of the regulatory process, the best course of action is to let this process expire and re-evaluate in the future, likely in concert with the Legislature, which would have a broader authority and better legal standing than Department of Labor regulations alone to balance the various needs of workers, businesses and industries.”

Source: <https://www.labor.ny.gov/workerprotection/laborstandards/scheduling-regulations.shtm>



# NY Bereavement Leave

---

- NY Legislature approved addition of bereavement leave to Paid Family Leave in June 2018
- Gov. Cuomo vetoed the bill in December
- Would have allowed up to 10 weeks of bereavement leave (12 beginning 2021) to be taken each year in any increments at any time
- Amendment was totally impractical as passed
- Governor suggested alternative approaches would be considered this year

# **New York Local Laws**

# Local Laws

---

## » NYC Sexual Harassment Training

New York City employers with at least 15 employees are required to conduct sexual harassment training for all employees each calendar year.

Effective 4/1/19

## » NYC Lactation Rooms

NYC employers with 15 or more employees must provide lactating employees with reasonable unpaid or paid break time and a private space to express milk.

Effective 3/18/19

## » Westchester Earned Sick Leave

Westchester County private employers with at least 5 employees must provide paid sick leave; other employers must at least provide unpaid sick leave.

Effective 4/10/19

## » Suffolk Salary History Ban

Suffolk County employers with at least 4 employees may not ask about or rely on the salary history of prospective employees.

Effective 6/30/19

# Keep Watching

---

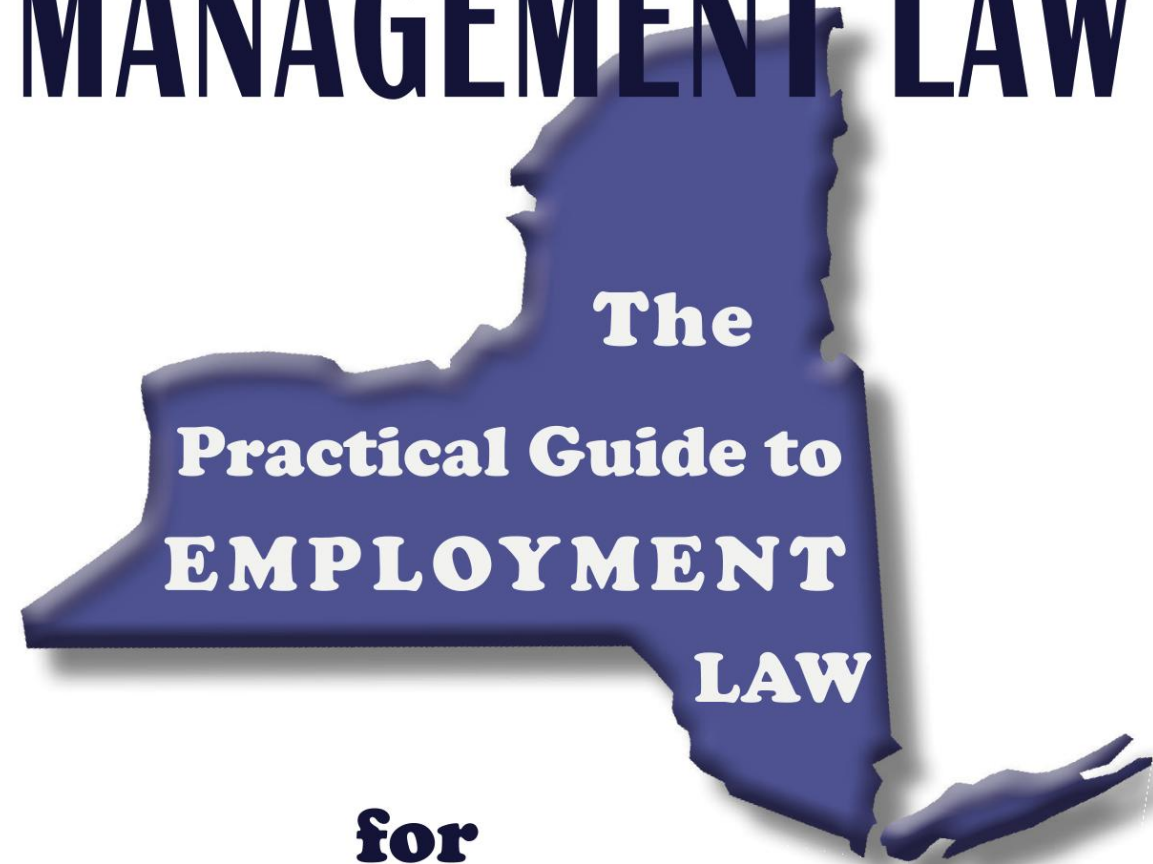
» Paid Sick Leave

» Paid FMLA

» Equal Pay Issues



# NEW YORK MANAGEMENT LAW



**for  
Business Owners  
and Managers**

**SCOTT HORTON**

**Available Through  
Online Booksellers**

## Learn more about:

- ✓ Avoiding common management missteps
- ✓ Paying workers properly
- ✓ Dealing with unions
- ✓ Reducing workplace harassment
- ✓ MUCH MORE!



**Thanks for your time!**



**Questions?**

# Spring 2019 Employment Law Update

*Should Your Business Be Concerned?*

---

Scott P. Horton, Esq.  
Horton Law PLLC  
4955 Chestnut Ridge Rd., Suite 203  
Orchard Park, New York 14127

scott@hortonpllc.com  
(716) 508-7748  
HortonPLLC.com

The logo for Horton Law PLLC is a large, white, semi-circular shape on a dark blue background, resembling a stylized 'H' or a partial circle. It is positioned between the contact information on the left and the firm name on the right.

**HORTON**  
Management Law