

**MFY LEGAL SERVICES, INC.**

# **Protecting Workers' Right to Be Paid**

**A Handbook for Advocates**



Produced by  
MFY Legal Services, Inc.'s Workplace Justice Project  
and Make The Road By Walking

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# 1 What is the Legal Landscape?

Community and legal advocates throughout New York State meet countless workers each week who face an overwhelming set of injustices at work. Strategizing about how to attack the problems requires understanding what the workers' legal rights are, whether enforcing those rights is feasible, and what would it take – beyond merely enforcing existing rights – to bring justice to the workplace.

This broad agenda requires tools to analyze the countless examples of mistreatment workers face every day. What, for example, would you tell the following workers?

- ◆ A worker employed at a factory three years ago was forced to work off the clock and was never paid overtime. He wants to know how much he is owed and whether he can still recover his unpaid wages. He was paid cash, so he has no way of proving how much he worked or was paid. Plus, he is undocumented and tells you that his boss repeatedly threatened to report him to immigration authorities after he complained about his working conditions. He is in contact with five of the former co-workers, but they too are undocumented and are frightened to take any action. What should he do?
- ◆ Another worker complained to her boss about not receiving overtime pay for the 20 hours of overtime she worked each week. The employer said that she would have to give him a social security number in order for him to pay her. He also said he would have to cut her weekly hours to 50 per week in order to be able to afford to pay her overtime. How do you advise her?
- ◆ A day laborer was never paid his last week of work on a construction job. For the three other weeks that he worked, he was promised \$100 a day for eight hours of work, six days per week. But he ended up working ten hours per day, seven days per week and received \$700 for each of the other week that he worked and was paid. The only information about his former employer the worker has is the license plate number of the contractor, the contractor's first name, and the address where he did the work. What can the worker do?

Worker advocates are all too familiar with stories like these that illustrate the endemic problems of non-payment and underpayment of wages, especially for immigrant workers and especially in certain industries.

This Handbook is designed to provide advocates with practical tools for analyzing the injustices workers face, determining what workers' legal rights are, and strategizing about how best to enforce those rights. The Handbook will focus primarily on workers' rights to be paid, with reference to other rights throughout. It provides advocates with concrete tips for analyzing whether a worker has a potential case and ideas for how best to proceed. It is important to note, however, that many of the law's requirements are very technical and fact-specific. Thus, this Handbook does not and cannot provide actual legal advice to advocates or workers. Advocates are encouraged to seek the advice of legal advocates when confronted with particular questions or scenarios.

## What Rights Are Protected by Law?

Before getting into specifics, it is perhaps best to start with an overview of what rights the laws governing the workplace in New York State actually protect. Workers – especially foreign-born workers – often think they have greater legal rights than they in fact do. There is often a gap between what fairness demands and what the law protects. Consider the following scenarios:

- ◆ A woman works in a doctor's office and takes the vacation week she was promised. When she returns from vacation, her boss is angry because the office was busy and he was short-staffed. He fires the worker when she defends herself by pointing out that he had approved her vacation. Is this fair? Is it legal?
- ◆ After fifteen years on the job, a worker shows up one Friday morning to find that he has been laid off with no warning and no severance. Fair? Legal?
- ◆ A garment worker is required to work twelve-hour days Saturday and Sunday, in addition to normal 10-hour weekday shifts, to finish an order. His employer pays him overtime for the weekend work. But the worker complains, saying he should get double time for the weekend work. The boss fires him when the order is finished, because the worker has a bad attitude. Fair? Legal?

Probably everyone would agree that none of the employers in the above scenarios acted fairly towards their workers. But, based on the few facts given, there is nothing obviously illegal about the employers' conduct. These scenarios capture some common misperceptions about workers' legal rights:

**No legal guarantee of job security.** In the United States, the general rule is what is called "at-will" employment. This means that an employer may discharge her employee "for good cause, bad cause, or no cause at all. At-will employment is based on a false equation that just as the employer may fire the worker at any time, the worker is also free to leave her job at anytime. The doctrine is unfair; if one day your boss is in a bad mood and fires you, even if you have worked there for twenty years, there is not much you can do about it.

Laws against discrimination provide the main limits on this unfair, but ultimately lawful power. In New York, an employer cannot fire you because of your sex, age, race or ethnicity, national origin, disability, or sexual orientation.

**No legal guarantee of due process on the job.** Flowing from the rule of at-will employment, workers have basically no rights to due process on the job. What this means is that an employer can order you to work weekends, stay late, switch to a worksite that is far away, demote you, or give you more work than you can complete in your shift and there is very little you can do about it through legal means. As long as your employer paid you the wages required by law, you have no real protection from being fired if you complain.

**No legal guarantee of common decency on the job.** An employer doesn't violate the law, generally speaking, by being lousy and nasty. Workers frequently complain about the treatment from supervisors single them out for mistreatment for no apparent reason. But again, unless there is some illegal discriminatory motive, the law does nothing to require that a boss treat you humanely on the job.

**No legal guarantee of meaningful benefits.** Many workers mistakenly believe that after some period of time on the job, workers have the right to vacation or sick time, severance, or other benefits. That, generally, is not the case. You have no legal right to paid vacation or paid sick time and no legal right to severance.<sup>1</sup> If, for example, your employer provides paid vacation, nothing prevents the employer from firing you for actually taking your vacation. Notably, however, if the boss has promised you benefits, there are rules that protect you if the boss tries to change his mind.

So, after that fairly bleak overview, what are the basic workplace rights of workers in New York State?

**Right to be paid.** Most basically, workers have the right to be paid for the work they perform. This typically includes the right to a basic minimum wage, overtime pay when they work more than 40 hours in a week, and the right to receive that pay generally every two weeks, if not more frequently.<sup>2</sup>

With their pay, workers are also entitled to receive a statement that indicates hours they worked, the rate paid, what taxes were withheld, and whether any deductions from pay were made. These rights do not vary based on whether workers receive payment by check or cash.

**Right to be free from discrimination.** As noted above, the main limit on the boss' otherwise unbridled power is that the boss cannot discriminate against you for reasons including your race, sex, age, disability, national origin, sexual orientation, and other limited categories.

**Right to a safe workplace.** Various federal, state, and local laws require that employers maintain a safe workplace for their workers. Specific laws often regulate particular hazards – such as rules governing working with asbestos. Also, workers who are injured on the job are generally entitled to workers compensation, which covers the cost of their medical bills and provides them up to two-thirds of the time workers cannot work because of a job-related injury.

**Right to organize to improve working conditions.** Federal law protects workers who join together with their co-workers to demand improved conditions and form or support a union.<sup>3</sup>

**Rights of undocumented immigrant workers.** As a general matter, workplace protections in New York State apply to all workers no matter their immigration status. Undocumented immigrants have the same right as any other worker to receive the minimum wage and overtime, to be free from discrimination in the workplace, and to work in a safe place. They are also protected when they organize to improve their conditions. The main difference in the protections afforded undocumented as opposed to documented workers is that courts will generally not order employers to re-hire workers who were illegally fired if those workers do not have work authorization.

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<sup>1</sup> The federal Family Medical Leave Act (“FMLA”) provide twelve weeks of unpaid sick time to employees with serious health problems, or to care for close family members with serious health problems. However, that law covers only employers with 50 employees and workers who have been on the job at least a year. See 29 U.S.C. §§ 2611(2)(A)(i) and 4)(A)(i), 2612(a) and (c).

<sup>2</sup> These rights are guaranteed under state and federal law. In addition, state law provides that manual laborers must be paid once a week and other workers paid once every two weeks. See New York Labor Law §§ 191(a)(i), (d). Additionally, in *Rogers v. City of Troy*, the Second Circuit reaffirmed that federal law also requires prompt payment of wages. 148 F.3d 52 (2d Cir. 1998).

<sup>3</sup> National Labor Relations Act, “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” 29 U.S.C. § 157.

## Sources of Rights

A series of federal, state, and local laws guarantee the rights outlined above. For most of these laws, there is an administrative agency that is charged with enforcing the laws and passing regulations that further explain the laws. The agency can bring actions against employers to enforce the laws. In addition, most of the laws provide what is called a “private right of action” permitting employees whose rights have been violated to sue their employer directly in court.

Below is a chart that identifies the primary federal and state laws that govern the workplace. The rest of the Handbook will explain which workers are covered and what rights the laws actually protect.

<b>Guaranteed Right</b>	<b>Federal Law</b>	<b>Federal Agency</b>	<b>State Law</b>	<b>State Agency</b>
<b>Minimum wage and overtime</b>	Fair Labor Standards Act (“FLSA”)	United States Department of Labor	New York Labor Law	New York State Department of Labor
<b>Safe workplace</b>	Occupational Safety and Health Act (“OSHA”)	Occupational Safety and Health Administration	New York Workers’ Compensation Law	New York State Workers’ Compensation Board
<b>Right to organize and unionize</b>	National Labor Relations Act (“NLRA”)	National Labor Relations Board (“NLRB”)	None	None
<b>Freedom from discrimination</b>	Title VII of the Civil Rights Act, Americans with Disabilities Act (“ADA”).	Equal Employment Opportunity Commission (“EEOC”)	New York State and City Human Rights Laws	New York State Division of Human Rights, New York City Commission on Human Rights

The right to the minimum wage and overtime is provided in what are typically referred to as “wage and hour” laws. The federal rights are found in the Fair Labor Standards Act (“FLSA,” more or less pronounced “fuh-lis-ah”), which was passed in 1938. State rights are found in the New York Labor Law and special protections for workers in New York City are found in the City Administrative Code. Rights to be free from discrimination similarly come from a series of federal, state and local statutes. The phrase “employment law” generally refers to wage and hour statutes as well as the various anti-discrimination laws.

The federal National Labor Relations Act (“NLRA”) provides the rights for workers to organize collectively to improve their working conditions. Typically, workers exercise these rights by forming a union. The NLRA became law in 1935. “Labor law,” as compared to “employment law,” is the phrase used to refer to the laws that govern workers’ rights to unionize.

The review above paints an interesting picture of government regulation of workers’ day to day working lives. On the one hand, the law sets a very basic floor for workers’ rights: the right to a basic salary and

safe workplace. On the other, the law protects workers who want to organize collectively to achieve anything above that basic floor. This arrangement was set during the New Deal in the 1930s. The American government consciously decided that it would involve itself minimally in setting the actual terms or conditions of any job and would leave it to workers, through their unions, and management to bargain to work out the rest of the details.

This regime made some sense in the 1930s, when the American labor movement was on the upswing. But the subsequent decline of unions means that most workers are without any institutionalized voice on the job, and thus have little hope of winning improvements above the floor set by law. On the other hand, significant structural economic changes, including the decline in heavy industry and the rise of the non-union service sector, have led to the growth of industries and sectors where noncompliance with even the most basic provisions of wage and hour law are the general practice. It is this flagrant abuse that many low-wage workers face every day.

The rest of this Handbook focuses on analyzing whether and how workers' basic legal rights are being violated and what options workers have for enforcing those rights. Given how paltry workers' substantive rights are under the law, this is an inherently limited and frustrating exercise; a purely legal-rights lens provides only a partial insight into the power and possibility of worker organizing. The most promising organizing efforts look past the bare minimums guaranteed by law and instead focus on capturing, fostering, and building workers' sense of outrage at their mistreatment, regardless of whether it is technically illegal. It is this momentum that can lead to victories for workers that go far beyond simply enforcing the minimums guaranteed by law. Our hope is that this Handbook will be but one tool that advocates use when strategizing and organizing with workers about what justice demands.



# 2 What Laws Apply

So, you think a worker might be owed money, but where do you begin?

Your first task is to figure out what violations have occurred and, based on that, what money the worker is owed. An employer may owe more money than is apparent at first glance. The answers largely depend on which laws apply to the situation. Federal law? State laws? Special state and city laws?

The answers to these questions will tell you how the employer violated the law and thus how to calculate wages, what rate to use, and what “extras” the worker might get – such as interest on unpaid wages, penalties, or a higher base-wage rate. Typically, your goal is to prove that FLSA, the federal wage and hour law applies because you may then seek “double damages” – the wages owed, plus the same amount as damages. Note, a worker is generally covered by federal, state and local laws – it’s usually not an either/or proposition.

Rather than start with a checklist comparing federal, state and city laws, this chapter begins with a series of questions. Deciding which laws apply is not a science: it’s a question of looking at the facts and figuring out what arguments you can make to get your client the most money. Remember, you don’t have to be 100% certain that federal law applies in order to demand federal damages from an employer, but you must have a good faith basis for making the argument. The questions below will help you assess what, in good faith, you can demand. The questions will also help you structure your interview with the worker and ensure that you get all the relevant information so you can start calculating the wages owed.

To decide what laws apply, you’ll generally want to explore three general areas: the size of the employer; the worker and the nature of her work; and the time period involved.

## The Employer

### Employer coverage under federal law

As a basic proposition, state law covers all employers.<sup>4</sup> The real trick in New York State is determining whether the employer is large enough to be covered directly under FLSA. This is because, under FLSA, workers are entitled to damages for unpaid minimum wage and overtime in an amount equal to their unpaid wages, or “double damages,” unless employer can show that he or she has made a “good faith” attempt to comply with the law, which we will get to later.

As a general matter, federal law applies only to those employers who generate \$500,000 a year, before taxes, from sales or services. The money must be made from activities affecting interstate commerce and at least some of the employer’s employees must be directly engaged in interstate commerce. This is called

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<sup>4</sup> Note, however, that there are special rules for non-profit employers in New York state. See 12 NYCRR § 143.0-8.



“enterprise coverage” under federal law.<sup>5</sup> (Even if the employer isn’t directly covered under federal law, the employee might still be – this kind of “individual coverage” is discussed below.)

Interstate commerce is business that involves crossing state lines. These days, most employers are no longer local – they bring raw materials in from out of state, they make credit card transactions that cross state lines, or they produce goods that leave the state. It is difficult to find a business that operates only within the boundaries of New York. It is usually safe to assume, in most cases, that the employer’s business involves interstate commerce.

### **\$500,000 – the magic number**

For federal law to apply based on employer coverage, the individual or entity must generate at least \$500,000 a year in sales or services. This is the gross amount, meaning the amount the employer makes before taxes are taken out. This may sound like a lot – but you would be surprised by how easy it is for a business to meet this requirement. While workers may not know what their employers gross each year, you can make an educated guess by asking the worker to estimate, on a daily basis, how much the employer generates. Remember, the employer only has to gross \$500,000 – that’s before taxes are taken out. Divided out, that means the employer needs to generate only \$1,369.86 per day.

TIP: you don’t have to know the exact dollar amount or be able to prove absolutely that the employer meets the \$500,000 enterprise requirement. You simply have to have a good faith basis for your belief that the employer does at least \$500,000 worth of business.

### **The Enterprise**

FLSA covers employers who are part of an “enterprise” that generate \$500,000 in sales or services a year. This is important because even if the direct employer of the worker is fairly small, it may still be covered under FLSA if it is part of a larger “enterprise” of related businesses that, taken together, generate \$500,000.

For businesses to be considered part of a single “enterprise,” as that is defined under FLSA, the businesses need to have:

1. Related activities,
2. Performed through a unified operation or common control,
3. For a common business purpose.

For instance, a set of separately incorporated parking garages throughout the City might be considered a single “enterprise” if the garages are operated and controlled by the same owner, share personnel, and/or have related activities.

To determine whether there is a larger enterprise, ask the worker questions such as:

- Are there other sites where the employer does business or makes its product? How many people work there? What do they do? Have you ever worked at another location?
- Has the worker seen other company names on business cards or signs at the worksite?
- Has the worker met supervisors or managers for other project sites?

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<sup>5</sup> 29 U.S.C. § 203(s)(1)(A).

If the employer meets the test for enterprise coverage under FLSA, the worker enjoys federal protections regardless of the type of work she does or the length of time she works for the employer.

## The Worker and Her Work

### Individual coverage under federal law

Above we noted that even if the employer isn't big enough to be covered by federal law, the individual worker might in fact be covered. This is known as "individual coverage," as compared to the "enterprise coverage" discussed above.

If the worker's job involves or affects interstate commerce, he or she will be covered under federal law even if the employer itself is not. This portion of the definition covers employers that have "employees engaged in commerce" (such as long-haul truck drivers) or in the "production of goods for commerce" or "handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person."<sup>6</sup>

One group of workers that are often covered by federal law through individual coverage are domestic workers. This is because Congress has specifically found that domestic service affects interstate commerce.<sup>7</sup> A worker, such as a factory worker, will be covered by FLSA if he assembles parts that are shipped from out of state into items that are then shipped across the country for sale. His job requires that he routinely handle items that have moved and will move in interstate commerce. Similarly, any worker who routinely runs credit cards for sales or makes bank deposits is typically considered to be doing work that affects interstate commerce. By contrast, a waiter in a small restaurant who serves food but does not ring up sales is unlikely to be doing work that affects interstate commerce. He most likely is not covered under FLSA.

Questions to ask workers on this issue include:

- Do you handle money for the business, how often, in what form, and what do you do?
- From where does the business get its materials and products? Where does it send the finished products?

If it appears that the worker's regular job duties affect interstate commerce, then there is a strong argument that she is covered under FLSA even if her employer is too small to be directly covered.

### Special protections for particular workers

Up until now, we have focused primarily on whether an employer and worker are covered under the Fair Labor Standards Act. You should also analyze, however, whether the worker is covered under city and state laws that provide certain kinds of workers special benefits – most notably, a base wage rate that is much higher than the minimum wage. To determine whether your client is covered, you generally look at the type of work the client performed and whether or not a form of government funding paid for it.

◆ Construction on public projects: if the worker is working on a project for a government entity, he is most likely entitled to the "prevailing wage" – a special higher minimum wage for government workers. Workers

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<sup>6</sup> 29 U.S.C. § 203(s)(1).

<sup>7</sup> Congress has found that the employment of persons in domestic service in households affects commerce. 29 U.S.C. § 202.

hired by subcontractors may not realize they are performing government jobs. Be sure to ask all construction workers about the type of building or site where they performed the work. Often, general contractors pay subcontractors the prevailing wage rate with the intention that those wages be paid to the workers – but the subcontractor massively underpays the workers and pockets the difference.

- ◆ City services: similarly, if workers are performing maintenance or cleaning services on government buildings, they are likely entitled to prevailing wage rates.
- ◆ Government-paid services: workers who perform work that is reimbursed to the employer from government sources are also likely covered by special laws. For example, home health attendants who work for companies that are paid by Medicaid are paid a higher minimum wage rate. This can be difficult to determine, because the worker may not know how the patient is paying the employer.

### **Independent contractors not protected under wage and hour laws**

The laws discussed above apply only to “employees,” as compared to “independent contractors.” While independent contractors typically have a right to sue to recover the money they’ve been promised for a job, they do not have a legal guarantee of receiving the minimum wage or overtime pay for their work.

There is no straightforward definition of “employee” or “independent contractor” found anywhere in federal or state law. Instead, a set of factors is considered when classifying a worker as one or the other.

Basically, an independent contractor is someone who picks his own work, sets his hours, bargains over the rate for a job, uses his own tools, and is not supervised directly while working on the job. An independent contractor stands to make the profit – or lose money – if his business does not go well. When a homeowner hires a plumber to come fix a sink, most likely the plumber is not the “employee” of the homeowner. By contrast, if the plumber in turn hires a helper to come in to assist on the job, that helper is probably an “employee” of the plumber.

Notably, it does not matter what your employer calls you. The courts look at the “economic reality” of the situation – not labels. In essence, the question is “whether, as a matter of economic reality, the workers depend upon someone else’s business for the opportunity to render service or are in business for themselves.”<sup>8</sup> The Second Circuit has set out a list of factors to consider – noting that this is not a complete list:

1. the degree of control exercised by the employer over the workers;
2. the workers’ opportunity for profit or loss and their investment in the business;
3. the degree of skill and independent initiative required to perform the work;
4. the permanence or duration of the working relationship;
5. the extent to which the work is an integral part of the employer’s business.<sup>9</sup>

When a boss sets a worker’s hours, rate of pay, and duties and hires, disciplines, supervises, and fires the worker, it is very likely that the worker is an employee, not an independent contractor.

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<sup>8</sup> Brock v. Superior Care, 840 F.2d 1054, 1059 (2d Cir. 1988).

<sup>9</sup> Id.

It is worth being suspicious when a worker reports that his employer classifies him as an independent contractor – it is quite likely he is being misclassified. Indeed, employers frequently misclassify employees as independent contractors to avoid paying overtime as well as avoid paying required payroll taxes. There is a federal tax on all money paid and earned as wages to employees – the employer pays half (about 7.25%) itself, and the other half is withheld from the employee’s pay. Thus, an employer saves itself at least 7.2% on its payroll if it misclassifies its workers as independent contractors.

For those paid off the books, the first you may hear of being an independent contractor is when a worker files a claim for unpaid wages. Employers will raise that as a defense to a claim for unpaid minimum wage or overtime. Don’t be fooled – focus on the “economic reality” of the relationship between the worker and her supervisor.

### **Exemptions of workers from federal and state coverage:**

As noted above, federal and state wage and hour law applies to “employees,” but not independent contractors. In addition, when advising and assisting low-wage workers with recovering unpaid wages, it is important to know about certain exceptions to the minimum wage and overtime protections already described. The following groups of low-wage workers are excluded in some way from minimum wage and overtime protections under New York state and federal law: domestic workers, low-level managers, truck drivers, and commissioned sales people.<sup>10</sup> Obviously, employers have an incentive to classify workers as exempt because they save on overtime and other benefits. Thus, if you encounter a worker in one of these groups who has not been paid overtime—the best advice is to consult with an attorney to ensure that the employee is properly classified as exempt.

### **Time Period**

Finally, in analyzing a worker’s situation, you must consider what time period is involved. Laws include what is called the “statute of limitations” – or the amount of time you have to bring a claim.

Under state law, the statute of limitations is six years. That means that if a worker files a lawsuit today, she can claim any wages owed for the six years before today. Say, for example, a worker was employed by a factory from 1992 until 2004. In 2007, she files a lawsuit to claim unpaid wages. Under state law, she can claim unpaid wages from 2001 to the present. It is too late to claim wages for work performed before 2001. Note, however, that it is always better to file a claim for unpaid wages as soon as possible after you discover your rights have been violated. This is because it will likely become harder to prove your case as time passes, especially if you have very few written documents supporting your case and you are relying primarily on your testimony or the testimony of witnesses.

Under federal law, you can sue going back two years automatically, or three years if the violation was “willful.”<sup>11</sup> Generally you can sue for three years under federal law, unless the employer has a good reason for violating the law, such as advice of a lawyer that the conduct is not illegal. However, if the employer shows “reckless disregard” for whether or not its conduct is illegal, the violation will be willful.<sup>12</sup>

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<sup>10</sup> These exceptions, or exemptions, under federal law are set forth in 29 U.S.C. § 213(a)(1) and 29 C.F.R. Part 541. The state exemptions generally track the federal exemptions, with certain limited situations where certain workers may be entitled to overtime at the rate of one and one half times the state overtime rate. See 12 NYCRR § 142-2.2.

<sup>11</sup> 29 U.S.C. § 255.

<sup>12</sup> *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). See also *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 141 (2d Cir. 1999) (adopting *McLaughlin* standard).

# 3 What Is a Worker Actually Owed?

By this stage, you probably have a pretty good idea of whether both state and federal law apply to your situation. But how do you actually calculate what the worker is owed?

Consider the following scenarios: (1) A worker performed remodeling work for a construction contractor over the course of 3 weeks and was not paid anything for the work. Clearly, he's owed some money; (2) Or, consider a worker who was promised \$100 a day, and worked eleven hours per day, six days per week, for three weeks. He was paid the agreed-up rate – \$1800 – but is he owed more? If yes . . . how much?

Calculating total damages involves the following:

- Calculating the worker's *regular rate of pay*, and thus whether there is a minimum wage violation;
- Based on the regular rate, determining what *overtime rate* applies to the worker's overtime hours;
- Determining whether a daily bonus for long hours, called the *spread-of-hours pay*, is owed;
- Deciding whether the worker is owed money for unpaid *breaks*;
- Analyzing whether the employer made any *unlawful deductions*; and
- Calculating *interest* and *damages* owed on the unpaid wages.

## Regular Rate of Pay

Federal and state law calculates wages based on the "regular rate of pay" – the hourly rate you receive for your non-overtime hours each week.<sup>13</sup> Thus, even if you are paid daily,<sup>14</sup> weekly,<sup>15</sup> monthly, or by the piece, you have to determine what the regular hourly rate of pay<sup>16</sup> in order to determine whether there is a minimum wage violation and what the overtime rate should be.

The simplest example is when a worker is promised an hourly rate – let's say \$8 an hour. In that case, the worker's "regular rate" is \$8 an hour.

Consider a worker who is promised \$100 a day for ten hours of work. In that case, the regular rate is \$100/10 hours of work, or \$10 an hour. What if, by contrast, the worker is promised \$100 a day and told he will work only 8 hours a day, but in fact works 10 hours per day? In that case, the worker was promised in essence a regular rate of pay of \$100/8 hours of work, or \$12.50 an hour.

To complicate matters, federal and state law calculate the hourly regular rate of pay on a weekly, not daily, basis. A workweek is defined as seven consecutive 24-hour periods starting on a day designated by the employer.<sup>17</sup> Once a workweek is set, only permanent changes can be made.<sup>18</sup> This prevents an employer

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<sup>13</sup> Regular rate is the "hourly rate actually paid the employee for the normal, non-overtime week for which he is employed." 29 C.F.R. § 778.108; 12 NYCRR § 142-3.14.

<sup>14</sup> 29 C.F.R. § 778.112.

<sup>15</sup> 29 C.F.R. § 778.113(a).

<sup>16</sup> 29 C.F.R. § 778.109; 12 NYCRR § 142-3.14.

<sup>17</sup> 29 C.F.R. § 778.104-106.

<sup>18</sup> 29 C.F.R. § 788.301-30 .

from conveniently choosing a different workweek each week on which to base an assessment of unpaid wages.

In light of this, look again at the construction worker discussed above. He is hired at \$100/day, for ten hours of work, and is asked to work six days a week. Thus, he is promised \$600 for the week and must work 60 hours to receive that pay. To determine the regular rate, you would divide \$600/60 hours for a resulting \$10/hour regular rate of pay (the same as above).

Similarly, look again at the worker who is promised \$100/day, for 8 hours of work, for six days a week. He receives \$600 for 48 hours of work that week, resulting again in a regular rate of \$12.50.

What about a situation where a worker is promised a certain amount of money for each week of work but there is no real agreement about how many hours he would work? Take, for instance, a construction worker who is promised \$100 a day, and is told he will work 6 days a week, with no discussion of the number of hours he would work on each day. Instead, the worker ends up working an average of between 8 and 10 hours a day from Monday to Friday– but generally works as few as 5 hours on Saturdays. In total, he typically works approximately 50 hours a week and receives the same rate of \$100 per day, regardless of how many hours he actually works, for a total of \$600 per week. Do you calculate the regular rate by taking \$600 and dividing by the 50 hours per week worked? Or do you assume that, absent an agreement to the contrary, the \$600 is intended to cover only 8 hours per day, or 48 hours per week? The first scenario yields a regular rate of \$12/hour. The second scenario yields a regular rate of \$12.50. Or do you assume that the pay received is intended to cover only 40 hours, without overtime? The difference may seem small, but it can add up over time.

The federal regulations addressing this issue instruct taking the total pay received for the week and dividing by the total number of hours worked. This would suggest that you should take the \$600 and divide by 50 hours, resulting in a regular rate of \$12/hour. But the regulations also state that there is a presumption that, absent a contrary agreement, the workweek is based on an 8-hour day.<sup>19</sup> Here, that would suggest taking the weekly wage of \$600 and dividing by 48 (or six days of 8 hours each). In the end, the method to be used in a given case will depend on what is a good faith argument.

## Piece Rate

For piece rate workers, the math can get a bit more complicated.<sup>20</sup> Let's say a worker is promised payment of \$1 per shirt and must produce 250 shirts a week, regardless the length of time actually required to make 250 shirts. Suppose that, in fact, the worker must typically work ten hours per day, six day per week – or sixty hours per week in total – in order to meet this production goal. By the terms of the oral agreement, the worker is entitled to \$250 for her sixty hours of work, resulting in a "regular rate" of pay \$4.16 – well below the minimum wage. Suppose, by contrast, the worker is told to produce 250 shirts, at a dollar per shirt over the course of a 40 hour work week. But, in reality, the worker must work for sixty hours not, forty, in order to complete the order. In that case, the regular rate would be calculated by dividing the weekly rate of \$250 by the agreed-upon 40 hours of work, resulting in a regular rate of \$6.25/hour. Note, in neither case did the worker receive the required overtime premium – which will be discussed below.

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<sup>19</sup> See, e.g., *Giles v. City of New York*, 41 F. Supp. 2d 308 (S.D.N.Y. 1999); *Moon v. Kwon* 248 F. Supp. 2d 201 (S.D.N.Y. 2002).

<sup>20</sup> 29 C.F.R. §§ 778.117, 778.122.

## Applicable minimum wage rate

Once you figure out the regular rate of pay, you then compare it to the applicable federal and state minimum wage to determine whether there was a minimum wage violation. Here is a chart of the basic minimum wage rates under federal and state law:

	9/1997 – 2004	2005	2006	1/1/2007 – 7/25/2007	7/25/2007- 7/24/2009	7/25/2009 onward
Federal minimum wage	\$5.15	\$5.15	\$5.15	\$5.15	\$5.85	\$7.25
New York State minimum wage	\$5.15	\$6.00	\$6.75	\$7.15	\$7.15	\$7.25

As you can see, depending on the year, you may have a state minimum wage violation but not a federal minimum wage violation.

If the worker worked on a government-funded project or for an employer reimbursed from government money, it is possible they are covered by a higher minimum wage rate. Information about the “prevailing wage” and/or the New York City “living wage” rates can be found at:

<http://www.lni.wa.gov/TradesLicensing/PrevWage/WageRates/default.asp> ,  
<http://www.livingwagecampaign.org/index.php?id=1954> .

## Contract rate of pay

As discussed previously, federal and state wage and hour law set a floor for the minimum wage an employee must receive, but nothing prevents the employer and worker from negotiating a regular wage that is higher than the minimum. In that case, the right to that higher wage is protected by state law. Article 6 of New York Labor Law protects a worker’s right to receive the agreed-upon – or contract – rate of pay.

Note, a worker may have a combination of a federal/state minimum wage claim *and* a contract claim. For instance, if a worker is promised \$600 per week for 60 hours of work, but is paid nothing, then she has a claim for unpaid minimum wage under state and federal law for the first 40 hours of work paid at the applicable minimum wage (and an unpaid overtime claim for the other 20 hours, which will be discussed below). She also has a right under state law to receive the unpaid difference between the minimum wage and the agreed-upon higher rate.

## Allowances against the minimum wage rate and deductions from wages

For certain workers, the employer is allowed to take an “allowance” or “credit” against the minimum wage they are obligated to pay. In those cases, the cash minimum wage the employer must pay is lower – but the sum of the cash wage plus the credit must equal the standard minimum wage rate.



## Tip Credit

Under federal and state law, the employer is allowed to “credit” a portion of the tips a worker receives against the employer’s minimum wage obligation.

Let’s look first at the federal tip credit. For example, the 2007 federal minimum wage is \$5.15 an hour and the federal tip credit amount is \$3.02 an hour. Say the worker gets \$10 an hour in tips from customers in the restaurant. The tip credit lets the employer take “credit” for a maximum of \$3.02 an hour that the worker gets from customers directly. Thus, instead of paying a minimum cash wage of \$5.15 an hour, the employer only has to pay a cash wage of \$2.13 an hour – the regular minimum wage (\$5.15) minus the amount the employer gets as the tip credit (\$3.02).

Employers can only take the tip credit if they follow special rules. First, the tip credit is available only when the employee routinely earns at least \$30<sup>21</sup> in tips a month. Second, the employee always has to earn at least the amount of the tip credit in tips. For instance, if an employee earns less than \$3.02 an hour in tips, the employer cannot take the tip credit.

Employers cannot take the tip credit if employees are forced to share tips with non-tipped employees (such as managers). However, under certain circumstances, *voluntary* tip pools among tipped employees are allowed. Under federal law, it is not illegal to make employees “tip-out” to non-tipped employees – it just means the employer cannot take the tip credit. However, it is a violation of the state law for the employer to make employees share tips with non-tipped employees.<sup>22</sup>

The second requirement is that the employer must provide the employee with advance notice that the employer will pay the lower minimum wage because the employer is taking the tip credit. Federal and state law does not spell out in detail what kind of notice is sufficient. However, courts generally agree the employer does not have to *explain* the tip credit, but merely give notice that it is taking the credit. Many employers fail to give adequate notice and thus should not be permitted to take the tip credit.

The rules about notice and tip sharing under state law basically follow the rules under federal law. However, different tip credit amounts apply, depending on the nature of the employee’s work and the amounts the employee receives in tips. The charts below summarize the various rates.

<b>FLSA tip credit</b> <i>workers who receive</i> <i>\$30/month in tips</i>	<b>2000- 2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
Federal tip credit	\$3.02	\$3.02	\$3.02	\$3.02	\$3.02	\$5.12
Tipped minimum wage	\$2.13	\$2.13	\$2.13	\$2.13	\$2.13	\$2.13
Tipped overtime rate	\$4.71	\$4.71	\$4.71	\$4.71	\$4.71	\$5.76

<sup>21</sup> 29 U.S.C. § 203(f).

<sup>22</sup> New York Labor law § 196-d. But note that these rules do not apply to coat check workers.

<b>NYS tip credit:</b> <u>misc. industries</u> (shoe shiners, laundry delivery, etc.)	<b>2000-2004</b> only if tips > \$1.25/hour <sup>23</sup>	<b>2005</b> only if tips > \$1.45/hour	<b>2006</b> only if tips > \$1.65/hour	<b>2007</b> only if tips > \$1.75/hour	<b>2008</b> only if tips > \$1.75/hour	<b>2009</b> only if tips > \$1.75/hour
Maximum tip credit	\$1.25	\$1.45	\$1.65	\$1.75	\$1.75	\$1.75
Tipped minimum wage	\$3.90	\$4.55	\$5.10	\$5.40	\$5.40	\$5.50
Tipped overtime wage	\$6.48	\$7.55	\$8.48	\$8.98	\$8.98	\$9.13

<b>NYS tip credit:</b> <u>food service workers</u> in restaurants and hotels (waiters, busboys, etc.)	<b>2000- 2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>7/24/2009 onwards</b>
Maximum tip credit	\$1.85	\$2.15	\$2.40	\$2.55	\$2.55	\$2.60
Tipped minimum wage:	\$3.30	\$3.85	\$4.35	\$4.60	\$4.60	\$4.65
Tipped overtime rate	\$5.88	\$6.85	\$7.73	\$8.18	\$8.18	\$8.28

<b>NYS tip credit:</b> <u>other service employees</u> in restaurants or hotels <sup>24</sup> (delivery workers, etc.)	<b>2000-2004</b> only if tips > \$1.65/hour <sup>25</sup>	<b>2005</b> only if tips > \$1.90/hour	<b>2006</b> only if tips > \$2.15/hour	<b>2007</b> only if tips > \$2.30/hour	<b>2008</b> only if tips > \$2.30/hour	<b>7/24/2009 onwards</b> only if tips > \$2.35/hour
Maximum tip credit	\$1.65	\$1.90	\$2.15	\$2.30	\$2.30	\$2.35
Tipped minimum wage	\$3.50	\$4.10	\$4.60	\$4.85	\$4.85	\$4.90
Tipped overtime rate	\$6.08	\$7.10	\$7.98	\$8.43	\$8.43	\$8.53

No tip credit is allowed for building service workers under New York State law. 12 NYCRR § 141-1.7.

### **Meal and Lodging Allowance**

Similar to the tip credit, employers who provide meals or lodging to their employees are allowed to credit a portion of the value of the benefit they provide against the minimum wage they must pay.

<sup>23</sup> See regulations for rates that apply for workers earning less than this amount in tips per hour. 12 NYCRR § 142-2.5(b)(2).

<sup>24</sup> See New York law for special rules that apply to chambermaids and other workers at resort hotels. 12 NYCRR § 138-2.1.

<sup>25</sup> See regulations for rates that apply for workers earning less than this amount in tips per hour. 12 NYCRR § 138-2.1.

Under federal law, an employer can count the reasonable cost of board (food), lodging or similar benefits towards the minimum wage rate obligation if the benefit is: (1) actually and voluntarily received by the worker; (2) not primarily for the benefit of the employer, and (3) not furnished in violation of the law. The amount counted towards the minimum wage obligation cannot be more than the reasonable – or actual costs incurred.<sup>26</sup> The rules also require that the benefit provided – for instance, housing – must comply with the housing code in order to be counted towards the minimum wage.

Because the value of the board or lodging provided to the worker counts as wages paid, that value must be included in calculations of the regular rate. For instance, if a worker is paid \$600 per week, and is also given \$50 worth of meals, then the total compensation for the week is \$650. That is important both in order to determine whether a minimum wage violation occurred and for the calculation of the proper overtime rate.

State law, by contrast, puts a dollar cap on the amount an employer can deduct for meals and housing. Because the caps are fairly low, state law is more protective than federal on this count.

### **MAXIMUM MEAL ALLOWANCES**

<b>Per Meal Maximum Allowances NYS</b>	<b>2000 – 2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>7/24/2009 onwards</b>
Food service workers (busboys and waiters)	\$1.65	\$1.85	\$2.00	\$2.10	\$2.10	\$2.10
Other restaurant/hotel employees <sup>27</sup>	\$1.75	\$2.05	\$2.30	\$2.45	\$2.45	\$2.50
Miscellaneous industries	\$1.75	\$2.05	\$2.30	\$2.45	\$2.45	\$2.50

### **Deductions from Pay**

The tip credit and meal allowances discussed above are examples of allowed deductions from wages. Most other deductions from wages are prohibited.

Federal law prohibits such deductions only if they bring the worker’s rate of pay below the minimum or overtime rate.<sup>28</sup> Thus, an employer cannot require a worker to buy a uniform or tool if the cost of that purchase would, for that workweek, reduce the worker’s wages below the minimum wage. But, under federal law, if the cost doesn’t reduce the worker’s wages below the minimum wage, the employer can require a uniform purchase.

<sup>26</sup> 29 C.F.R. §§ 531.33-531.35. 29 U.S.C. § 203(m).

<sup>27</sup> See New York law for special rules for chambermaids and other employees at resort hotels. 12 NYCRR § 138-2.7(c).

<sup>28</sup> 29 USC § 206.

State law, by contrast, explicitly regulates the types of deductions employers can make, prohibiting them unless:<sup>29</sup>

- They are required by law (such as taxes and child support orders) or
- They are authorized in writing by the worker and for the benefit of the worker<sup>30</sup> (such as union dues or health care costs).

Examples of deductions that are totally illegal under state law include deductions for tardiness, breakages, theft by customers, and cashier drawers coming up short.<sup>31</sup>

Travel expenses are another cost for which employees are often entitled to reimbursement. Employers cannot deduct, for instance, travel costs associated with the job. Thus, while the worker has to pay to get to and from work, the employer must pay for tolls and gas if the employer picks the worker up and transports him to the job site.

Recently, the highest court in New York ruled that a temp agency firm could not deduct a fee from wages when workers cashed their checks at machines operated by the employer.<sup>32</sup>

Likewise, an employer cannot require a “de facto” deduction, i.e. it cannot require an employee to pay an expense out of pocket. For instance, an employer cannot require an employee to pay for tools that will be used primarily for the benefit of the employer since that, in essence, operates as an illegal deduction.

Note, under federal law workers are entitled to claim only that portion of a deduction or cost that brings their pay below the minimum wage. Under state law, by contrast, they are entitled to recover the full amount of the illegally deducted money.

It is important to ask workers about deductions from pay because many workers do not realize they are illegal. Deductions from wages must be included when calculating the regular rate of pay. For example, say a worker is promised \$100 a day, but the employer provides a meal and uses the \$2.10 meal allowance. For that day, the employer would only have to pay the worker \$97.90, because the \$2.10 was already “paid” through the provision of the meal. However, for purposes of calculating the regular rate, you would use the full \$100 that the person earned, not the \$97.90 in cash that they were paid.

### **Costs of Maintaining Uniforms**

New York law requires that employers pay the cost of cleaning and maintaining uniforms. If the employer requires the employee to clean the uniform herself, the employer must pay that employee an additional amount each week. The uniform allowance is absolute; it does not matter whether the employee actually spends anything at all cleaning the uniform. The following are the per-week rate that the employer must reimburse.<sup>33</sup> This applies to all industries.

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<sup>29</sup> New York Labor Law § 193.

<sup>30</sup> Enumerated deductions that are allowed include: payments for health insurance premiums, union dues, pension, charitable contributions, payments for U.S. bonds, or similar payments for the benefit of the employee. New York Labor Law § 193. The deductions cannot exceed 10% of the gross wages for the period. 12 NYCRR § 195.1.

<sup>31</sup> 12 NYCRR § 137-2.5 (restaurant industry); 12 NYCRR § 142-2.10 (miscellaneous industries).

<sup>32</sup> *Angello v. Labor Ready, Inc.*, 7 N.Y.3d 579, 859 N.E.2d 480 (2006).

<sup>33</sup> 12 NYCRR § 137-1.8 (restaurant industry); 12 NYCRR § 138-2.5 (hotel); 12 NYCRR § 142-2.5(c) (misc industries).

Hours Worked	2000–2004	2005	2006	2007	2008	2009
30 or more hours a week	\$6.40	\$7.45	\$8.40	\$8.90	\$9.00	\$8.90
20-30 hours a week	\$5.05	\$5.90	\$6.60	\$7.00	\$7.10	\$7.00
20 or fewer hours a week	\$3.05	\$3.55	\$4.00	\$4.25	\$4.30	\$4.25

The uniform allowance is not included for purposes of calculating the regular rate of pay. Suppose, for example, that a full-time worker cleans her own uniform and it costs her \$15 a week to do so. The employer is only obligated to reimburse the worker \$8.90 towards that cost. Suppose as well that the worker earns \$600/week, but the paycheck shows \$608.90 (the wages and the reimbursement). For calculating the regular rate, you would use the \$600 of wages earned, not the amount on the paycheck.

## Overtime Rate of Pay and Spread-of-Hours Pay

### Overtime Rate

Once you determine the worker's regular rate of pay, then it is simple to calculate the overtime rate – it is 1 ½ times the regular rate of pay.<sup>34</sup> The overtime premium is mandatory – employers cannot offer compensatory time off in lieu of paying overtime.

Overtime is calculated in a similar manner for all types of payments. Piece workers, for example, must be paid the overtime premium if they work more than forty hours in a week – and the rate is 1 ½ times the regular rate of pay (calculated as described above).<sup>35</sup>

For tipped employees, the overtime rate is 1 ½ times the *regular* minimum wage, minus the tip credit. Thus, the tip credit amount is the same for regular and overtime hours. See the chart above for the rates. For example, the tip credit amount in 2007 for a food service worker is \$2.55 and the minimum wage is \$7.15. The overtime rate for that worker is \$7.15 times 1.5 minus \$2.55, or \$8.18.

### When Overtime Rate Applies

In general, the overtime rate applies to all hours over 40 worked in a single workweek. Again, overtime is calculated on a weekly basis, not per day. For example, suppose a worker works 12 hours a day, 3 days a week. Many workers believe that they are owed overtime. However, because the total number of hours the worker performed that week is 36, no overtime premium is owed. In addition, many workers mistakenly believe they are entitled to overtime pay for work performed during weekends or holidays. Again, this is not the law, by law you are only entitled to overtime compensation for the hours that you work over 40 hours during a given week.

<sup>34</sup> 29 USC § 207(a)(2)(C).

<sup>35</sup> 29 USC § 207(g); 29 CFR §§ 778.117, 788.122

## **New York Spread of Hours**

New York does have a special daily premium. If you earn only the minimum hourly wage and your shift during a single day is longer than 10 hours, you are entitled to what is called “spread of hours” pay – an extra hour at the basic minimum wage, in two circumstances.<sup>36</sup>

First, you are entitled to an extra hour of pay at the minimum wage rate if the start of your workday and the end of your workday span a period longer than 10 hours, even if you do not work that entire time. For example, if you start work at 8:30 and finish at 6:45, your spread of hours is 10 hours and 15 minutes and are you therefore to spread of hours pay. Worker are entitled to this protection even if they take an hour break for lunch in the middle: you look at the start and stop times, not the total hours worked.

The second scenario is a “split shift” – where you work a portion of your shift, have a significant period of time off, and then finish your shift later in the day. Again, if the total time between the start and end of your day is over ten hours, you are entitled to the special daily premium.

## **What Counts as Working Time That Must Be Paid?**

Calculating the regular and overtime rates depends, in large part, on knowing how many hours in a week count as “work” that must be paid.

As a basic rule, all hours spent working must be paid. This includes work or time that the employer didn’t request, but “suffered or permitted.”<sup>37</sup> In essence, time spent that is primarily for the benefit of the employer, not the employee, will generally be considered work time that must be paid. Specific, common instances are discussed below.

### **Training Time**

Time workers spend being trained, at lectures or work review meetings, or at similar activities count as work time that must be paid if it is mandatory or directly related to the worker’s job.<sup>38</sup> Note, under federal law this means the worker must be paid at least minimum wage (or overtime) for these hours. Under state law, the worker must be paid whatever rate was agreed upon.

This type of situation can arise for many kinds of workers. Sales personnel who must attend regional or store meetings outside their regular shifts must be paid for that time. New waitstaff that are “shadowing” seasoned workers also must be paid for their hours. Off-duty seminars on safety or other subjects likewise count as compensable work time.

### **Travel Time**

Time spent traveling during the work day for the benefit of the employer or during which the employee works, counts as working time.<sup>39</sup> Note, however, that time spent getting to and from work does not count

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<sup>36</sup> 12 NYCRR § 142-2.4 (misc industry); 12 NYCRR § 137-1.7 (restaurant industry), §142-3.4 (certain non-profits).

<sup>37</sup> 29 C.F.R. § 785.11-13. See also *Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 718 (2d Cir. 2001) (analyzing 29 CFR § 785.11). *Holzapfel v. Town of Newburgh*, 145 F.3d 516, 522 (2d Cir. 1998), cert denied 525 U.S. 1055 (1998).

<sup>38</sup> 29 C.F.R. § 785.27-785.32.

<sup>39</sup> 29 C.F.R. § 785.38.

as work time that must be paid.<sup>40</sup> Basically, it is not your employer's problem if you must commute two hours each day to work.

Consider a construction day laborer. The time the worker spends waiting on the corner will not count as work time. Likewise, the time spent after the employer picks up the worker and drives him to the worksite will not count as work time. However, if the worker finishes a quick job in the morning and the employer then drives him to a second worksite located one hour away, that hour must be paid.

### **Prep Time**

Many jobs require set-up and break-down before and after the worker's regularly scheduled shift. The general rule is that time spent on duties that are a key part of a worker's job must be paid. For instance, workers who must change into special safety gear for their work must be paid for that time.<sup>41</sup> However, waitstaff that spend time changing into their uniforms in a dressing room do not have to be paid for this time.

### **On Call and Call-In Time**

Some jobs require substantial amounts of time spent waiting to be called to work. The general rule in these cases is that on-call time must be compensated unless the worker is nearly totally unrestricted in how she uses her time off. If a worker is "engaged to wait" she must be paid; if she is "waiting to be engaged" she need not be paid.<sup>42</sup>

To illustrate, a worker who obtains work through a temp-agency is not generally entitled to be paid for the time he or she spends at the agency waiting for a placement – in that instance, the worker is waiting to be engaged. By contrast, an assistant on a construction site who is on-call to run errands or pick up extra materials must be paid for those hours. He has been engaged to wait.

Under New York law, employees also are entitled to receive call-in pay when they go to work only to be sent home because there isn't enough work to do. Employees required to work on any day must 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.<sup>43</sup>

### **Meals and Break Time**

Under federal and state law, meals breaks that are less than half an hour and breaks that are less than twenty minutes must be paid as work time.<sup>44</sup> Meals or breaks that are longer need not be paid, as long as the worker is totally relieved of responsibilities during the break. In many low-wage industries, workers must usually work through their breaks. Cashiers in retail stores that must eat behind the counter in case a customer needs assistance must be paid for that time. Likewise, construction workers who are required to

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<sup>40</sup> See, e.g., 29 U.S.C. § 254(a), 29 CFR § 785.35.

<sup>41</sup> See *IBP, Inc. v. Alvarez*, 546 U.S. 2 (2005).

<sup>42</sup> 29 C.F.R. § 785.14-15. 29 C.F.R. 553.221(c). *Nonnenmann v. City of New York*, 2004 U.S. Dist. LEXIS (S.D.N.Y. May 20, 2004). 29 C.F.R. § 785.17.

<sup>43</sup> 12 NYCRR §§ 142-2.3, 142-3.3.

<sup>44</sup> 29 C.F.R. § 785.19.



stay on the jobsite to protect the employer's equipment also must be paid for that time, since they are performing a duty primarily for the benefit of the employer.<sup>45</sup>

Federal law does not require employers to provide any mealtime or breaks. By contrast, state law requires meal breaks:

- ◆ Factory workers must be given an hour noontime meal break. Factory workers whose shift is at least six hours and starts any time between 1 p.m. and 6 a.m. must receive their hour-long break at the mid-point of their shift.
- ◆ All other workers must get a 30-minute break between 11 a.m. and 2 p.m. if they work at least six hours spanning that period of the day. Workers who start before 11 a.m. and work past 7 p.m. must receive an additional twenty-minute break between 5 p.m. and 7 p.m. for dinner. Nighttime workers whose shift is at least six hours and starts between 1 p.m. and 6 a.m. must get a forty-five minute meal break at the mid-point of their shift.<sup>46</sup>

Notably, the state break requirements covers every "person" employed in establishments covered under state law – and therefore applies to workers who are not covered by the minimum wage and overtime provision, such as managers.

## **Sleeping Time**

For workers on 24-hour shifts who are allowed to sleep, employers may deduct up to 8 hours for sleep time if the worker is regularly able to sleep at least 5 hours without interruption. However, the employer must pay for any period in which the worker is actually awake and working during the night.<sup>47</sup> The worker must also be provided with adequate sleeping accommodations.

## **Damages, Interest and Attorneys' Fees**

Assume that a worker has a claim for unpaid wages under both federal and state law. The law provides not only recovery of the unpaid wages, illegal deductions, or illegally appropriated tips but it also entitles workers to extra money in the form of damages, interest, and attorneys' fees.

FLSA provides for 100% "liquidated damages" – essentially, a bonus to compensate the worker for not being paid appropriately.<sup>48</sup> This means that workers recover their wages – times two. Federal liquidated damages are mandatory unless the employer shows it was acting in good faith and reasonably when it violated the law. This is a heavy burden that most employers cannot meet. For instance, an employer may avoid paying liquidated damages if it can show that it relied on advice of a lawyer concerning classifying certain workers as exempt from FLSA. In the run-of-the mill case, however, employers will be required to pay damages.<sup>49</sup>

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<sup>45</sup> *Reich v. Southern New England Telecom. Corp.*, 121 F.3d 58 (2d Cir. 1996).

<sup>46</sup> New York Labor Law § 162. The Commissioner can permit a shorter break, but the permit must be in writing and conspicuously posted. New York Labor Law § 162(5)).

<sup>47</sup> 29 CFR §§ 553.222, 785.21.

<sup>48</sup> 29 USC § 207

<sup>49</sup> *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 142 (2d Cir. 1999) ("the burden is a difficult one, with double damages being the norm and single damages the exception.")

State liquidated damages are 25% of the wages owed. They are awarded only for “willful” violations of the law.<sup>50</sup> A violation is “willful” where an employer shows a knowing, deliberate, or voluntary disregard of its obligations under state law. The employee need not show malice or bad faith on the employer’s part.

Note that FLSA damages can only be claimed for FLSA violations. While this may seem obvious, it can complicate unpaid calculations. For instance, consider a worker promised \$10 per hour for a 60-hour workweek who was paid nothing. In that week, the worker is owed the federal minimum wage for the first forty hours and he can claim 100% damages for the federal minimum wage violation. But, under state law, he is also owed the difference between the contract rate and the federal minimum, and therefore entitles only to 25% damages on the amount of that violation. The worker was also not paid overtime – which is calculated the same way under both FLSA and state law and based on which he can also seek double damages under FLSA.

Let’s say that before his last week of work, a worker had been in the job for 8 years and received only straight-time pay for the work he performed. He can claim the unpaid overtime pay for six years under state law and under federal law for three years. He will generally not however be able to recover unpaid wages for the first two years that he worked, except in certain very limited circumstances.

Notably, federal and state laws provide that liquidated damages – if applicable – cannot be waived by the worker. This is a reflection of a public policy which favors the enforcement of statutory minimums. It is also a recognition that workers and employers are not on a level playing field, and therefore employers cannot be permitted to pressure workers to waive their statutory rights. Only the Court or the Commissioner of Labor is allowed to award a worker less than the full amount owed. This is important because a worker who has already accepted less than the full amount owed is not barred from bringing a suit to recover the rest – even if he has signed an agreement to the contrary, unless the agreement has been ordered by the Court or the Commissioner of Labor.

In addition to liquidated damages, a worker can claim pre-judgment interest under state law. State law provides 9% interest on money owed – which accrues starting from the date to the violation occurred up until the date of judgment.<sup>51</sup> Interest does not compound – meaning you don’t get interest on the unpaid interest. Note, however, that FLSA damages are compensatory – so a worker cannot claim both FLSA liquidated damages *and* pre-judgment interest on the same unpaid wages.

Finally, state and federal law also provides that a worker can recover reasonable attorneys’ fees incurred to recover wages.<sup>52</sup>

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<sup>50</sup> New York Labor Law §§ 198(1); 663(1).

<sup>51</sup> CPLR §§ 5001-5004.

<sup>52</sup> 29 USC § 216(b) (“employer . . . shall be liable [for unpaid minimum wages and overtime] . . . and in an additional equal amount as liquidated damages; New York Labor Law §§ 198(1-a), 663.1.

# 4 Developing a Claim for Unpaid Wages

At this stage, you have determined what type of claim the worker has and how much he or she can seek from the employer. The next step is to develop the case. This involves analyzing who can be held liable for the wages<sup>53</sup> and gathering proof of the worker's claim.

## Who Can Be Liable for Unpaid Wages?

Determining who can be held legally responsible for paying a worker the money he or she is owed can be one of the most important steps in a case. In low-wage industries, a worker's direct employer has often gone out of business or has little money, which means that even if you win in court, you may have difficulty collecting a judgment. In some industries, there may be a whole network of related entities – and recovering money may require going after the entity in that chain with deepest pockets. All of this boils down to the same issue– who can you actually sue for unpaid wages?

Traditionally, an “employer” was someone who exercised *control* over servants. This approach derives from what are called “agency principles” and asks whether an individual is an “agent” acting on behalf of the employer. The agency test arose from cases focused on whether an employer could be held liable for the harms caused by his “agent” – for instance, when an employer's car driver hits a pedestrian while delivery the employer's goods. The test turns on the affirmative acts of direct control by the employer over the worker; the idea is that if the employer controlled what his or her employee was doing, then the employer is responsible.

By contrast to this traditional definition, federal and state law in New York today define the word employer more broadly. FLSA defines “employ” to include both active control *and* passive control or indirect acts of “suffer[ing] or permit[ting] to work.” This is a much broader definition and can cover a broader range of entities and people who will be considered “employers.”<sup>54</sup> To apply this broad definition, courts have developed what is termed the “economic reality” test. Courts look to the economic reality of the relationship between the worker and the alleged employer to determine whether to hold the entity or individual liable for the unpaid wages. Two situations are particularly important to consider: (1) joint employment of a single worker by more than one person or business; and (2) individual liability of corporate officers or managers who exercise sufficient control over a worker's terms and conditions of employment.

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<sup>53</sup> For information on how to research potential defendants consult *Collecting a Small Claims Court Judgment*, forthcoming MFY Legal Services, Inc. and Make the Road New York.

<sup>54</sup> See, e.g., *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (FLSA's definition of “employ” has such breadth as to “stretch ... the meaning of “employee” to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”); see also *Zheng v. Liberty Apparel, Inc.*, 355 F.3d 61, 69 (2d Cir. 2003) (FLSA contains “the broadest definition [of employee] ever included in one act”); *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (“warrant[ing] an expansive interpretation of its [FLSA's] provisions so that they will have the widest possible impact in the national economy.”). State law employs a similarly broad definition. *Lopez v. Silverman*, 14 F. Supp.2d 405, 411 n.4 (S.D.N.Y. 1998).

## Joint Employment

Because the definition of “employ” is so broad, often more than one entity can be considered a worker’s “employer” for purposes of liability under federal law. A worker can be jointly employed by more than one employer where:

1. one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
2. The employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under the common control with the other employer.<sup>55</sup>

As with all definitions under federal wage and hour law, courts apply the economic reality test generously for an expansive view of joint employment.<sup>56</sup>

A leading example of joint employment is found in an old Supreme Court case concerning a slaughterhouse. The slaughterhouse – the stable, deep-pocketed company – contracted with a middle-man “labor agent” to hire, pay, and supervise the meat boners on the premises. The contract with the labor agent stated the agent would have “complete control over the other boners, who would be his employees.”<sup>57</sup> The Court found that both the agent and the slaughterhouse were employers of the boners. The Court emphasized that the boners’ work was part of an “integrated” economic unit intended to produce boneless beef at the slaughterhouse. The court also found that it was important that the owner of the slaughterhouse kept close watch on the quality of the worker by the boners.

A typical modern-day version of joint employment arises in the garment industry. The leading case in the Second Circuit addresses joint employment in the garment industry and, based on *Rutherford*, sets out a list of factors to consider:

1. whether the alleged joint employer’s premises and equipment were used for the work;
2. whether the direct employer had a business that could or did shift as a unit from one putative joint employer to another;
3. the extent to which the workers performed a limited line-job that was integral to the overall process of production;
4. whether responsibility under the contracts could pass from one subcontractor to another without changes;
5. the degree to which the alleged joint employer, or its agents, supervised the work; and
6. whether the workers worked exclusively or predominately for the alleged joint employer.<sup>58</sup>

The basic principal is that the more you can say that the work being performed is a key part of the alleged joint employer’s overall business, the more likely it is that the entity will be held liable for the unpaid wages.

When two or more employers jointly employ a worker, each employer is what is called “jointly and severally liable” – although the worker can only recover the total wages due, she can recover the full

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<sup>55</sup> 29 C.F.R. § 791.2

<sup>56</sup> See, e.g., *Lopez v. Silverman*, 14 F. Supp. 2d 405, 412 (S.D.N.Y. 1998). See, e.g., *Falk v. Brennan*, 414 U.S. 190, 195 (1973).

<sup>57</sup> *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 724-25 (1947).

<sup>58</sup> *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003); see also *Lopez v. Silverman*, 14 F. Supp. 2d 405 (S.D.N.Y. 1998)

amount, or any part of it, from any of the joint employers. This is important if, for instance, one of the joint employers has gone out of business since the work at issue was performed.

## Individual Liability

The broad definition of “employ” also means that individuals, not just corporate entities, can be held liable as “employers.” In many small businesses, there is a formal incorporated entity that is the obvious employer. But the business is run day-to-day by the owner of the business or other people who are closely related to the business. You may be able to recover wages from those individuals as well. This is key when the business employing the workers has few assets or profits. If you obtain a judgment against the individuals as well, you have a better chance of recovering money a worker is owed.

Here is how the principal of corporate liability would work against a corporate officer such as the president of a company. Such an officer will be considered an employer if he or she exercises “managerial responsibilities” and “substantial control of the terms and conditions of the [employee’s] work.”<sup>59</sup> For example, in a family-owned business, if the owner is directly involved in the day-to-day operations and has control over the wages, schedule, and other conditions of the worker’s job, then the owner will likely be personally obligated to pay the wages owed.

State law generally follows this rule – specifically defining an employer to include an “*individual*, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer.”<sup>60</sup> Moreover, under state law, the ten largest shareholders of a company (which is not traded on an exchange) can be held personally liable for the unpaid wages of the company.<sup>61</sup>

Whether front-line supervisors and managers can be held liable as “employers” Presents a more difficult questions. Where such managers set a worker’s pay and schedule and are aware of the violations as they occur, they may be held liable as employers.

## Proving Your Case

A key part of developing a claim is gathering all possible forms of proof. Workers in low-wage industries often have few if any documents proving they even worked for an employer. Workers paid off the books in cash may have only their own memory of the hours they worked and what they were paid.

This, however, does not prevent a worker from going forward with a claim for unpaid wages, although it may make proving the case more difficult. Under federal and state law, the employer is obligated to maintain detailed records for all employees that show, among other things, the hours worked, what was paid for each pay period, whether any credits or allowances were taken, and what was withheld from pay.<sup>62</sup> Under federal law, records must be kept for three years. Under state law, records must be kept for six years. In low wage industries, few employers comply with the record-keeping requirements.

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<sup>59</sup> *Falk v. Brennan*, 414 U.S. 190, 195 (1973); The Second Circuit has followed this view, noting that “[i]n FLSA cases, courts have consistently held that a corporate officer with operational control who is directly responsible for a failure to pay statutorily required wages is an ‘employer’ along with the corporation, jointly and severally liable for the shortfall.” *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 387 (2d Cir. 1989).

<sup>60</sup> New York Labor Law § 651(6).

<sup>61</sup> New York Business Corporation Law § 630.

<sup>62</sup> 29 USC §§ 211(c), 215(a)(5); 29 C.F.R. § 516.5; New York Labor Law §§ 195, 661.

Courts are sensitive to the difficult issues of proof in wage cases. The Supreme Court has held that where an employer fails to keep records, a worker has adequately proved his case if “he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.”<sup>63</sup> Thus, where the employer has no records, the worker can prevail by presenting evidence that establishes a reasonable basis for his calculation of his damages. This evidence may be in the form of the worker’s own testimony, the testimony of co-workers, or documents if the worker has them.

Although a lack of records is not a bar, it is important to educate workers to start maintaining a daily log of their hours and wages, especially for cash jobs. A worker’s contemporaneous notes about what she was paid will be incredibly useful in pursuing a claim for unpaid wages going back several years. A worker’s records can be key if an employer has maintained false payroll records.

When you first meet workers, make sure to ask them for any information they have that links them to the employer – a business card, a scribbled note with a phone number, nametag, receipts from deliveries, a birthday card sent by the employer, or a photo of the worker at the job.

In cases where there simply are no documents, you may ask the worker to carefully describe the employer, the layout of the worksite, and other details associated with the job. For instance, a worker at a small retail store can describe areas of the store where customers are not allowed. If the employer claims that the worker didn’t work at the store, detailed testimony showing that the worker has seen the off-limits parts of the premises and any documentary evidence will make the worker’s story more persuasive. Ask construction workers to describe the route they took to get to work; retelling the details will refresh the worker’s memory and make him or her a better witness if you have a trial.

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<sup>63</sup> *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-688 (1946); see also *Tho Dinh Tran v. Alphonse Hotel Corp.*, 281 F.3d 23, 31 (2d Cir. 2002); *Reich v. Southern New England Telecomm. Corp.*, 121 F.3d 58, 66–67 (2d Cir. 1997); 29 C.F.R. §§ 516, 516.2 (setting forth required showing where employer has not kept records).

## Getting Legal Help

**MFY Legal Services, Inc.** provides free legal assistance to low-wage workers on a wide range of issues, including unpaid wages, unlawful terminations, discrimination, unsafe conditions, sexual harassment, Workers' Compensation, Unemployment Insurance, Family and Medical Leave, and barriers to employment for people with criminal records.

MFY provides a full range of services, from advice and counsel to representation in court and on appeal. To get legal help, workers should call:

MFY Legal Services, Inc.  
Workplace Justice Project  
**212-417-3838**  
Mondays & Tuesdays  
2:00 pm – 5:00 pm

## Know Your Rights Workshops

**MFY Legal Services, Inc.** offers trainings to workers and to worker advocates on issues of concern to low-income workers, including:

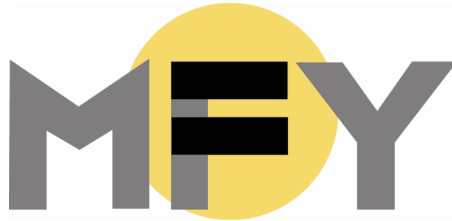
Understanding Wage and Hour Laws  
How to File a Wage Claim in Small Claims Court  
Removing Barriers to Employment for  
People with Criminal Records  
Workers' Rights  
Unemployment Insurance  
Labor Laws and Immigrant Workers  
*and other topics on request*

To schedule a training, please call Rushaine McKenzie at 212-417-3703 or e-mail her at [training@mfy.org](mailto:training@mfy.org).

For more information on MFY's programs:

**[www.mfy.org](http://www.mfy.org)**





**MFY Legal Services, Inc.** is a not-for-profit organization that provides free civil legal services to individuals and families in New York City who cannot afford an attorney. Practice areas include employment, housing, public benefits, consumer, civil and disability rights, access to health and senior benefits, and family law matters.

MFY's **Workplace Justice Project** provides free legal assistance to low-wage workers on a wide range of issues, including unpaid wages, unlawful termination, health and safety issues, discrimination, Unemployment Insurance benefits, Workers' Compensation, barriers to employment because of a criminal record, Family & Medical Leave Act, sexual harassment, and employment rights of domestic violence victims.

With support from the New York City Council's **Immigrant Opportunities Initiative**, MFY provides legal assistance to immigrant workers, regardless of their citizenship status, and offers training to workers' groups and their advocates on a wide range of topics. For more information on MFY's programs, visit [www.mfy.org](http://www.mfy.org).

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