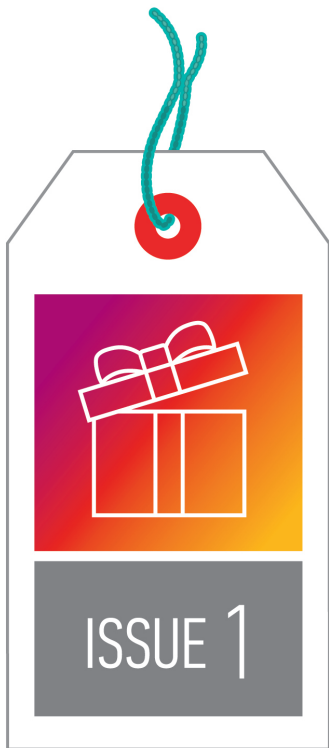


ual Workers” Under New York Law?



In the retail environment, customer service is paramount. Workers spend their time

answering questions, stocking shelves, organizing displays, sourcing and sizing, and, yes, even gift-wrapping sometimes. They do it all. They're on the go and on their feet most of the day. But they're not *assembling* the products, so they certainly aren't "manual workers," right? Not necessarily. Guidance provided by the New York Department of Labor has long held that an individual is a "manual worker" if they spend at least 25% of their working time engaged in physical labor. Courts have interpreted the term "physical labor" to include common tasks such as lifting and carrying items, cleaning a store, sweeping the floor, wiping down workstations, standing for long periods of time, stocking shelves, and arranging inventory. Accordingly, individuals like grocery store workers, janitors, cooks, and even home care workers, have been found to be engaged in "physical labor" and thus subject to manual worker rules.

Why is this important? Most employers pay biweekly. However, the New York Labor Law (NYLL) § 191(1)(a) provides that "a manual worker shall be paid *weekly* and not later than seven calendar days after the end of the work week in which the wages are earned." Recently, multiple large retailers have been named as defendants in class action lawsuits alleging that their biweekly pay structures violate the NYLL. In 2022 alone, Apple, Urban Outfitters, and the Cheesecake Factory, to name a few, were sued by employees claiming that standard retail floor employees are "manual workers" who should have been paid weekly and, thus, are entitled to liquidated damages for their delinquent wages.

Uptick in Claims After *Vega* Ruling

Although the rule that manual workers must be paid weekly has existed for some time, there has been a significant increase in the number of lawsuits after the 2019 ruling in *Vega v. CM & Associates Construction Management, LLC*. In that case, the New York Appellate Division, First Department, held that "manual workers," who eventually receive full pay but are paid biweekly instead of weekly in violation of the above-cited provision of the NYLL, have a private right of action and can recover liquidated damages. This means that employers who pay their manual workers biweekly can be liable for liquidated damages on all of the wages that were paid "late" (not within seven days of the week in which they were earned) even though these wages have been paid in full.

The potential exposure is significant. The NYLL's six-year statute of limitations period means employers could be liable for damages on all wages that were paid late during the six-year period preceding a lawsuit. In addition, an employee who prevails on such claims may also recover (1) the full amount of underpayment, if any; (2) all reasonable attorneys' fees; and (3) pre- and post-judgment interest.

Exceptions to the Weekly Requirement

Under NYLL § 191(1)(ii), the commissioner may authorize an employer to pay manual workers less frequently than weekly if the company has had (1) an average of 1,000 employees or more during the last three years, or (2) an average of 1,000 employees or more in New York during the last year and an average of 3,000 or more outside New York during the last three years.

Takeaways

To avoid significant liability, employers must first evaluate whether they, in fact, have any "manual workers." If so, they must ensure their manual workers are paid on the proper schedule. Whether an individual is a "manual worker" under the law is a fact-specific inquiry. Accordingly, employers should speak with experienced counsel to determine whether they are required to pay their workers weekly and, if so, whether they are eligible to apply for an exemption to this rule.

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