

Employment Law Issues for U.S. Business Owners

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Employment Law Issues for New U.S. Businesses

- Employment-related filing and insurance requirements
- Hiring and the interview process
- Forming an employment relationship
- Confidentiality agreements and restrictive covenants
- Wage and hour issues
- Workplace policies and required notices

Employment-Related Filing and Reporting

- Federal Level
 - Obtain Employer Identification Number (EIN) with IRS
 - Employees must complete Forms W-4 and I-9

- New York
 - Complete NYS Employer Registration Unemployment Insurance, Withholding, and Wage Reporting (NYS100)
 - Submit required new hire reporting information to NYS Dep't of Taxation and Finance
 - Insurance:
 - Unemployment
 - Workers' Compensation
 - Disability
 - Paid Family Leave

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Hiring and Interviewing Process

- Discrimination in the hiring process
 - NYC prohibits discrimination in employment on the basis of:
 - *age, race, creed, color, national origin, alienage or citizenship status, gender (including gender identity), disability, marital or partnership status or sexual orientation, unemployment status, arrest or conviction records, and status as a victim of domestic violence, stalking or sex offenses*

 - Discrimination in the hiring process can occur when:
 - Advertising a job (or on the face of a job application)
 - Conducting an interview
 - Rejecting an applicant
 - Setting terms of employment (e.g., compensation)

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Hiring and Interviewing Process

- New York City “Ban-the-Box” Laws
(apply to employers with 4+ employees)
 - **Fair Chance Act** – prevents employers from asking an applicant about their criminal history until after making a conditional offer of employment
 - **Stop Credit Discrimination in Employment Act** – prohibits employers from requesting or using the credit history of an applicant or employee for any employment decisions
 - **Salary History Ban** – employers cannot ask about (or search) an applicant’s compensation history and cannot rely on compensation history when making compensation decisions

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Hiring and Interviewing Process

- NYC Fair Chance Act
 - Employers cannot make any **inquiry** or **statement** related to the pending arrest or criminal conviction record of any applicant for employment until **after** a **conditional offer of employment** has been extended
 - **Inquiry** – any written or oral questions or searches of public records
 - For example:
 - Questions on job applications or other pre-employment docs
 - Questions during interviews
 - Conducting a search of public records for criminal history
 - **Statement** – employers should not even mention background checks

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Hiring and Interviewing Process

- NYC Fair Chance Act (Con't)
- After extending a conditional job offer, employer may:
 - Ask, orally or in writing, about criminal history
 - Perform a criminal background check
 - Ask applicant about the circumstances giving rise to the conviction
 - (Note: can **never** inquire about or act on non-conviction information such as a sealed or expunged criminal charges or a juvenile delinquency finding)
- If employer later performs criminal background check and wants to take an adverse action, must perform Article 23-A analysis and go through the Fair Chance Process

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Hiring and Interviewing Process

- NYC Stop Credit Discrimination in Employment Act
 - Unlawful for employers to request or use the consumer credit history of an applicant or employee (subject to limited exceptions) for the purpose of making any employment decisions, including:
 - Hiring
 - Compensation
 - Job duties
 - Other terms and conditions of employment
 - **Consumer Credit History** – may include a consumer credit report, credit score or worthiness, or information an employer obtains directly from the individual regarding credit

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Hiring and Interviewing Process

- NYC Salary History Ban (effective Oct. 31, 2017)
 - Unlawful for an employer **to inquire** about an applicant's salary history directly or by searching publicly available records or reports
 - Any question or statement to the applicant or the applicant's current or past employer for the purpose of obtaining salary history
 - Employers cannot rely on an applicant's salary history in making compensation decisions during the hiring process unless applicant unprompted and voluntarily disclosed such information

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Hiring and Interviewing Process

- NYC Salary History Ban (Con't)
 - Employers may inform applicants about the position's proposed or anticipated salary or salary range
 - Without inquiring about salary history, employers may discuss with applicants their expectations regarding salary, benefits and other compensation
 - Does not apply to applicants for internal transfers or promotions with their current employer

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Hiring and Interviewing Process

- Takeaways from “Ban-the-Box” Legislation
 - Be sure job applications do not contain questions about criminal history, salary history, or credit history
 - Train hiring managers and interviewers on applicable laws and permissible/impermissible questions

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Hiring and Interviewing Process

- Social Media
 - Law still developing on use of social media in hiring process
 - Permissible (and often useful) to conduct social media searches of applicants
 - BUT be careful!
 - Searches may reveal information about membership or affiliation with certain protected classes: religious affiliations, national origin, sexual orientation, etc.
 - Consider having one person screen applicants via social media and a different person conduct interviews
 - The screener should not reveal information with respect to applicant’s protected class affiliations to the interviewer

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Forming an Employment Relationship

- Considerations in engaging individuals:
 - Employee or consultant/independent contractor?
 - At-will or specified term of employment?
 - Employment agreement?
 - Compensation arrangements
 - Mandatory arbitration agreements
 - Restrictive covenant agreements

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Forming an Employment Relationship

- Often expensive for new companies to hire employees
- Alternative is to engage individuals on 1099 basis – consultants or independent contractors
 - Be aware of certain factors courts look at to distinguish employees and independent contractors
 - It is not necessarily about the relationship that the parties want, intend, or agree to

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Forming an Employment Relationship

- Employee vs. Independent Contractor Factors: (among others)
 - Who controls the work being performed?
 - Who determines the work schedule?
 - Specified duration?
 - Does the individual receive employment benefits?
 - Does the individual operate his/her own business?
 - Is the individual (or his/her business) engaged by multiple companies?
 - Provision of tools and materials?

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Forming an Employment Relationship

- Employees vs. Independent Contractors
 - Courts narrowly construe independent contractor status
 - Risks of Misclassification
 - Costly wage and hour litigation (importance of class action waivers in mandatory arbitration agreements)
 - Liability for:
 - Back wages and overtime
 - Employee benefits
 - Tax and insurance obligations

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Forming an Employment Relationship

- NYC Freelance Isn't Free Act (FIFA) – effective May 15, 2017
 - If engaging a freelance worker (i.e., independent contractor) for services valued at \$800 or more, must have a written contract which includes at minimum:
 1. Name and mailing address of hiring party and the I.C.
 2. List of all services to be provided, the value of the services and the rate and method of compensation
 3. Date of payment or mechanism used to determine such date
 - “**Freelance Worker**” - any natural person or any organization composed of **no more than one natural person**...that is hired or retained as an independent contractor by a hiring party to provide services in exchange for compensation

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Forming an Employment Relationship

- Employment “At-Will”
 - Employer or employee may terminate relationship at any time, for any reason, with or without cause
 - At-will status presumed in U.S.
 - Employees usually employed at-will, except certain executives or management personnel
 - Ensure all employment-related documents (e.g., employee handbooks, workplace policies, disciplinary procedures, etc.) reaffirm employees are employed at-will

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Forming an Employment Relationship

- Offer Letters and Employment Agreements
 - Federal law and most state laws do not require written agreements between employer and employee
 - Note: NY requires written commission agreements
 - Can be beneficial to have employee sign an **offer letter** containing general terms of employment, such as:
 - Position
 - Start-date
 - At-will status, or term of employment
 - Compensation and manner of pay
 - Eligibility for benefits
 - Also included in employee handbook (discussed later)

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Forming an Employment Relationship

- Employment Agreements
 - Typically reserved for senior executives and managers (higher ranking employees)
 - Such individuals may be guaranteed a certain term of employment or only terminated for cause --- different than at-will
 - Other provisions in employment agreement may specify:
 - Bonus compensation
 - Equity grants, stock options or profit-sharing
 - Severance (if terminated without good cause)

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Forming an Employment Relationship

- Mandatory Arbitration Agreements
 - Employment-related disputes subject to mandatory arbitration
 - Disputes resolved by arbitrator instead of court
 - Tool to help minimize risks of costly litigation, class action lawsuits and negative publicity (among others)
 - Typical benefits of arbitration:
 - Fast
 - Cost-effective
 - Private
 - Convenient
 - Arbitration fees usually paid for by employer

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Forming an Employment Relationship

- Mandatory Arbitration Agreements
- Class action waiver
 - Guard against costly wage and hour litigation brought by a class of plaintiffs (as opposed to a single individual)
 - Currently enforceable in Second Circuit (NY federal court)
 - However, the First Department of New York's Appellate Division recently found class action waivers in arbitration agreements to be unenforceable as a violation of the NLRA
 - Supreme Court to hear issue on enforceability

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Confidentiality Agreements and Restrictive Covenants

- In order to protect confidential and proprietary information (intellectual property and trade secrets), goodwill and client and employee relationships, employers may require employees enter into certain restrictive covenant agreements:
 - Confidentiality agreements
 - Non-solicitation of clients
 - Non-solicitation of employees
 - Non-competes

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Confidentiality Agreements and Restrictive Covenants

- **Confidentiality Agreements**
 - Protect dissemination of confidential information and trade secrets
 - Obligations on employees last forever
 - **Defend Trade Secrets Act** (federal law)
 - Helps protect against misappropriation of trade secrets
 - Provides employers with avenue to get to federal court
 - Must provide employees with written notice of certain whistleblower protections in the confidentiality agreement or other agreement protecting trade secrets and proprietary information

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Confidentiality Agreements and Restrictive Covenants

- **Non-Compete Agreements**
 - Harder to enforce
 - Must be reasonable in terms of a specified time period following termination of employment and geographic scope
 - Cannot keep employees from earning a living
 - Must be necessary to protect legitimate business interests of employer
- **Non-solicitation of employees and clients**
 - Generally enforceable in NY
 - Easier to enforce compared to non-compete agreements but generally analyzed using the same reasonableness standards
 - Keeps employees from soliciting business from company clients or the services of employees for a specified time period following termination

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Wage and Hour

- New York State Minimum Wage
 - 2019:
 - \$15/hour – NYC “Large” Employers (11 employees or more)
 - \$13.50/hour – NYC “Small” Employers (10 employees or fewer)
 - \$12/hour – Nassau, Suffolk, Westchester Counties
 - \$11.10/hour – Rest of New York

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Wage and Hour

- NYC “Large” or “Small” Employer?
- “Large” = business employs at least 1 employee in NYC and has employed more than 10 employees at any given time during the current or prior calendar year, counting all worksites (in and outside NYC)
- “Small” = business employs at least 1 employee in NYC and has not employed more than 10 employees at any given time during the current or prior calendar year, counting all worksites (in and outside NYC)
- Count all employees – both full-time and part-time

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Wage and Hour

- Payment of the new wage rates:
 - Employers must pay the applicable rate based on where the employee performs the work
 - If an employee works in two regions, the employer may pay each hour worked in each region at the applicable minimum wage rate for that region, or pay the higher rate for all hours worked

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Wage and Hour

- New York State minimum wage increase implemented incrementally as follows:

Date	New York City Large Business (at least 11 employees)	New York City Small Business (10 employees or fewer)	Nassau, Suffolk, Westchester Counties	Rest of the State
12/31/2016	\$11.00	\$10.50	\$10.00	\$9.70
12/31/2017	\$13.00	\$12.00	\$11.00	\$10.40
12/31/2018	\$15.00	\$13.50	\$12.00	\$11.10
12/31/2019		\$15.00	\$13.00	\$11.80
12/31/2020			\$14.00	\$12.50
12/31/2021*			\$15.00	TBD*

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Wage and Hour

- Payment of Overtime
 - **Non-exempt** employees must be paid overtime at a rate of 1.5 times the employee's regular rate of pay for all hours worked over 40 in a workweek
 - Employers classify employees as "exempt" or "non-exempt" from minimum wage and overtime requirements under the federal Fair Labor Standards Act (FLSA)

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Wage and Hour

- Exempt vs. Non-Exempt
 - Common exemptions include administrative, executive and professional employees
 - In order to qualify as exempt, employees must meet:
 - Duties Test
 - Salary Basis Test
 - *Duties test* – employee must spend a sufficient amount of time performing certain duties that meet the exemption requirements
 - *Salary basis test* – employee receives a predetermined salary each pay period at a minimum threshold level

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Wage and Hour

- New York State Exempt Employee Salary Thresholds
 - New York:
 - Exempt salary thresholds for executive and administrative employees subject to incremental increases over time dependent on the region and size of the employer's business
 - 2019:
 - Large NYC employers = \$1,125 per week (\$58,50/year)
 - Small NYC employers = \$1,012.50 per week (\$52,650/year)
 - At federal level, the U.S. Department of Labor proposed threshold of \$35,308, up from current \$23,660

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Wage and Hour

- Executive and administrative employees in NY must earn the following weekly salaries to qualify as exempt from overtime pay:

Date	New York City Large Business (at least 11 employees)	New York City Small Business (10 employees or fewer)	Nassau, Suffolk, Westchester Counties	Rest of the State
12/31/2016	\$825.00	\$787.50	\$750.00	\$727.50
12/31/2017	\$975.00	\$900.00	\$825.00	\$780.00
12/31/2018	\$1,125.00	\$1,012.50	\$900.00	\$832.00
12/31/2019		\$1,125.00	\$975.00	\$885.00
12/31/2020			\$1,050.00	\$937.50
12/31/2021*			\$1,125.00	

- (No salary threshold for “professional” employees in NY)

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Wage and Hour

- Remember, merely paying an employee the requisite salary is not enough to qualify as exempt

- **MUST ALSO MEET DUTIES TEST**

- Requires an analysis of the job duties actually performed and responsibilities of the employee
- May be difficult for startups where employees “wear many hats”

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Wage and Hour

Liability for wage and hour violations and misclassification of workers could survive business closure

- Founders and equity holders could incur liability following closure as:
 - An individual exercising sufficient control over terms and conditions of employment to qualify as the “employer” under FLSA
 - Owner of a new business formed after closure of one business if the new business was formed to avoid debt (Uniform Voidable Transfer Act)
 - One of the 10 largest shareholders of a private NY corporation

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Workplace Policies and Required Notices

- New York Wage Theft Prevention Act (WTPA) requires employers to give written notice to new hires of:
 - Rate of pay, including overtime rate of pay (if applicable)
 - How the employee is paid (hourly, weekly, commission, etc.)
 - Regular payday
 - Official name of employer and trade names (“doing business as”)
 - Address and phone number of employer’s main office or principal location
 - Allowances, if any, claimed as part of the minimum wage (e.g., tip credits, meal credits, lodging, etc.)
- Employee’s must sign and date notice - employer retain for 6 years

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Workplace Policies and Required Notices

- WTPA notice must be provided in English and employee's primary language (if NY Dept. of Labor offers the notice in such language)
- If any data in the notice changes, the employer must tell employees at least 7 days before it happens unless they issue a new paystub that carries the notice
- Employer has burden of proving compliance with notice requirements, which is why it is important for employers to retain employee signatures acknowledging receipt

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Workplace Policies and Required Notices

- Paid Time Off (PTO) Policies
 - NY employers must notify employees – in writing or by publicly posting – of employer's policies on sick leave, vacation, personal leave, and holidays (typically included in employee handbook)
 - In NYS, no requirement to provide employees with paid vacation or personal time, paid sick leave or paid holidays, but must notify employees of policies (e.g., "[EMPLOYER] does not provide employees with paid vacation days.")
 - In NYC, employers are required to provide employees the ability to accrue sick time in accordance with NYC Earned Sick Time Act

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Workplace Policies and Required Notices

- NYC Earned Sick Time Act (ESTA)
 - Employers with 5 or more employees are required to provide employees the ability to accrue up to 40 hours of paid sick leave per calendar year (if less than 5 employees, the sick leave can be unpaid)
 - Effective May 5, 2018, employees will be allowed to take leave under ESTA when an employee or employee's family member is a victim of a family offense matter (defined in ESTA to include a variety of acts or threats that represent types of domestic violence), sexual offenses, stalking, or human trafficking

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Workplace Policies and Required Notices

- Employee handbooks (written policies) typically include recommended policies concerning (among other things):
 - At-will employment
 - Anti-discrimination, anti-harassment, and non-retaliation
 - Accommodations for disabilities, sincerely held religious beliefs, pregnancy
 - Compensation, timekeeping, and payroll practices
 - Conflicts of interest and standards of conduct
 - Technology usage and social media
 - Workplace safety
 - Governmentally-mandated benefits, such as workers' comp and disability insurance, military leave, voting leave, jury duty leave, etc.
- Include “receipt of employee handbook” acknowledgment at end of handbook and retain a signed copy from employees

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Required Notices and Posters

- Employers are required to provide certain notices to employees and post certain notices/posters in a conspicuous place in the workplace for all employees to see
- New York State Notices/Posters – among them include:
 - Minimum Wage
 - Anti-Discrimination
 - NY Correction Law Article 23-A
 - Unemployment Insurance (must complete/submit form to obtain)
 - Workers' Compensation (obtain from employer's insurer)
 - Disability Benefits (obtain from employer's insurer)
 - NY Paid Family Leave Statement of Rights
 - WTPA Notice (discussed in previous slides)

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Required Notices and Posters

- New York City Notices/Posters – among them include:
 - Notice of Employee Rights under the NYC Earned Sick Time Act
 - Note: We expect there to be an updated notice given the recent amendments to the law
 - NYC Pregnancy Accommodation

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