



Season 3, Episode 1: “Navigating NYS’s Updated Minimum Wage and Exemption Thresholds,” With Lee Jacobs and Rosemary Enright

Speakers: Lee Jacobs and Rosemary Enright, Barclay Damon

[Lee Jacobs]: Hello. Hello and welcome to Barclay Damon’s Labor & Employment Podcast, everyone. We’re pleased to be launching our third season here. I’m Lee Jacobs, and I’m pleased to be joined in from our new podcast studio in Buffalo, New York, my colleague Rosemary Enright. We’re here to discuss with you what you need to know about the important changes related to minimum wage that’s here in New York. Good morning, Rosemary. How are you?

[Rosemary Enright]: I’m great, Lee. And I like to refer to it as “Studio B” because we’re in Buffalo.

[Lee]: So I’ll take that. I’ll take that. And I’m here in Radio City Music Hall. So, you know, right, right across the street is NBC Studio. So you can do that.

[Rosemary]: Perfect. Good, good, good. Well, you know. Hi, everybody. It’s great to be back. And you’re probably sitting there wondering, well, where’s Ari? Why are Lee and Rosemary here? And so I wanted to let you all know that Ari has a new baby girl. So she went out on maternity leave in October, and little Stella Kwiatkowski joined us.

[Lee]: Awww.

[Rosemary]: Yeah, and she is adorable. I was going to share a picture, but I thought Ari might not like that. We’ll let her do that when she comes back. But we expect we expect Ari back sometime in the spring. So in the meantime, Lee and I have stepped in and we’re going to try to help everybody through the next several months. So as Lee said, we’re going to be talking about the minimum wage, changes to the minimum wage. But before we do that, Lee, Ari always likes to start with a fun fact. So I’ll start with one to give you a few minutes to think. But she always had me do travel, I think, as many of our listeners know. So but I’m not going to talk about travel ...I’ll shake it up and let you all know that last year I joined—you’re all going to abuse me for this—but the Buffalo Croquet Club. So Buffalo has...I did not know this, but I guess you would call them internationally rated croquet courses up in our Delaware Park, which is by... was designed by the same architect who did Central Park in New York, Lee. And so there are four lovely croquet courses there. And there is a league, and so we joined last year and played, and I’m pleased to say we did not come in last, we were second from last, and it was a lot of fun. Croquet is a lot of fun. I can’t recommend it enough. So that’s my little fun fact that I’m now a croquet player so...

[Lee]: That interesting. I’m assuming you’re not playing outdoors in the winter with these Buffalo winters with the snowstorms and squalls coming through.

[Rosemary]: That’s right. No, I am not. But I am curling. I am curling.

[Lee]: That I think might be a conversation for our next podcast.

[Rosemary]: There you go.

[Lee]: So my fun fact, I am set in about 36 hours from now to start off on a whirlwind adventure. I'm going to be spending some time in the Maldives and then taking the long way around home with a layover in New Zealand. And my boyfriend and I are currently living in a hotel. And today marks day 28 in this small New York City-sized hotel. So we are ready and able and willing and happy for this adventure to undertake for us. But, you know, before that: minimum wage, overtime, right?

[Rosemary]: That's right. That's right.

[Lee]: I think I think we should jump into it. So for those of you that don't know, this year, last year, actually, Governor Hochul signed a law that increased the minimum wage for everybody across the state, irrespective of where you're located. And it's set to go up. It went up on January 1, 2024, and it's set to increase every year at New Year's through January 1, 2026. And then after that, it will increase based upon inflation, consumer prices, consumer price information. It very, very briefly. And Rosemary, jump in at any time. I'm just going to give you the basic numbers of where we are, what minimum wage is in the different jurisdictions. So I think in New York City, not I think, I know in New York City, Nassau, Suffolk, and Westchester counties, minimum wage is now \$16 an hour. Everywhere else, it's \$15 an hour. And then over the next two years, it will rise from \$16.50 to \$17 in New York City, Nassau, Suffolk, in Westchester. And then for the rest of New York state, it will rise from \$15.50 to \$16 an hour. So the push for \$15 seems to have won and now it's increasing and going even further beyond that.

[Rosemary]: Yeah, and, you know, for those of you who are sitting out there, you know, frantically writing or sitting, hitting pause and then let me rewind so I can hear the numbers. Don't worry. The numbers are... you can find them online. So you know Lee... I don't know if our listeners are all familiar with the New York State wage orders.

[Lee]: Yeah, right.

[Rosemary]: And so there are there are two really two wage orders out there. There's the Miscellaneous Industries Wage Order, and then there is the Hospitality Wage Order. And so if you simply go out and you can literally just google it, just put in New York's, you know, New York wage orders and they will come up and within those wage orders there is a table, and that table includes all of the minimum wages. When they go up, you know, by year. And it's, as Lee said, through 2026, right Lee, that's where they have. Oh, yeah, Yeah.

[Lee]: Yeah.

[Rosemary]: So go ahead.

And in addition to that, we also have available on our website and the alert sections. Last September I wrote an alert when this was being proposed and before the numbers were finalized and now that the numbers are finalized and are out there, I have an alert forthcoming, I believe in the next few weeks, but you'll be able to find it on our website where you'll be able to get all of these numbers in a quick and dirty fashion. But the Hospitality Wage Orders are one of the few areas of the law that I found that actually read in simple English. You don't need to sit there and be a lawyer and get out [Black's Legal Dictionary] to understand what's going on there. The Hospitality Wage Order and the Miscellaneous Wage Order explain the different rules. Like, for example, you know, what is minimum wage or minimum wage is? It's I still think for the Fed and federal government, it's \$7.25 an hour. I think.

[Rosemary]: Like that. Yes, something like that.

[Lee]: Like I remember I was making that when I was a shoe salesman my junior year of high school. And it hasn't gone up since then. So, you know, since... (high school civics lesson, you know, the federal government sets the floor, the bare minimum, \$7.25 an hour. And the states can... states and cities can fill in and get to a

higher number.) And that's where we are now. And one of the... and I'm curious, Rosemary, with your clients, if you get this question a lot, because I get this question, you know, my employees say they had to work on Sunday or they had to work on Thanksgiving or Christmas and they're owed overtime because it's... they had to work on that special day and I always say, no, no, no, that may be the case in other places. But in New York, overtime is 40 hours in one work week. What do you what are your thoughts on that? What do you get from your clients now?

[Rosemary]: Same thing, same exact thing. They think if I work on a Sunday, as you said, or on a holiday, there's some special pay I should be getting or, you know, I should be getting, as you said, time and a half or we'll have a lot think, double time, isn't it? Double time? Because I'm working on a holiday and as you said, the answer is no. You know, you work more than 40 hours in a workweek. That's when you get the time-and-a-half. But anything other than that doesn't matter. And it doesn't matter whether it happens to be a holiday like Christmas or, you know, Rosh Hashanah or any other holiday. So it's that New York doesn't pay attention to, though. So but I do get those questions a lot, Lee. Absolutely.

[Lee]: It's 40 hours, one work week. And so for our listeners, it's, you know, it's time and a half. So upstate rest of New York, not down here in the city. So minimum wage is \$15. So overtime would be \$22.50 and for \$16 an hour. And I've got my handy dandy calculator, which I always keep close by. I as it comes on 16 times one-and-a-half is \$24 an hour. So overtime down here in New York City, Nassau, Suffolk, and Westchester is \$24 an hour. And as a... for our listeners that are in the hospitality industry, that work with tip credits or anyone that works as other types of credits or deductions related to uniforms or meals to that nature, always remember credits come out at the end. You know, back in elementary school. "Please excuse my Dear Aunt Sally." Order of operations. It's minimum wage, your base wage to get to overtime. And then the deductions of credits and meals and tips and things to that nature. People think, well, it's, you know, I can do \$15 minus five. I'm paying my employee \$10. That's the tip credit employee. So overtime is based upon that \$10 an hour. Nope, it's based on \$15, up to \$22 and a half, minus five, down to \$17.50. So Rosemary, in addition to the updates of minimum wage going up, the threshold levels for exemptions have gone up. I ...what does... how do you explain exemptions to your clients? How do you... because for me I think they... the government uses the wrong word but it because it makes kind of a logical sense. But what... how do you explain it?

[Rosemary]: Basically, Lee, what I tell them is, is a particular position, not a person, but a position overtime eligible. All right? And so, and I make that point of "person" versus "position" because as I said, the conversation I had yesterday with a client, they said, well, this this individual, this person who we have in this position has a master's degree in X-Y-Z, doesn't matter what it is? And so they're a learned professional. And I said, but the job that they're doing, the duties they're performing do not meet the duties test. So, yes, while they may have, you know, an advanced degree, but that is only one piece of it, because, Lee, is, as you know, and I think many of our listeners now, there are actually three tests, right? So when you're deciding on whether or not someone is exempt or overtime eligible or not eligible, all right. So we have our salary basis test. So they have to be paid a salary versus an hourly rate. There's a salary threshold, which are set by New York State. Some of you may be panicking. Lee and I will talk about that in a minute and say, wait, New York has its own salary threshold, but there's a state and the feds and as Lee already said, you know, the feds set the floor, right? We said. And so we have the salary threshold. And then, of course, there's the duties test. And that the duties for that particular position and what that person performs. So all three tests have to be met for someone to, I'll say, not be. How do we say it? Lee, "entitled to overtime."

[Lee]: Yeah, yeah. I think that's fair. I mean the vast majority of my... that the majority of my clients are in the hospitality. Right and so it's the... I like to explain it in this way that I remember again going back to high school, everyone in McDonald's was called an "assistant manager." Everyone was called an assistant manager because we can give someone the title of manager and avoid paying them overtime. And then when you double-click into it and you actually look into it. All right, as you said, Rosemary, you got to be paid enough and you got to do the right thing. And so, again, don't worry. You don't need to hit pause, don't need to write these numbers down. They're available in the wage orders, are available on our website. But here very quickly,

is that is the new number that you need to be aware of: New York City, Nassau, Suffolk, and Westchester for this year in order to avoid paying overtime to make... to be an exempt employee. And we'll talk about duties in a second. It needs to be \$1,200 per week or \$62,400 per year. If your employees are making less than that, they are eligible for overtime regardless of what they do. Period,

[Rosemary]: Right. Because they don't meet the salary threshold.

[Lee]: Exactly. And upstate, the rest of New York, it's \$1,124.20 per week, or \$58,458.40 per year. And again, these are set to go up over the next three years through 2026. And so if you don't make that amount, you're eligible for overtime. And then so if you do, then we have to actually look at what you do. So there are very briefly and we're not going to go into each of them because we can wax poetically for hours and all of them. But there are generally three categories of exemptions: executive manager, administrative, and professional. So the executive manager one, just this is the one where a lot of my clients are in the pandemic had an "uh-oh" moment in order to be considered a manager. Right? They could be paying their employees sufficient higher than the threshold. But to be considered a manager, you actually have to be managing two people. So what happened in my restaurant clients, when they got rid of all their staff and the only people that were working was the cook, the bartender, and the manager. The manager was no longer "managing" anybody and one could argue they fell out of the duties and responsibilities and would then therefore become overtime eligible. So it's a tricky one and it's one that you should work with us, with your attorneys, to make sure your job descriptions are correct. So that way your employees fit into the right exemptions and the duties and responsibilities, and help work with us and your payroll companies to make sure that your employees are paid enough. But I think

[Rosemary]: I'm sorry, Lee, I thought you were going to move to the next. So I just wanted to jump in. I'm sorry. And what's important with the duties and you know, I know, Lee and I have talked about this and is you can have a job description, all right? And say, well, here's my job description in Rosemary or Lee, and you can see it lists all the duties and I mean, it clearly qualifies. But then you talk to Tommy or Suzy and you ask them, what are you doing? And they're not performing the duties, you know, on that on that job description. So, for example, if the New York State Department of Labor came knocking.

[Lee]: I was just going to say that. Literally, just going to say that.

[Rosemary]: Yeah, exactly. They may say you're going to say, well, here are the job descriptions. They're going to say, no, I want to talk to Lee and Rosemary and they're going to sit down. And when they say, well, no, I don't manage anybody directly or no, I don't exercise independent judgment or whatever it happens, whatever the, whether it's the executive or the administrative. No, I don't do that. Guess what? It's now failed the test.

[Lee]: It's a problem and one that is, you know, is doable if you have a good in employment practices program where you're actively monitoring, maintaining, and updating and listening to things like this, following along to our podcast or reading our alerts to make sure that you're always up to date. And more importantly, I think reaching out when you need help because the... as we're going to talk about in a moment, the penalties for noncompliance on some of these things are groundbreaking. They really, really are. And it's much easier to pick up the phone, ask the simple question, and then get the correct answer, rather than cheating in the dark. So the one last thing that I wanted to talk about, exemptions, Rosemary, before we move to penalties for failing to follow these rules, is "highly compensated individuals." That it used to be back in the day. And what I mean, back in the day was before last year, correct me if I'm wrong here on this one, that you could pay someone \$100,000 a year, \$125,000 a year, and that was enough. You know, it didn't matter what the person did, they would be ineligible for overtime. They would be exempt from overtime. But the Supreme Court changed that. The United States Supreme Court said that you need to have a regular salary that an employee can count on week by week by week, not something that is paid up on bonuses or commissions or things to that nature. Did I get that that interpretation correct, Rosemary?

[Rosemary]: Yep, yup.

[Lee]: Sometimes, and sometimes I'm not. That's the one of the weakest ones for me in my memory.

[Rosemary]: No, I think you I think you captured it and explained it perfectly. So I can add to that. But I will actually. Lee, I think let's go back for a second. When we were talking about our, you know, the salary threshold in New York, there's one thing that quite a few of our clients have gotten tripped up on, and that is in New York, the executive/administrative manager. When Lee referred to that, I don't know if you noticed, but he didn't mention "professional." He did not mention professional. And that was not an oversight. All right. New York actually follows the FLSA. So the salary threshold for professionals in New York is the current \$684 a week.

[Lee]: Yeah, \$684 a week and

[Rosemary]: I can't remember. He's got his handy dandy calculator...

[Lee]: \$35,568 per year.

[Rosemary]: Right. So, so there you go. So let's just be crystal clear on that. So in New York we, everybody gets the minimum wage. Now for our exemptions. All right. We've got the executive and we have the administrative. All right. And those follow the numbers that Lee gave you already and for professional that's following the FLSA, which is the \$684 a week. Now, interestingly, that number, Lee, is probably going to go up FLSA. I mean the comment period I think closed in November or December. And correct me if I'm wrong... and I believe that they are going to come out with whatever the decision is. All right. In April. So I think in April we'll know. And the proposed number, it was a significant jump. Lee, I can't remember, was less than New York, but I'm pretty sure it was over a thousand. What was it.

[Lee]: For the federal government? It was a big jump.

[Rosemary]: It was a huge jump. And they... and so a lot of the comments that came in were it's too big of a jump. So we'll see what they... where they land. And you know, you'll probably be tuned in, I would think probably in that, you know, April--May timeframe and we'll be giving you an update on that. But I ...that will be changing. And for those of us in New York, the only exemption that that would affect would be the professional, because we're already following New York with the executive and the administrative. So I just wanted to make that point. Lee, so go ahead. I think you.

[Lee]: Say and I would say to our listeners, stay tuned. When this comes out, we will have a full episode on exemptions because the professional exemption is a tricky one. You just think because someone's that professional that they fall into it. But no, you have to have a degree from that...you can't have an English degree and be a computer professional or something to that. Your degree needs to line up with what you're doing. But it's a tricky one

[Rosemary]: Very tricky.

[Lee]: And it's one that will help you navigate through this process. So I as we were saying, you know, it's important now, I think, to talk about the damages, the consequences for failing to pay your employees properly. So you must pay your employees everything they're owed. For every hour for every hour that they worked. Hard stop. There is no settlement, there is no paying less. And they are agreeing they're owed every dollar that they that they've earned. But the state puts penalties on to that, that if you don't pay your employees on time and depending upon whether or not you're a manual labor or not. So manual laborers in the state of New York, which usually are people that work in the hospitality industry, people that work with their hands, on their feet, there's a test that, you know, we can go into in further detail on additional calls.

But if you don't pay your people on time, it's a 100% liquidated damages. So what that means is say you pay your... an employee is supposed to make \$500 per week and you're supposed to pay them every week, but you only pay them once per month. You still paid them \$2,000. But the... \$1,500 of that was late. The state will assess a \$1,500 penalty. So you have to pay your employees on time. And, Rosemary, do you do you run into issues with this, with your clients where they don't pay their people on time and then they get shocked by these penalties that start racking up against them?

[Rosemary]: Absolutely. We just had... we just finished an audit with the DOL and that, as you said, they were not paying them on a weekly basis and they... the employer thought, Oh, well, there might just be a small penalty or something. And then when they looked and they said, oh my... everything was doubled and they, they about fell off their chairs. And as Lee said, there's no negotiating. It's not "listen, it was not done with intent." Right. Or, you know, whatever all the arguments you may try to make, that doesn't matter. It makes no difference.

[Lee]: And I find it. And the intent question. Right. The "innocent intent" to the dog ate my homework. Hurricane Sandy washed away all my records. There was a fire in the basement. You know, the law doesn't care.

[Rosemary]: No.

[Lee]: It's strict liability. It either happened or didn't. And the other part where these damages start compounding and become really catastrophic for businesses. So you have to pay your employees what they're owed. And if it's a late payment and if you didn't pay them proper minimum wage, it's a late payment. So you're going to have to pay them what they're owed. Plus, times two. And then on top of that, there's the Wage Theft Prevention Act that's here in New York, which has two pieces to it. It requires that when you hire someone or before changing their rate of pay, that you give them a form. And the form has to be filled out correctly and fully. There is no partial credit if the form has anything not checked, not filled out or it's wrong, it's a \$50 per day penalty, capping at \$5,000 per employee. And this is where I think intent comes in, Rosemary. It's sometimes, at least for... I've had with my clients, where intent is relevant. So the form is wrong. You don't have the form or it has a mistake in it. It's a \$5,000 penalty. Let's just cap up the employee worked for 100 days. The law allows a court to the DOL to "double treble." That's the legal speak for triple those damages from 5 to 10 or even 15. So that's where intent matters. I've seen it play out. That you can show it is an innocent mistake. Hurricane Sandy washed away all of my records. Yes, \$5,000 is still the damage. But if you are, keep your head in the sand or you intentionally not pay your people or you ignore your obligations under the law. I've seen those numbers double or even triple in damages to \$15,000. Have you seen the same at all in your experiences, Rosemary?

[Rosemary]: Yep, absolutely. It's funny you said that. I had one where it was doubled and unfortunately the client, the first time around, it was innocent. But the DOL came back three years later.

[Lee]: Ah. There's no excuse.

[Rosemary]: They wanted to make sure. and that had made similar mistakes. And they said now and they doubled it. And, and it was I mean, it was... there was nothing I could do. I mean, nothing we could do. And so the client learned the hard way there. So yeah. And as Lee said, there really is no negotiating with this. So and the reality is it's really not that hard. It really is not that hard to comply with these laws. You know, like the Wage Theft, you go out on the New York website, they've got all the forms right there. And I think Lee said this, it has to be in the individual's first language. And so I had clients say, well, you know, I don't know how to translate this form or put all this information in, for example, Burmese or something. Well, luckily, New York has done that for you. You literally can go out and they have translated all the forms. It is so easy you.

[Lee]: Into Albanian, Arabic, Bengali, Chinese, French, Greek, Hindi, Haitian, Creole, Italian, Japanese, Korean, Polish, Russian, Spanish, Urdu, and Yiddish.

[Rosemary]: Yes, precisely. So you download the form. Boom! Employee signs off on it. Give them a copy. You keep a copy, you're done.

[Lee]: And what I like to tell to my clients now is particularly this time of year, and they should do it every year. And especially now with a minimum wage rate increase. Every year, you should do these forms again. Even if we are the most perfect employer and you have the greatest employment practices program, mistakes happen. People forget to do things. Things aren't signed. Documents get lost. So here's your opportunity with a minimum wage increase because everyone should get a new form, just do the form again. There is no penalty for doing the form and no one didn't get a raise. Just give them the form again, correct your mistakes, make sure it's correct. But here is where the consequence comes, I think, in relation to raises that everyone got, whether it now may be minimum wage or you're exempt from overtime, overtime and eligible employees is the other half of the Wage Theft Prevention Act, which is a wage statement. And note here, I'm not saying pay stub wage statement. We like we think it's a pay stub because you get a check with a pay stub on top of it. But the law doesn't require you to pay your employees by check. You can pay by cash, chickens, shekels. However you want to pay your employees. But there needs to be a wage statement that says what the business is, the pay periods, things of that nature. But specifically the number of hours worked times the rate of pay, equating to how much the pay is, and then all the deductions, taxes, and things to that nature. So if you're in a scenario where you didn't give your employee an updated minimum wage, you didn't give them a raise, in addition to having to pay them what they're owed, times two, for the for the failing to pay on time, there is now a penalty because the pay stub is wrong. Clearly they didn't get paid right. It's a \$250 per pay period penalty capping at \$5,000 per employee. So if you pay your employees weekly, you reached that cap in 20 weeks, five months. If you pay them every other week, it is 10 months, if my math is correct there. But and again, these numbers can be doubled or even tripled. And the thing that is the real death knell to some of my clients, as it relates to this, is that when there is a violation of these laws and this is what most Americans... we think that when you are injured because we see on television your lawyers, the lawyers saying "you don't pay unless you win." And we think that your lawyers get one third of whatever you recover, not here, not under the Labor Law. What you lose? And if you didn't fill out the forms, right. You didn't pay your employees, right? You have to pay not only your lawyers. You have to pay your employee what they're owed back wages, fines, penalties and interests. But you also have to pay their lawyer's fees as well. I learned this lesson the hard way, and I'm curious how you learned it, Rosemary. The ...my very first foray into labor and employment, I picked up a case from someone who had retired and I did a federal trial. It was about whether someone was exempt or not, whether they were a chef and exempt from overtime, or a line cook and overtime eligible. It was a three-day federal trial in Federal Court in the Southern District of New York. I was my best lawyerly self. I was able to convince the jury that this person was, in fact a chef, and we won on that point. But my client did not give the proper wage acknowledgment form to the employee. The judge ruled from the bench \$5,000 to the employee, as was his right under the law. And then 30 days later, his lawyer put in a fee application for \$113,000.

[Rosemary]: Oh, my heavens, Lee.

[Lee]: So who won in that scenario? Just his lawyer.

[Rosemary]: Right.

[Lee]: And he... I was able to knock that down to \$83,000, but still, you know.

[Rosemary]: Wow. Luckily, I do not have a story like that. I can't top that story. And I think we should end there.

[Lee]: Because I think that is a good ending point. And so, you know, reach out to us for help, for questions. We're here to help. And I and we thank you for listening. And we'd like to hear from you, our listeners, about your thoughts about these changes to minimum wage here in New York. And to that end, we encourage you to head to Spotify and let us know what your thoughts are. And we've got a question for you: How does the New York State minimum wage increases that we've discussed here today impact your business specifically? We want to know, we knew this. We got this covered, in the bag. Thank you. But we knew this. But more specifically, we want to know where you've still got questions, where there's problems. Reach out to us. We're here to help. We want to always continue the conversation. Any closing thoughts from you, Rosemary?

[Rosemary]: No, I think that was perfect. I can't top that, Lee. I'm looking I'm looking forward to our the next time we chat.

[Lee]: Yeah. And so you should be aware. Please stay tuned. Our upcoming schedule is we're going to head to employee handbooks and we're scheduled to have a two-parter. So be... lookout on for that and we look forward again to continuing the conversation. So thank you again, everybody.

[Ari]: The *Labor & Employment Podcast* is available on barclaydamon.com, YouTube, LinkedIn, Apple Podcasts, Spotify, and Google Podcasts. Like, follow, share, and continue to listen. Thanks.

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