

Trouble-Free in 2023: Post-Pandemic Human Resource & Employment Law Considerations

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Essential Workplace Considerations



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Independent Contractor or Employee

- **Independent Contractors:** Workers not legally entitled to most statutory safeguards applicable to employees, with terms of retention set forth in written or implied contract
- **Employees:** Workers entitled to regulated workplace protections, including wage entitlements & statutory benefits
 - Established by factual circumstances
 - Employment can be **At-Will** (Default) or by **Employment Contract**
 - At-Will employees are terminable for any legal reason, at any time, usually without “cause” or advance notice
 - At-Will employees are either Non-Exempt (hourly) or Exempt (salaried) staff
 - Parameters of employment for employees working under an Employment Contract are dictated by the terms of their contract
 - Collective Bargaining Agreements dictate terms for union workers



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Independent Contractors

- Workers are Independent Contractor only when as a matter of “economic reality” they operate a business of their own, or are otherwise employed by another entity, and not solely dependent on an employer for wages
 - Accidental & deliberate misclassification of workers as contractors rather than staff is a frequent & costly source of liability exposure within the nonprofit sector
- Worker status is determined by the circumstances, not desire of the parties
 - NYS prefers workers to be classified as employees whenever possible to enhance its ability to regulate the workplace, afford workers the maximum level of statutory benefits of employment (reduced FICA contribution, as well as unemployment, workers comp & disability) & assure the proper withholding of income taxes
- Several factors are considered to determine if a worker is economically dependent or a legit contractor
 - No one single factor is controlling, nor must all be present



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Legitimate Contractors:

- tend to possess specialized training, skills or education enabling them to perform tasks that cannot be done in-house by the nonprofit’s staff
- control the day-to-day aspects of their work w/o the nonprofit’s direction
- assist nonprofits with business operations, like finances, legal concerns, facility maintenance, etc., not mission-focused services
- negotiate a rate for their services, which can result in a profit or loss
- advertise & make their services available to multiple entities
- usually, only work intermittently &/or for periods of limited duration
- provide their own technology, equipment, supplies, etc.



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Essential Employment Considerations: Exempt versus Nonexempt



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FLSA Employment Exemption Status

Non-Exempt

- Default category
- Often paid hourly, but can be salaried w/ time tracking
 - Must be paid, a minimum wage of \$15.00 if “Downstate,” or \$14.20 if “Upstate” (north of Westchester, which will increase to \$15.00 in 2024)
- Hourly staff are entitled to overtime at rate of 1 ½ for hours worked in excess of 40 per week
 - Includes hours worked remotely, if checking work email or when contributing to social media
 - Additional hours worked beyond those regularly schedule are billed at “straight time” if less than 40/weekly

Exempt

- Strictly limited to qualified staff
- Not entitled to overtime
- Must satisfy Three-Part Test:
 1. job duties;
 2. regular salary; &
 3. minimum salary level
- Minimum salary levels for 2023:
 - Executives & Administrators:
 - \$58,500 (“Downstate”)
 - \$55,341 (“Upstate”)
 - ❖ Upstate minimum will likely increase to \$58,500 in 2024
 - Professionals/Artists: \$35,568
 - ❖ default federal minimum, which may increase before 2024

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Job Duties

Executive: primary duties relate to personnel management, specifically requiring the supervision of two or more staff

Administrative: responsibilities must concern the performance of office work directly related to the management or business operations of the employer or consumers of its services

- Duties must include the exercise of discretion and independent judgment with respect to matters of significance

Professional: primary duties require advanced knowledge in a field of science, learning or a “recognized field of artistic endeavor”

- Knowledge is usually acquired by prolonged, specialized instruction, generally evidenced by specialized licensing &/or an advanced degree



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Salary Basis

- In order to qualify for exemption, an employee must regularly receive a predetermined compensation each pay period
 - Doesn't apply to doctors, lawyers, teachers or artists, but does apply to all other professionals
- Must be paid the full salary for any week in which the employee performs any work
 - Need not be paid when no work is performed
- An employee is not paid on a salary basis if salary deductions are made for absences allowed by the employer



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Salary Level

- In NYS, to qualify as exempt most employees must earn a minimum salary that is far higher than that required by the federally or by other states
- NYS has implemented a regionally-based, progressively increasing minimum salary-level for exempt employees
- For 2023, minimum salary levels, as established by job duties & region, are:
 - \$58,500 — Executive or Administrative job duties working in NYC, L.I. or Westchester
 - \$55,341 — Executive or Administrative job duties working anywhere Upstate
 - \$35,568 — Professional job duties employed anywhere in NYS (federal minimum)
- Minimum level has annually increased at a rate of ~7.75% , but is presently capped at \$58,500, with only Upstate scheduled to increase in 2024
 - Salary level minimum is *not* pro-rated for part-time staff
 - The primary job duty is used to determine salary level minimum for employees who qualify for exemption under more than one criteria



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FLSA Classification Considerations

- There is *never* a legal obligation to increase wages in order to keep formerly exempt employees on staff
- Salaried wages can always be converted to an hourly rate
 - $\text{salary} / 52 \text{ (weeks)} / 40 \text{ [or, 35, 37.5, etc.] (weekly hours)}$
- Formerly exempt (or any other non-exempt) staff can still be paid a regular salary, but must receive additional compensation if working beyond regularly-scheduled hours
 - only weekly hours beyond 40 are overtime, anything less is paid at straight time
- With great caution, certain grey-area strategies can be utilized to minimize salary-level concerns
 - proper reliance on professional job duties exception & prove helpful



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Consequences of Misclassification

- Employers are required to immediately address any acknowledged employee misclassification, including any suspected prior mistakes
- Failure to properly classify workers can result in Department of Labor complaints & audit (either self-audit or as conducted by DOL)
 - DOL audits are expensive, time-consuming & uninsurable
 - All unpaid wages due must be repaid in a lump-sum in full, with all interest due
 - Default lookback window is 6-years & applies to all impacted workers
 - Fines, up to treble damages (3x actual cost) may be imposed if egregious
- Options exist to rectify misclassifications, but they must thoroughly assessed & properly implemented with consistent application



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New York Sick & Safe Leave



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What Employers Need to Provide

- **1-4 Employees & annual net income of \$1 Million or less:**
up to 40 hours of unpaid sick leave in each calendar year
- **1-4 Employees & annual net income of more than \$1 Million:**
up to 40 hours of paid sick leave in each calendar year
- **5-99 Employees:**
up to 40 hours of paid sick leave in each calendar year
- **100 or more employees:**
up to 56 hours of paid sick leave in each calendar year



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Who Is Covered?

- All private sector workers in New York State are now covered under the state's sick & safe leave law, regardless of industry, occupation, part-time status, overtime exempt status, & seasonal status;
- Covers sickness, injury or safety of employee, spouse, domestic partner, child, parent, step-parent, grand parent, sibling, grandchild, foster child *in loco parentis*, legal ward, legal guardian; and
- Employee or employee's family member who are victims of domestic violence, a family offense, sexual offense, stalking, or human trafficking.



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What Can The Leave Be Used For?

- **New York State: (Sick Leave)** Diagnosis, care, or treatment of a mental or physical illness, injury or health condition, or need for medical diagnosis of, or preventive care for, the employee or the employee's family member; or
- **New York State: (Safe Leave)** Employee or employee's family member that are victims of domestic violence, a family offense, sexual offense, stalking, or human trafficking for shelter & rape services; safety planning, file a complaint, relocation; attorney, social service & law enforcement meetings; new school enrollment; and for other steps necessary to ensure health or safety.
- **New York City Additional Permitted Uses:** for business or school closure by a public official order due to public health emergencies, and for permits leave for custody, visitation, matrimonial issues, orders of protection, immigration, housing, employment discrimination, and consumer credit.
- **Westchester County Additional Permitted Uses:** when an employee or their family member may jeopardize the health of others because of exposure to a communicable disease or has actually contracted it. Also, to attend or testify in criminal or civil court hearings for domestic violence or human trafficking cases.



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New York Paid Family Leave



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What is NYS's Paid Family Leave?

- Guaranteed paid job protected leave to care for family in certain circumstances.
- Up to 12 weeks in any given 52-week period.
 - can be taken in daily (must be a full day) or weekly increments.
- Employee requesting PFL are entitled to:
 - job protection with reinstatement to same or comparable position & wages;
 - protection from retaliation for using PFL;
 - maintain their existing health insurance while on leave; &
 - use all employer-funded sick &/or vacation time before using PFL.
- Payment is 67% of the employee's average weekly wage, up to a cap of 67% of the current Statewide Average Weekly Wage of \$1,688.19
 - For 2023, maximum weekly benefit is \$1,131.08
- Wage benefit funded by employees through payroll deductions:
 - contribution is 0.455% of an employee's gross wages/pay period. Maximum annual 2023 contribution is \$399.43.



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What Can It Be Used For?

New York's Paid Family Leave (PFL) is for employees to:

- Bond with a new child within 12 months following birth, foster, or adoption;
- Care for a close relative with a serious health condition (includes COVID) defined as:
 - inpatient care in a hospital, hospice, or residential health care facility, or
 - continuing treatment or continuing supervision by a health care provider.
- Close Relative is defined as: spouse, domestic partner, child & stepchild, biological siblings, adopted siblings, stepsiblings, half-siblings, parent & stepparent, parent-in-law, grandparent, & grandchild.
- Assist with family situations arising when the employee's spouse, domestic partner, child, or parent is deployed abroad on active military service or has been notified of an impending military deployment abroad; or
- It may also be available for use in situations when the employee or the employee's minor dependent child are under an order of quarantine or isolation due to COVID-19.



Note: PFL cannot be taken for the employee's own illness, disability or qualifying event.

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Who Can & Cannot Take It?

Can Collect:

- Full-time (regularly work 20 or more hours/week) & have worked at least 26 consecutive weeks; and
- Part-time (regularly work fewer than 20 hours/week) & have worked at least 175 days.
- Citizenship or immigration status does not matter.
- Time spent on paid vacation, sick or personal days can be counted toward an employee's eligibility determination.

Cannot Collect:

- Minors (those under 18 years of age);
- Paid Officers and Directors (Board President/Chair, VP, Secretary, Treasurer, etc.);
- Teachers, or those primarily engaged in instruction; &
- Research Scientists.



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New York's Secure Choice Savings Program



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What is it?

It's an automatic volunteer retirement savings program funded by the employee through a payroll deduction into a ROTH IRA type savings plan.

How much is the automatic deduction?

- The standard employee after income tax default contribution amount is 3%, but not more than 10% of eligible wages.
- Annual contribution increases of 1% are required until the 10% ceiling is reached.
- Employees may select a different contribution amount, either a different percentage or a dollar amount within the annual IRS limits.
- Employees can elect out of the program. You're in unless you proactively opt out.

What are the annual IRS limits for these contributions for 2023?

- \$6,500 for those under 50 & \$7,500 for workers 50 and older.

Who administers it?

- NY State administers the plan. It's a state-run program and the state covers the cost of running it.



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Who? What? When?

Who is eligible?

- All NY employers with 10 or more staff, either full time or part time, in business for, at least 2 years & not already offering a qualified retirement plan. Employers already offering 401(a), 401(k), 403(a), 403(b), 408(k), 408(p), 457(b), or other qualified retirement plan in the preceding 2 years are not required to offer it, nor can they switch from their current offerings over to the Secure Choice Savings Program.
- Employees must be at least 18 years of age, earning wages, & employed by an employer in NYS during a calendar year.

What do employers need to do?

- Employers can either set up their own retirement savings program or choose access to the state-run program.
- If choosing the state-run program, employers will need to set-up the automatic payroll deduction & cover the set-up expenses.

When is this effective?

- Once the state has set up the program, employers will have 9 months to comply. As of Dec. 22, 2022, the program was in the beginning phase of development with no current enrollment requirement. Enrollment is expected to begin sometime in 2023.



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New York City's Retirement Savings Plan The Savings Access New York Retirement Program ("NYC Retirement Program")

What is this plan?

- Covered employers are required to automatically enroll employees into an IRA account.
- The plan is portable – employees who change jobs can continue to contribute or roll the funds over into other IRA's or other retirement savings plans.

Who does this apply to?

- Employers of 5 or more employees who work in NYC, have been in continuous operation for 2 years, & who do not have a retirement plan during those 2 years.
- Employees must be 21 years or older, work at least 20 hours a week, & have regular job duties within NYC.

How much is the automatic deduction?

- The standard employee after income tax default contribution amount is 5% capped at the IRS maximum contribution rate (\$6,500 for employees under 50 or \$7,500 for employees 50 & older).
- Employees can opt out or change their contribution amounts.

When is this effective?

- NYC's plan has not yet been implemented & the City may suspend it due to the State implementing the State's program.



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Recently Enacted or Expanded NYS Worker Protection Standards



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General Technology Use Considerations

- In general, any technology owned by an employer can be monitored by an employer, at its discretion, subject to proper advance notification
- With proper notice, company property can be monitored even if used offsite
- Employers have limited ability to monitor use of privately owned property used for work whether onsite or offsite, but can prohibit such use for work
- Staff can be restricted from their use of technology as follows:
 - using company technology or accounts in any manner inconsistent with policy
 - relying on use of personal technology or accounts for work, if prohibited
 - utilizing or accessing either company or personal technology or accounts in any manner that reflects poorly on either the employer or the employee, such as engaging in illegal, unethical, immoral or even simply embarrassing activities or publicly disparaging or impermissibly claiming to represent the employer



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Electronic Monitoring Requirements

- All employers are required to offer staff advance written notice of their ability to monitor onsite or offsite use of company-owned telephones, emails, internet access or any other related means of electronic communication
 - New Hires: employer must provide written notice, obtain an acknowledgment of receipt (handwritten or submitted by electronically) & maintain related records
 - Current Staff: employer must post notice “in a conspicuous place which is readily available for viewing” by all employees subject to monitoring
- Indirect monitoring such as use of antiviral software or maintenance is exempt
- Recommended that all staff receive & acknowledge specific written notice & that an Electronic Monitoring Policy be added to Employment Handbooks
 - Notices should specifically incorporate certain detailed statutory language in notice
- NYS AG can impose progressively increasing fines from \$500-3K per violation



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Wage Transparency Laws

- **New York State:** All new job advertisements, as well as internal promotion & transfer postings must disclose compensation or ranges of to job applicants & current employees. Job descriptions must also be made available.
 - Effective 9/17/23 & applies to all employers with 4+ staff
 - Prohibits retaliation against both applicants & current staff
 - DOL is authorized to impose progressively increasing fines from \$1-3K per violation
 - Employers are required to maintain historical records of compensation ranges, promotion or transfer opportunities & job descriptions
- **New York City:** Analogous to NYS statute, but presently applies to all NYC-based employers &/or other employers w/ staff performing work in NYC
 - Retaliation protections limited to current staff, system of fines differs in application
- **Albany & Westchester Counties & City of Ithaca:** Similar to NYC protections



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Enhanced Whistleblower Protections

- NYS recently expanded & enhanced whistleblower protections
- Employers can't retaliate against staff or contractors from disclosing, or threatening to disclose, activities, policies or practices that they "reasonably believe" violate laws or regulations or threaten public health or safety.
- Employees can be required to make a "good faith effort" to notify the employer of offending activities prior to public disclosure, but several exceptions apply to truly egregious situations
- Aggrieved parties can sue for reinstatement, backpay & benefits & may be entitled to courts costs & attorney fees.
- Current whistleblowers rights must be prominently posted
- Effectively requires updating of most whistleblower protection policies



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Remote Work Considerations



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Remote Work Q&A

- **Do employees have a right to work remotely?**

No. As COVID-19 has finally become endemic & manageable it can no longer be plausibly claimed that a worksite is inherently unsafe or possesses an “unreasonable risk of exposure to infectious disease” or that working remotely is a “reasonable accommodation” necessary to safeguard staff.

- **Is it advisable to voluntarily allow employees to work remotely?**

Possibly. Remote work is here to stay for certain employers, but not all, & not for all employees. Going forward, it will remain an incentive for certain employees, but unavailable for others. Fairness & equity must be considered.

- **Is there a difference between remote work & working from home?**

Yes. Working from home presumes working from a location where you reside w/in close proximity to an office. Remote work can be performed anywhere.

- **Should we have an established remote work policy?**

Yes. Any employer w/ a remote work option must have a comprehensive policy



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Remote Work Policy Considerations

1. **Eligibility: Who can work remotely & why?**
 - During the pandemic, remote work was easily justified w/o regard to equity
 - Post-pandemic, objective criteria should be utilized to determine if staff may work remotely, particularly if it's not an option for certain employees
 - Subjective criteria such as tenure, performance, productivity personal circumstances, etc. can be also be considered, but should not be overemphasized
2. **Schedule: What days & hours will be worked remotely**
 - Remote work can be full, partial or as needed/when possible
 - Specific hours of availability should be designated & a meal break scheduled
 - Does working remotely mean working from home or somewhere else?
3. **Productivity: Does working remotely impact the quality/quantity of work?**
 - In general, it's challenging to justify remote work if productivity suffers
 - It's also notoriously challenging to assess the productivity of remote workers



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Remote Work Policy Considerations

4. **Communication & Technology: How do you stay connected?**
 - What platforms will you utilize to assure uniformity in communication?
 - Will remote staff use your technology, their technology or a combination?
 - The owner of the technology is generally also the owner of the content
5. **Workspace: Do staff have appropriate workstations**
 - Ideally, a remote work location will resemble an office workstation, i.e. designated space with a desk, computer, etc.
 - Remote workstations should be safe & secure, but need not be OSHA compliant
 - Employees injured while working remotely are covered by workers comp
6. **Security & Confidentiality**
 - Is your organization's confidential information secure at a remote location
 - Is there adequate security to transfer content electronically



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Final Considerations



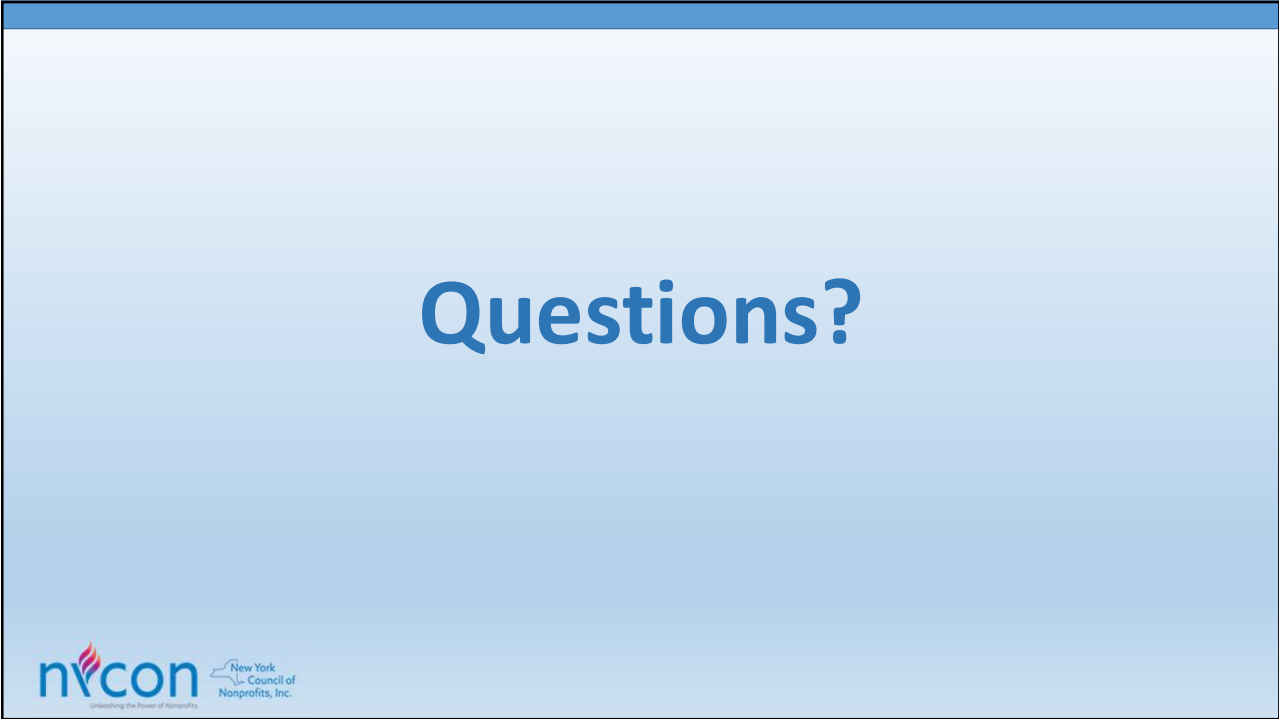
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Now, What Should We Do?

- **Stay Informed.** Given frequent, aggressive changes in labor laws & regulations, it's essential that you remain informed
- **Personnel Policies.** For the same reason, personnel policies, handbooks, etc. should be thoroughly reviewed every 2-3 years &, ideally, scanned annually.
- **Job Descriptions.** Should be subjected to periodic review by staff, supervisors, the Board & qualified counsel to assure proper classification
- **Self-Audit.** Conduct a self-audit to informally assess potential impact of any concerns raised during this presentation
- **Qualified Assistance.** Promptly seek guidance to address suspected trouble



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