


## Complying with New York's Agricultural Wage and Hour Laws and Other Changes

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## Wage & Hour Impacts

1. One day of rest in seven;
2. Overtime at 1.5x the regular rate for hours worked in excess of 60 per week;
3. Minimum wage; and
4. Creation of a Wage Board.

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## Who is covered?

- Definition of “employee” under the Labor Law previously excluded “any individuals employed as farm laborers.” The exclusion was eliminated.
- Added farm laborers – “the term ‘employee’ shall also include farm laborers. ‘Farm laborers’ shall mean any individual engaged or permitted by an employer to work on a farm, except the parent, spouse, child, or other member of the employer’s immediate family.”

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## Who is covered?

- Per NYS DOL FAQs:
  - Who is covered by the day-of-rest provision of the FLFLPA?
    - All farm laborers are covered except for the foreman in charge (maybe more than on), and members of the employer’s immediate family including a parent, child or spouse.
  - Who is covered by the over-60 overtime provision of the FLFLPA?
    - All farm laborers, including crew leader/chief and foremen in charge, are covered by the overtime provisions of the Act except for the members of the employer’s immediate family including a parent, child or spouse.

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## Who is covered?

- Per NYS DOL FAQs:
  - Are family members of LLCs, S-corps, C-Corps and partnerships excluded from the day of rest and overtime provisions?
    - Yes, the immediate family members, including a parent, child or spouse, are excluded from the day of rest and overtime provisions. The immediate family members of shareholders are not excluded from the day of rest and overtime provisions.
  - Are all foreign guest workers covered by the overtime and day of rest provisions?
    - Yes, all foreign guest workers (H-2A, J-1, TN, etc.) engaged in agricultural work are covered by the overtime and day of rest provisions. Overtime must be paid at 1 ½ times the AEWR, prevailing wage rate or contract rate.

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## Who is covered?

- ORDER ON MOTION FOR TRO – USDC W.D.N.Y (12/31/19):
  - NY is temporarily enjoined from treating as farm laborers:
    - Any individual related to the employer to the third degree of consanguinity or affinity.
    - Any foreperson in charge.
    - Any bona fide executive, administrator, professional, or supervisor.
  - This means they cannot enforce overtime, day of rest, or notice and record-keeping provisions to these employees.

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## One Day of Rest in Seven

- Every person employed as a “farm laborer” is entitled to 24 consecutive hours of rest in each **calendar** week.
- Farm laborers may elect to work on the day of rest, but employers must pay the employee overtime (1.5x) for hours worked.
- 24-hour rest periods caused by weather or crop conditions satisfy the rest requirement.
- The day of rest should coincide with laborer’s day of religious worship “whenever possible.”
- The rest requirement does not apply to the employer’s immediate family members.

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## One Day of Rest in Seven –

- What is a day? “24 consecutive hours spent at rest.”
- Per NYS DOL in FAQs:
  - What is a calendar week for purposes of overtime and day of rest?
  - “For purposes of compliance with overtime and day of rest, the term calendar week will mean **an established, recurring consecutive 7 days designated by the employer.** A calendar week should not be changed from week to week.”

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## One Day of Rest in Seven –

- Per NYS DOL in FAQs:
  - Do the employer have to schedule a farm laborer's day of rest in advance?
    - **The law does not require that the day of rest be scheduled** in advance. The day of rest can be designated and recurring, or it can vary, and should occur at the latest on the 7<sup>th</sup> day of the calendar week.
  - Can a farm employer apply for a variance from the day of rest provision?
    - Yes, an employer may apply for a variance by completing the LS 137.

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## Overtime

- Coverage:
  - Most farm employees are included, including foreign guest workers, interns, and apprentices.
  - Simply paying a salary does not eliminate the overtime requirement, but the employee must be **exempt** from overtime.
  - Immediate family members (parent, spouse, child) of the farm owners are **exempt** from the overtime requirement.
    - This includes owners of LLCs, S- and C- corps, and partnerships
    - Small shareholders may not be included if NYSDOL view the shares as a sham to avoid paying overtime.

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## Overtime

- “Employee” does not include:
  - Those employed “in a bona fide executive, administrative, or professional capacity” ...
- But must meet 2 criteria:
  - Salary test – must be paid on a salary basis AND
  - Duties test

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## Bona fide executive

- Primary duty consists of the management of the enterprise.
- Customarily and regularly directs the work of two or more other employees.
- Authority to hire or fire other employees .
- Suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees have particular weight.
- Customarily and regularly exercises discretionary powers.
- Employee is paid on a salary basis, inclusive of board, lodging, other allowances and facilities, of not less than \$885.00 - \$1125.00 per week (effective 12/31/19 and depending on location – increases each year).

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## Administrative

- Primary duty consists of the performance of office or non-manual field work directly related to management policies or general operations.
- Customarily and regularly exercises discretion and independent judgment.
- Regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity or who performs under general supervision, work along specialized or technical lines requiring special training, experience or knowledge.
- Salary basis (same as above).

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## Professional

- Primary duty consists of the performance of work that:
  - Requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education, an apprenticeship, training in the performance of routine mental, manual, or physical processes, or is original and creative in a recognized field of artistic endeavor, and produces a result that depends primarily on the invention, imagination, or talent of the employee.

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## Professional

- The employee's work:
  - Requires the consistent exercise of discretion and judgment in its performance.
  - Is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work).
  - Is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

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## Overtime - So I just pay 1.5x the hourly rate, right?

- Requires overtime pay at 1.5x the "**regular rate**" for all hours worked over 60 during a workweek.
- Regular rate = All remuneration received by an employee.
  - It does not include:
    - Expenses;
    - Premium payment for overtime;
    - Premiums paid for holidays, Saturdays, or Sundays;
    - Discretionary bonuses;
    - Gifts;
    - Payments in the nature of gifts on special occasions; and
    - Payments for periods when work is not performed, e.g., vacation, holiday, or illness

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### What is included in regular rate – bonuses?

- Discretionary vs. Non-Discretionary
  - A Christmas bonus that is a gift, entirely up to management about whether and how much to pay to employees, would be “**discretionary**” and not included in “regular rate” of pay
  - Compensation is categorized as “**non-discretionary**” if it is agreed on in advance with the employee. For example, a milk quality incentive where employees know in advance how much they get paid if they hit certain quality targets.

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### Overtime – What if I pay piece rate?

- Must track hours worked – should already be doing this for minimum wage purposes.
- Divide total piece rate pay for the work week by the number of total hours worked to get the regular rate.
- Pay 1.5x regular rate for each hour worked over 60 hours in the work week.
- Equivalent of a performance bonus – the more efficient they are, the higher the regular rate and then the higher the overtime rate.
- Can I prohibit them from working for more than 60 hours?

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### Minimum Wage – Can I just pay them less to offset this extra expense?

- Employers must pay farm laborers the minimum wage established by NY law, or federal law if higher.
  - Minimum wage in Nassau, Suffolk and Westchester Counties:
    - \$12.00 currently.
    - \$13.00 per hour on and after December 31, 2019.
    - \$14.00 per hour on and after December 31, 2020.
    - \$15.00 per hour on and after December 31, 2021.
  - Minimum wage in all places outside New York City and Nassau, Suffolk, and Westchester counties:
    - \$11.10 currently.
    - \$11.80 on and after December 31, 2019.
    - \$12.50 on and after December 31, 2020.
- Employers must pay underage farm laborers the established minimum wage.

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### Minimum Wage – H-2A Workers

- H-2A employer – Must pay the highest of three wages:
  - The federal or state minimum wage.
  - The “prevailing wage,” as determined by the Department of Labor using a special H-2A methodology to conduct wage surveys.
  - The H-2A “adverse effect wage rate” or “AEWR.”
    - Currently \$13.25 for New York.
    - Piece rate workers must receive at least the AEWR for each hour worked.
- Includes domestic workers in corresponding employment.

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## What if I use a Farm Labor Contractor?

- Farm Labor Contractors - Who is responsible?
  - Unless you are willing to give up almost all control over how the work is done, you will be considered, at best, a joint employer with the FLC.
    - Economic realities test.
    - Right of control of work performance
  - Ultimately, you will be held responsible for ensuring that the FLC is properly paying employees if you delegate payment to the FLC.

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## Creation of a Wage Board

- Board Composition:
  - 3 members appointed by the farm bureau, New York State AFL-CIO, and commissioner.
- Board Powers. The Board may:
  - Conduct public hearings;
  - Consult with employers and farm laborers and related parties;
  - Administer oaths;
  - Subpoena witnesses for testimony or deposition, books, records, and other evidence; and
  - Make recommendations to the governor and legislature on overtime.

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## Creation of a Wage Board (continued)

- Board Report
  - May not recommend increasing the overtime above 60 hours.
  - Must recommend whether the 60-hour threshold can be lowered, and if so, to what threshold.
  - May recommend lowering the threshold in a series of successively lower thresholds by phase-in dates.
- Public hearings;
  - First hearing to be held no later than March 1, 2020 ;
    - 2 months after FLFPA becomes effective and prior to harvesting season.
  - Must hold at least three meetings that allow for public comment.

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## Creation of a Wage Board (continued)

- Provide report and recommendation to the Governor and legislature by December 31, 2020.
- The Wage Board must "specifically consider the extent to which overtime hours can be lowered below such amount set in law, and may provide a series of successively lower overtime work threshold and phase-in dates as part of its determination."

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## Summary of Alternate Pay Structures:

- Q: Can I classify farm laborers as independent contractors?
  - A: No.
- Q: Can I classify employees as salaried, exempt?
  - A: No.
- Q: Can I make up for OT by decreasing workers' hourly wage?
  - A: Yes, but only if the new wage is not less than the minimum wage.
- Q: What if I pay based on productivity instead of by hour?
  - A: Still must pay overtime.

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## Unemployment Insurance

- Effective January 1, 2020, employers must pay unemployment insurance for farm laborers.
  - Positive change – do not have to do so for H-2A workers
- Prior exceptions repealed – coverage is no longer dependent on money paid, number of employees, or coverage under federal law.

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## Workers' Compensation

- Effective January 1, 2020, all farm laborers are covered.
- Prior exceptions repealed – coverage is no longer dependent on aggregate money paid in prior year.
- Required to post workers' compensation notices in English and Spanish.
- Supervisors, FLCs, and foreman are required to provide the farm notice of an on the job injury.
- Cannot discriminate or retaliate against employees because of assertion of workers' comp rights or participation in procedures related thereto.

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## Paid Family Leave

- Effective January 1, 2020, the exemption for farm laborers is repealed.
- Entitled to receive paid family or disability leave if they qualify.
  - worker must remain in employment for 26 consecutive weeks if they regularly work 20 or more hours per week, or 175 days if they regularly work less than 20 hours per week.
- Generally funded by employees through payroll deduction.

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- Provides partial income replacement and job protection for qualifying leave.
- Generally funded by employees through payroll deduction.

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## Paid Family Leave

- Some temporary and part time employees can waive.
- Qualifying leave:
  - Bond with a newborn, newly adopted or foster child;
  - Care for a family member with a serious health condition;
  - To assist when a family member is deployed.
- Cannot discriminate or retaliate against employees for using leave.
- Policy and notice requirements – included in handbook and poster.

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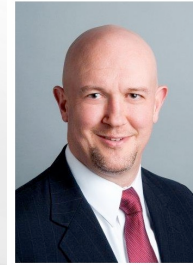
## Migrant Housing

- Effective January 1, 2021, permit required for all migrant housing.
- Formerly required for labor camps of 5 or more workers.

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# Final Questions



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