

Season 4, Episode 1: “New York’s 2026 Wage and Exemption Updates: What Employers Need to Know”

Speakers: Rosemary Enright and Michael Sciotti, Barclay Damon

[Rosemary Enright]: All right. Welcome, everyone, to the *Labor & Employment Podcast*. We’re back and pleased to be launching our fourth season. Yes, I can’t believe it. Fourth season. I am in my Studio B, as everybody knows, so in Buffalo, New York. And I’m thrilled to have Mike Sciotti, my partner and friend, joining me. So he’ll be joining me this fourth season. So you’re going to have to listen to the two of us for the next 12 months. Mike, welcome and why don’t you take a moment and introduce yourself to everybody.

[Michael Sciotti]: Sure, thanks, Rosemary. Happy to be doing this. Like Rosemary, I am a labor and employment attorney. doing this now for 35 years—represent solely management. Pretty much do everything soup to nuts from labor and employment negotiations to handling discrimination cases to lots of training and investigations, all the fun stuff that we get to do. Like I say, I don’t work a day in my life because I have the best job in town.

[Rosemary]: That’s awesome. I agree too. I was with somebody the other day and they said that they did “happy law.” And I said, that’s good. They work with nonprofits helping them do...it doesn’t matter what. And I said, I’m going to say that we do fun law. It’s just, it’s always fun. It’s always interesting.

[Michael]: You never know what employees will do and we have all the stories and I just shake my head 10 times a week. It’s like, what did they do? And we got the funnest job in town.

[Rosemary]: Exactly. So all right. So Mike, because I know you’ve listened to our past podcasts, you’re a fan. But in the past, we would always do this fun fact, we kick off each of the sessions. But I think we need to shake it up here, Mike, and in season four. So I’ve got this, calendar, a *New York Times* calendar, and it’s one of those like...how you have like word a day and those types of things. This is like a “question a day.” And so I’m, what am I, nine in January, well January 22 when you’re all listening to us, but January 9 when Mike and I are recording this. And so I’ve got nine questions that I’ve had to answer thus far. And I picked this one, Mike, for us. All right, so you ready?

[Michael]: Okay, shoot. I am.

[Rosemary]: All right, so here’s the question. If you were invited to join or beyond whatever the right word would be, the internet invited to be on the International Space Station for one month. Would you do it?

[Michael]: Hell yeah. I wouldn’t even think twice. I’d be like, where do I sign up? And let’s go.

[Rosemary]: My gosh, yeah. and my response was as effusive with a “hell no,” Mike. The thought of having to go through the, I guess it’s the atmosphere and then have to reenter it and it just completely flips me out, completely flips me out. And then being in that small space, I don’t know, I just, I’m sure it would be spectacular, but I could not do it, could not do it.

[Michael]: Yeah, I say I can do it, but whether I’d actually passed the fitness test, I sort of doubt, who knows?

[Rosemary]: Well, we know I wouldn’t. That’s what I’ll say, Mike. I couldn’t pass the fitness test. Anyway, all right. Well, that was fun. So we’ll see. I’ve got a whole bunch of these, which are a lot of fun. So we’ll do those throughout the year.

[Michael]: Okay, sounds good.

[Rosemary]: Right, everybody. So thanks for joining us again. And Mike and I spent a lot of time talking about what do we want to kick it off, know, kick the season off with. And we thought, you know what? What should be top of mind right now is January 1, there were some changes here in New York state relative to the minimum wage. All right. And I say “minimum wage” and all of you are listening thinking, well, big deal Rosemary, we all know about the minimum wage. What some people may not know is what happens, Mike, when the minimum wage in New York state goes up.

[Michael]: That the salary exemption for exempt employees also goes up in a corresponding percentage. And what many people don’t know is we have so many minimum wages in New York. Another repercussion is the Department of Labor republishes effective 1/1/2026, the employment poster for the minimum wage. Now in New York, there’s not just one, there’s one for each of the various minimum wage orders. So there’s a fair amount of compliance and planning you have to do actually before 1/1 to get ready for the new year. So those are the initial things that come to mind.

[Rosemary]: Yeah, and actually, as I said, the topic for this particular podcast is around the salary thresholds, which we’ll talk about. But as all of our listeners know, in the past, like when Lee and I would be talking, I might make a comment or he might make a comment and we’ll say, hey, you know what? Everybody should know about that. Let’s talk about it. So let’s put the thresholds on the...back burner for a minute, Mike. And if you don’t mind, you’re talking about the wage orders. We could have listeners out there who don’t even know what you’re talking about. Like, what is a wage order? So if you could, just tell them about it.

[Michael]: Yes. So this applies to New York state employers. So we have two laws that New York state employers typically have to comply with in the wage and hour arena. The Fair Labor Standards Act, if they’re covered, and that’s the federal law. And then we have the New York state labor law, which has greater protections for employees, which you also have to follow in... relative to a higher minimum wage relative to additional posting requirements and relative to changes in the salary amount. So one of the first things that, when we get a wage and hour question from a New York employer, I ask, which minimum wage order are you covered by? And a lot of times I’m met with “what? What are you talking about?” Because it really, not so much with the three main things that I just identified. But each order is different relative to employer obligations that fall within it. So just by way of example, the hospitality and fast-food workers have their own minimum wage order. In addition, farm workers, building industry, miscellaneous industries, and not-for-profit all have their own minimum wage order. And the not-for-profits is a little funky because there’s two of them. There’s one that applies if you just in general and there’s another one that applies if you opted out of that and selected the other minimum wage order. Most... I have found most not-for-profits don’t know that and they don’t know which one they’re covered by. And if the not for profits been around, Rosemary, for decades and decades. Those of us that are older remember the office fire down in Binghamton, the state office building. And the elections for not-for-profits were housed there and were lost in the fire. This is all pre-computers and things like that. So we have that issue we always have to work through because many employers simply don’t know and the records to establish it are gone they were destroyed in the fire. A new not-for-profit, that’s easy enough we can figure out. But that’s sort of generally why it’s important because it really sets forth your obligations, how you pay your employees. Some of the big things that we see are split shifts, spread of hour rules, and those differ depending on the minimum wage order. It’s one of the most important things for an employer to understand and have a copy of the payroll and HR people, you need to know the minimum wage order and every year, print it out and keep it because it’s sort of your bible on how to pay people for that year.

[Rosemary]: Precisely. And dear listeners, you may be sitting there thinking, okay, I didn’t know there was a wage order, as Mike said, that he gets that blank stare, but, where do we find it? You know what? Just go out. I was going to say, go out on the internet, put in, go ahead, Mike.

[Michael]: Yeah. Just I find it a “New York State minimum wage orders” and it’ll take you right to the and they’ll pop up. You can download them into PDF format so you can print them out or download them.

[Rosemary]: Yep, exactly. and you heard Mike hit on a few of them, for example, the hospitality, you look at that talks about your tip credits, right? So all of that is explained in there. There’s discussions in them about uniform maintenance. So as Mike said, everything to do with, the compensation with your employees are in those wage orders. Very, very helpful. So like I said, Mike, because you mentioned that I thought, we should hit on that quickly. The other thing, and then the other thing, Mike, was you made reference just briefly, it was just a passing comment about the wage and hour, the posters. So just if you would just take a second and just remind everybody about their posters.

[Michael]: Yeah, if you’re but we have posting obligations pretty much federal and state, under the Fair Labor Standards Act, there is an employment poster that has to be up. It addresses minimum wage over time and child labor rules. The New York State Department of Labor has different posters that address generally the same issues, but they’re industry specific and they’re tied into the minimum wage orders. They revise those every single year. When the minimum wage goes up, the department revises the employment poster and you’re supposed to take the old one down, put the new one up. You also see these requirements, Rosemary, pretty much under all the other employment laws, know, Title VII of the Civil Rights Act, the Human Rights Law, the Equal Pay Act is under the Title VII one. But there’s lots and lots of employment poster requirements that exist out there and we’ll probably hit that in another podcast.

[Rosemary]: Yeah, exactly, exactly. Thanks, Mike. Yeah, and so again, I just thought it was important since, in that intro, you mentioned those two things, and I want somebody to be sitting there thinking, what are they talking about? I don’t know what these wage hour orders are. And it’s obviously very relevant to our topic today. So... go ahead.

[Michael]: Yeah, and you would also find them the posters the same way you find the minimum wage orders. Just type in “New York State Wage and Hour posters” and boom, it will take you to the web page and you’ll be able to download or print out each of them.

[Rosemary]: Yep. Great. Perfect. All right. So now we’ll come back to what we said we were going to talk about, which is the increase for the New York State’s thresholds. So before we do that, I always think, and I think Mike, you agreed with me when we talked about this, that it might make sense to give everybody just a quick refresher on, you’ve been mentioning the FLSA, but the exemptions, what we’re talking about. Because, I still get questions about that, Mike, and I bet you do too. I just had one two weeks ago from a client asking me, we’ve got this employee, their salaried, that means they’re exempt, right? The answer was, well, no, not necessarily. And we talked through it. So the first thing I want to say, hopefully everybody’s aware of this, but, we’re talking about the exemptions, what we’re talking about is exemptions from the Fair Labor Standards Act, so FLSA, and the New York State overtime requirements. So that’s what we’re talking about, that you are exempt, an employer, or rather an employee, is exempt from receiving overtime. So, FLSA has got three tests. New York follows those tests. All right, and I always say three, Mike, you may say two, some say, so it depends on the L&E attorney, but I always say there are three tests. The first is, is the employee paid on a salary basis, right? So they’re not an hourly employee. All right, so that’s the first test. So they pass that test, we get a little check mark. Yes, that’s good. Second one is the salary threshold. That’s what we’re talking about today, what’s happening in New York state. And we say salary threshold, we mean, what is the floor? All right, so this individual has to make this certain amount, all right, on a weekly basis. We’ll talk about those numbers in a minute. And then the third is the duties test. All right, and so the duties are, what does this particular employee do day to day in their job? All right, and for a minute, let me just digress, not digress, but just put a little more meat on the bones for the duties test. Can’t tell you—and I’m sure Mike you’ve had the same thing, feel free to jump in at any point—that an employer is saying, well here’s the job description. It says right on here exempt, because we’ve classified them as exempt and then here are their duties. And my answer, my next question or my first question is, well, so tell me what they do. well, they do X, Y, and Z. Okay, well, X, Y, and Z aren’t necessarily on this job description, but this is their job, that’s their

job description, no. There is a duties test and you can find all that information about what the duties are for a particular exemption. And I'll flip it to Mike in a minute online, on the internet. So you'd go in there and say duties for executive exemption or administrative exemption. And I do have to say the federal government, I think has put out some terrific fact sheets. I mean, you can get those and it's for each exemption, and it will go through and define, it breaks it all down. What is a duty? What is a primary duty? How much time is spent? And the individual, you've got to go through and actually determine whether that person is spending at least 50 percent of their time doing or performing those duties. It's okay to do some non-exempted work. We all do, right? We all do. A great example is in a restaurant. The restaurant manager would be an exempt employee, maybe if he's salary or he or she is salaried and meets the salary threshold and salary basis, but they may be bussing tables, right? That's not exempt work. But if they spend more than 50 percent of their time doing the duties of an executive in this particular instance, or yeah, I would say executive, then they're exempt. All right, so Mike, I'll let you chime in.

[Michael]: Yeah, and I agree. Let's go back to the job description. That is a piece of the puzzle. It is not conclusive. The Department of Labor is not held to what you've put on that piece of paper. What the department does if they're auditing you is they will interview your employees. What do you do? They will interview the managers. What does Johnny Jones do for you? And they will ask specifically. And, if the job description lines up with reality, wonderful. If it does not, they're going to go with the interview. They're going to go with what the manager told them, what the employee told them, and not what's on that piece of paper. So the department can blow through the job description in a matter of seconds. So, I mean, it's in a...

[Rosemary]: That's right, and they do!

[Michael]: They're not held to it. It's an important piece of the puzzle. I like employees to sign off on the job descriptions. You're not required to have job descriptions, but I tell employers if you're going to, make them accurate and keep them updated because the worst thing that you can do is give the department a job description that's wrong and then they're going to start questioning you and say, wait a minute, you say this is what the job description is. But we talked to Johnny and Johnny laughed at this job description and he signed off on it. So we're not really, we're going to blow by it and we're going to get into reality what the employee really does. Your point also on non-exempt duties. Everyone does non-exempt duties if you're an executive. I mean, the owner of a company could be the first one in the door and there was a snowstorm. He shovels the sidewalk. OK, this doesn't mean you'll lose the exemption simply because you do non-exempt work. I think the other thing employers need to realize if it's a close call, they're non-exempt. You have to fit squarely in the exemption. That is what the Department of Labor, either New York State or US will tell you. You're either in or you're out. And to clarify also, we're talking about the... what I call the big four exemptions, executive, administrative, creative professional, and just educational professional. Those are what I call the big four. Some call it just the big three. There are other overtime exemptions like the motor carrier exemption, the amusement park exemption, other ones that are out there that... the outside sales/computer exemption. They're a little different than the big three or big four. And let me just give you a quick "for instance," the computer exemption Rosemary, I can pay hourly or salary to meet that salary level thing. So they're all a little different... but that's sort of just some additional background.

[Rosemary]: Yeah, which is great. Thanks, Mike. Well, and again, we wanted to kind of set, make sure everybody's at the same baseline, right? So, you've got somebody, so it's the end of 2025. Well, you shouldn't wait until the end of 2025, but we'll just pretend. And so you look and yes this all my, all of my employees are properly classified as exempt or non-exempt. Hey, well, New York state minimum wage is increasing effective January 1, 2026. I know because I listen to Mike and Rosemary, that that means that the salary thresholds in New York State is going to go up so I've got to look at that. All right, so Mike, got the, we understand now what the tests are, what the FLSA says, but my question to you, Mike, is this. So, you talk about the big four. New York has got its own salary threshold, as we said. Is it the same? Does the New York salary threshold apply to all four, to the big four that you just referenced?

[Michael]: No, it typically, if you look at the minimum wage orders, the professional exemption, the salary amount does not apply to, and it applies to the executive and administrative. If you're listening to this podcast sometime in the future, always double-check the minimum wage order, because if you're listening to this in 2027 or something like that, just to go back, it could always change. So it's... just realize it applies to the executive and the administrative exemptions here in New York.

[Rosemary]: Yeah, at this point. That's great point, Mike, to check, because you never know. You never know. So again, I'm just going to put a real fine point on it because, like I said, people get confused. your professional exemption, if you're claiming that, so he said the educational and the creative, if you're claiming that, you still got to pass the duties test. We told you where to find that. Got to pay them on a salary basis. But you don't have to meet the New York State threshold. You have to meet the feds. You meet the feds. And I've got it down here. So and what is that? Right. It's \$684 a week, which is I'm going to look down because my math isn't that good. \$35,568 annually. So that is the current salary threshold for the professional exemption. So New York again follows the FLSA for the professional exemption relative to salary. So when we're talking now about the salary threshold increasing in New York state, we're talking about the executive and the administrative. Right. And so, so Mike, I don't know that we necessarily want to give everybody all the numbers...Why don't you just at a high level, where can they find it and just give them a high level...?

[Michael]: Yeah, you could always find it very simply. "New York State salary exemption threshold." It'll take you right to it. Right now, it looks like New York City, Nassau, Suffolk, and Westchester County and the fast-food industry the salary amount for 2026 \$1,275 dollars per week. And for the rest of New York, it's \$1,199.10. Now you may say, well, I thought there were all these different minimum wages. There are and... but they've sort of everyone's sort of catching up. And so right now we have two salary numbers here in New York and that's what we're dealing with. So you have to pay attention to where your assets are, meaning your employees. If someone's down in New York City, the salary threshold down there is higher than it is in Erie County or Onondaga County or Monroe County or Albany County. So you really need to simply pay attention and every year you need to sort of self-audit yourself. Is there anyone who was exempt last year who now won't be exempt and how do I fix that? Well, it's very simply: you increase their salary or you leave it alone. And if you leave it alone, they are now a non-exempt salaried employee and they would be entitled to overtime. So you sort of have to do some planning here to decide what do we want to do? Do we want to keep raising Johnny's salary every single year to keep up? Or do we want to make this person non-exempt? Nobody, Rosemary, has the right to be an exempt employee. This is sort of up to the employer. If you're exempt and I want to change your pay to hourly, I can do it. And people think, no, I'm exempt, you can't change that. Of course you can. And you have to do a new Wage Theft Prevention form, do it on proper notice to the employee. But, you're in charge, employers. Please remember that.

[Rosemary]: That's right. Well, and I'm so glad you jumped ahead to the next question I was going to pose to you, Mike, which was, how do you decide, if Johnny Jones, that was the example employee that you used, if we're going to increase their salary or not. And, I'm sorry, go ahead.

[Michael]: Yeah. Good. No, I think it's a business decision. I and...as an employment lawyer, I tell employers, hey, you're free to give away as much money as you want. I'm just going to tell you what the law is, then if you want to meet that salary threshold, great. And I'm assuming you meet all the other parts of the test. If you don't, you have created a non-exempt employee. And that person is entitled to overtime. And I'm not a fan of the salaried, non-exempt employees because it's very difficult to take money away from them. The rules are different. I would convert that person to an hourly employee. And I think it's easier for record-keeping. It's easier for leave issues and things along those lines. That's just me though. If you want to have a salary, non-exempt employee, maybe to make the person feel good...

[Rosemary]: That's it. Like that's exactly why people do it. Cause they're like, they want to be able to say they're salaried. Yeah. I have a lot of employers who have done that. They're like, well, we're just going to do this because it's a, it's a pride. Yeah.

[Michael]: It's an ego thing. Yeah, and which is fine. And then I always tell them, but remember, with a non-exempt employee, there are record-keeping requirements. We need to record their hours worked. And it's not just 40 hours a week. What was their start and end time for the day? And did they go over 40? And if they go over 40,

[Rosemary]: What was their meal period? Did you, their meal period is from? Yeah.

[Michael]: So if you have a non-exempt employee, you have to track their actual hours worked and, the start time and the end time. Well, we have a schedule. No, that's not acceptable. That is not the actual start and end time. We also say track their meal period and don't have an auto doc. If you have an auto doc, you just need to be aware of some stuff, which I'm sure we'll address in another podcast, but you need to record actual hours worked so you know if they exceed 40 hours in a work week. And if they exceed 40 hours in the work week, you're going to have to pay them time and a half. And if you keep, Rosemary, the person salaried, it's a bit of a pain because now we have to decide as an employer, does the salary cover all straight time or just straight time for hours one through 40. It makes a difference because if it's one through 40, you owe time and a half. If it's all straight time hours, you only owe half time. But that has to be clear and undisputable, meaning you can't be wishy-washy about it. And the employee has to basically know it. And if as long as you do, you're in great shape. But then you only owe either half time or time and a half depending on the situation.

[Rosemary]: Right. And as you're talking about that, Mike, I think that would be a great topic going forward, for another episode, what you were just talking about, the straight time and all of that. So we should make a mental note of that. But a couple of points that I want to, know, that I, everything Mike says is amazing and wonderful. He's brilliant. But what I know is that a couple of things I want to just point out or stress. So you heard Mike make that passing comment about you got to give them notice. That's right. Whenever you're changing an employee's compensation, their wages, you have to give them notice. What does New York State say? Well, they say, we'd like you to give them as much notice as possible, but it's a minimum of one pay period. I always say to my clients, do as much as possible. Morale issues, all of those things which we could talk about for hours. But New York State says, at least one pay period. So that's the first thing I would say. Second thing is you heard him make the passing comment about the wage notice. So we can do another episode on that. So stay tuned for that. But again, we are required in New York State to provide our employees with a wage notice under the Wage Theft Protection Act. So we'll talk about that. And then the other thing, so I wanted to just emphasize those points, Mike. Thank you. The other thing, Mike, I want to just throw out to you and I'm watching our time, so we may have to wrap up soon here. But I can't tell you how many of my employers will say to me, well, Rosemary, they're exempt. We're going to get in trouble if we're not paying them properly. And what they mean is in their heads, what they're thinking is that there is this, this person must be exempt. Right. And so they have to be exempt. So I have to just keep chasing that dollar amount. And so I'd just like you to again make the point, you made it, but let's make it again. All right, about that.

[Michael]: Yes. No one has the right to be a salaried exempt employee. That means in the most ridiculous example I have, your chief executive officer of a company that has 5,000 employees, you can make that person an hourly rate employee if you wish. It is up to the company to decide. It is a business decision. Now, you do so... for you make someone exempt if, maybe it is for morale, but usually it's driven by do we expect them to work more than 40 hours in the work week? Are they supervising two or more full-time employees? Are they performing what I call like "very important managerial level functions" for the organization? We sort of figure that out. And then we decide, we have a budget. How much are we going to pay people and are they going to be exempt or non-exempt? But nobody, and I mean no one, has the right to be an exempt employee. And sometimes employees push back and say, you can't change me from exempt to non-exempt. It's illegal. No, it's not. You just have to do it the right way. And so don't be concerned about that. Remember, you're in charge of your business, but be tactful. Remember, if you change someone's... how they're paid, they may not like it and they might run to a union and try to do a union organizing campaign. So being diplomatic and nice gets you a long way in this area.

[Rosemary]: It does, it really does. So just Mike hit on these. And so just to wrap up and then I'll ask Mike if there's anything else he wants to say specific to this topic. But so what should you be doing? My notes, I'm looking down, the implications, all right. So your options—Mike already hit on these. If you have got these exempt employees and you want to maintain that exemption. You're going to raise their salaries above the threshold here in New York. All right. Or you may decide you have to reclassify them. Or you decide you're going to limit your hours. I had one employer do that. They said, you know what? It makes more sense for us to put more boundaries around. So you make the business decision, and then you either do the increase, or you don't. Now, depending on if you're reclassifying, as Mike has already said, we've got record-keeping requirements that are going to kick in, payroll system adjustments that need to be made, there's quite a few things that need to change. It isn't as simple as just, well, you know what, we're not going to give them a, I don't know what that increase is, Mike, is it from \$100? I don't know the dollar amount, but you just decide that financially, we just can't do that. And so it isn't just enough to say, all right, we're just going to leave them where they are. Now they're non-exempt. So you've got to take care of all these things that Mike and I have spoken about. Anything else on this topic, Mike, before we wrap up?

[Michael]: Just...it is... what else is there? Maybe they need a new job description. Maybe their employee benefits are somehow changed because of going from exempt to non-exempt. You need to take a look at the whole picture and not have blinders on relative to, I can change their how they're how they're paid. Correct. However, are there other things internally that will be impacted? Maybe how we...do we frontload sick time versus accrue it? Do they get more or less PTO? I don't know. It is organizational dependent. So just consider all the issues before you jump and make a change. And if you're listening to this later in the month of January and you missed the change in the increase. What I would do is change it right away going forward and do a retroactive payment for the mis-paid periods. I think you're going to be OK. The department should see that. And if you're not OK, there is some risk. But I think generally speaking, the department would forgive that because you did a good faith, "oh, we made a mistake. We forgot. We immediately went back to the retroactive payment for one pay period and fixed it going forward." I think that's no harm, no foul.

[Rosemary]: I agree, I agree with you Mike on that. Yeah, and those are great points. Great points, because you're right. There are some that, particularly around sick leave or PTO, you're not exempt, might accrue, and you're exempt, don't. So those are great points. Thank you so much. All right, so I guess what we'll say at this point is thanks to everybody for tuning in for our first episode of season four. We, as always, want your take on what we just talked about, the New York State minimum wage increase and more specifically the increase to the salary threshold. So feel free to drop your thoughts, your questions on Spotify and don't forget to join us for episode two. Now I will tell you, Mike and I, we're going to talk about handbooks. We're trying to do this, those things that are top of mind for everybody at the start of the year, but...One of the questions that we, all of us, are getting hit with multiple times in the day is, tell me about this "I'm trapped at work" act. So Mike and I are going to in our next episode, break that down for you so that you understand what you can and can't do and what the act applies to and what it doesn't. So we look forward to seeing you in our next episode and hearing from you on this first. Thanks.

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