

A hand in a dark suit jacket pointing upwards with the index finger. The years 2021, 2022, 2023, 2024, and 2025 are overlaid on the hand, with 2024 being the largest and most prominent.

BUSINESS IN 2024

WEEKLY WEBINAR SERIES



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Your Host



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TODAY'S AGENDA

Gabe Oberfield – (12:00PM-12:05PM)

- Welcome / Agenda
- Recent NYS Bill Signings of Note

Christopher Cruz Sierra– (12:05PM-12:15PM)

- The Road Toward Congestion Pricing Continues

Jeanette Lombardi – (12:15PM-12:25PM)

- The Florida Community Property Trust Act – Not Just for Florida Residents

Patrick J. Caldarelli – (12:25PM-12:35PM)

- Recent New York State Department of Labor Guidance on Protecting Outdoor Workers

Kymerley Walcott-Aggrey – (12:35PM-12:45PM)

- U.S. Dept. of Labor Issues Enforcement Report on Coercive Contractual Provisions

G. Oberfield – (12:45PM)

- Questions
- Wrap Up

NYS Bill Signings

Gov. Kathy Hochul Signs Some Legislation – Other Bills Vetoed

- Recently Signed
 - S.932D/A.4667B
 - Flexibilities in cancelling gym memberships
 - S.8182B/A.7939B
 - Telemarketing controls
 - S.509B/A.28C
 - Restaurant sanitary grades posted online
 - S.8880A/A.1010B
 - Labeling of over-the-counter pharmacy items
- Recently Vetoed
 - S4877-A / A2740-B
 - Agency reporting to State Comptroller on late contracts



Credit: Official NYS Website of Gov. Kathy Hochul

Bills Awaiting Signature

- Examples include:
 - Grieving Families Act (S8485/A9232)
 - Climate Change Superfund Act (S2129/A3351)
 - Lithium-ion battery safety (S6809/A6811)
 - TREES Act (S8898/A9711)
 - Fashion Workers Act (S9832/A5631)
- *Please expect updates on legislation as the end of CY '24 approaches*



U.S. House – in NYS

The Road Toward Congestion Pricing Continues



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New York City's Congestion Toll - Background

- April 1, 2019 – NY State Legislature enacted the Traffic Mobility Act
 - Directed a congestion tolling program for vehicles entering the Central Business District (area south of 60th Street)
 - The toll aims to reduce congestion and pollution in Manhattan while generating revenue for public transportation improvements
- On June 5, 2024, Gov. Hochul halted the congestion pricing plan a few weeks before it was set to launch
- Concerned with the toll's impact on working-class individuals
 - Gov. Hochul: *"From day one, I have made affordability for New York families a top priority. I always have, and I always will, fight to put more money in the pockets of everyday New Yorkers. That's why back in June, I stood up on behalf of hardworking families and simply said no. No to a new \$15 congestion toll that at that particular time was just too much. Too many people were worrying about high costs. Groceries, rent, childcare. These are real challenges for our families and launching a toll that high really would have hurt a working mom or working dad trying to make ends meet."*

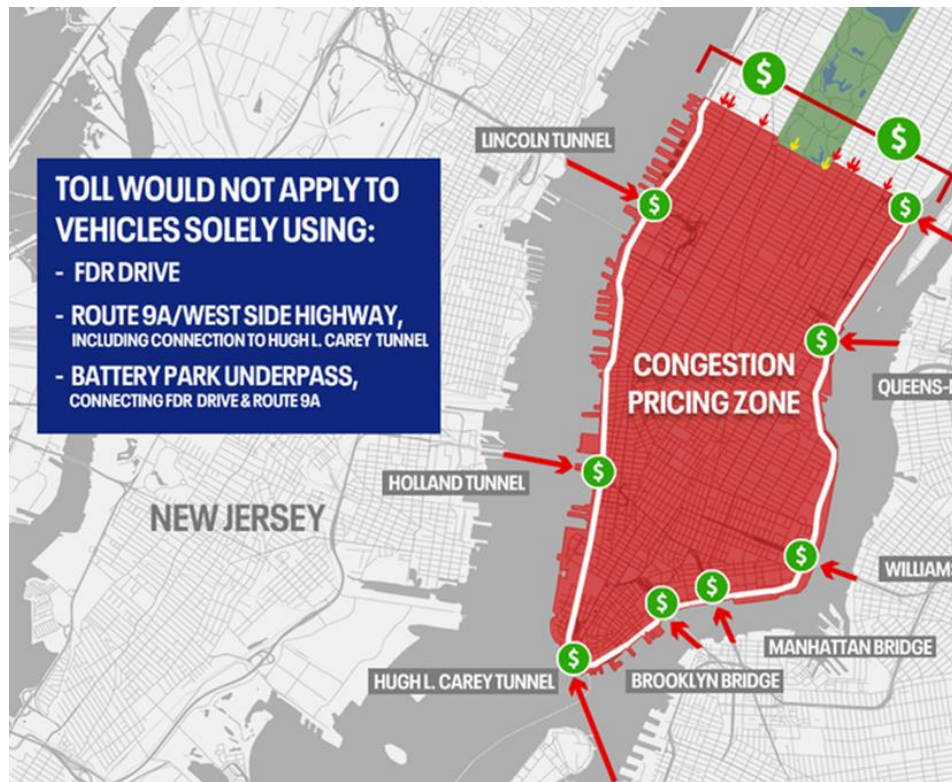
New Plan Announced

- On November 14, 2024, Gov. Hochul announced a new plan to begin implementing congestion pricing in NYC that would allegedly be more affordable

New Start Date: January 5, 2025

- New Plan approved by the Federal Highway Administration
 - Concerns with the incoming presidential administration, which has opposed any congestion toll

New Program Overview



Daytime Tolls (5 AM – 9 PM weekdays; 9 AM – 9 PM weekends)

- Passenger vehicles (once per day): \$9
- Motorcycles (once per day): \$4.50
- Small trucks and non-commuter buses: \$14.40
- Large trucks and sightseeing buses: \$21.60

Tunnel crossing credits reduced by 40% of original plan to \$3.00

Off-Hour Tolls – 75% less than daytime prices

Taxis and black cars: \$0.75

App-based for-hire vehicles: \$1.50

- Per-ride fees for all trips to, from, or within the Central Business District

Exemptions

- Emergency vehicles
- Specialized city vehicles
- Public transit busses
- City school busses
- Qualified disability

Discount:

- Low-income volume discount – 50% discount on the daytime rate after the first 10 trips in each calendar month

Revenue Utilization

- According to the Gov. office, commuters will see new and improved subway services, a Second Avenue subway extension to East Harlem, investments to the LIRR and Metro North, elevator service for senior and people with disabilities, proposed expansion of electric bus service and plans to build interborough express (eliminating 30 minutes of commuting time between Brooklyn and Queens).

Legal Challenges

- Some critics of the plan have called it an added tax; some critics argue it will impose environmental and health risks on other areas of NYC; some argue that the plan is unconstitutional and not within the Gov.'s authority
- 9 pending lawsuits, including one from the New York State United Teachers Union and another from the Trucking Association of New York
- Southern District Judge Lewis Liman stated that the New York State United Teachers Union and the Trucking Association of New York have until November 29, 2024, to make their case for a preliminary injunction – temporary stop
- Judge Liman will then hear from both sides on December 20, 2024, before issuing a final decision

The Florida Community Property Trust Act – Not Just for Florida Residents



Jeanette Lombardi

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Recent New York State Department of Labor Guidance on Protecting Outdoor Workers



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New York's Goals

- “Protecting Workers from the dangers of extreme weather is more important than ever as we face the increasing impacts of climate change. These new guidelines will provide New York businesses with the tools they need to safeguard Outdoor Workers from dangerous conditions.” – NYS DOL Commissioner Reardon.
- The DOL guidance documents emphasize the importance of training and emergency planning, ensuring employers and workers are prepared to respond quickly to changing weather conditions.
- Reduction in Workers' Compensation claims, use of sick leave and insurance costs. Improved productivity.

Protection From Extreme Heat

- The Four Steps
 - 1) Provide Water
 - 32 ounces of cold drinking water per hour.
 - 2) Allow for Rest and Relief
 - Allow breaks based on heat temperature index, modify schedules or work locations, provide access to shade and personal protective equipment.
 - 2) Develop and Provide Training
 - Train employees and supervisors annually on rest and relief measures and signs of heat related illness.
 - 3) Develop and Provide a Plan
 - Written plans for the protection of workers from extreme heat including an acclimatization procedure.

Protection From Extreme Precipitation

- The Three Steps
 - 1) Allow for Rest and Relief
 - Allow breaks, modify schedules or work locations, provide appropriate Personal Protective Equipment.
 - 2) Develop and Provide Training
 - Signs and symptoms of cold weather-related illness.
 - 3) Develop and Provide a Plan
 - Written plans for the protection of workers from wet weather hazards
 - Buddy system, emergency response plans, two-way communications system with employees in the field.

Protection From Wildfire Smoke Hazards

- The Three Steps
 - 1) Allow for Rest and Relief
 - Allow breaks, modify schedules, provide appropriate Personal Protective Equipment when the Air Quality Index exceeds 150 with additional measures taken when AQI exceeds 300.
 - 2) Develop and Provide Training
 - Signs and symptoms of illness related to smoke exposure.
 - 3) Develop and Provide a Plan
 - Written plans for the protection of workers from wet weather hazards
 - Buddy system, emergency response plans, two-way communications system with employees in the field.

Impact on Employers and Recommendations

- These guidance documents function only as recommendations but likely track future legislation.
- Consider monitoring the National Weather Service in advance of outdoor work and during outdoor work for possible sudden changes in weather conditions.
- Potential Compliance Obligations
 - Ensure response plans to extreme precipitation and wildfire smoke events are created.
 - Acquire necessary PPE in advance of extreme precipitation and wildfire smoke events.

USDOL Issues FY'24 Enforcement Report on Coercive Contractual Provisions



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(under the guidance of Gabriel Oberfield)

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Overview of FY' 24 Solicitor of Labor Special Enforcement Report on Coercive Contractual Provisions

- **Types of Coercive Provisions**
 - Waivers of Statutory Protections
 - Misclassification Clauses
 - Indemnification Clauses
 - “Loser Pays” Clauses
 - “Stay or Pay” Clauses
 - Confidentiality and Non-Disclosure Agreements
 - Internal Reporting Mandate
- **Consequences of Using Coercive Provisions**
- **Key Takeaways for Employers**

Waiver of Statutory Protection

- Provisions that require workers to waive their rights to minimum wage, overtime pay, or other statutory protections
 - **Examples:**
 - provisions purporting to waive workers rights to bring claims or recover damages under the Fair Labor Standards Act (FLSA)
 - provisions requiring workers to agree to a shortened SOL to bring FLSA claims
 - Provisions requiring workers to forego the recovery of liquidated damages under FLSA if their claims succeed
- It is well settled law that a worker's rights to minimum wage, overtime pay, and liquidated damages under the FLSA may not be abridged or waived by private agreement

Misclassification Clauses

- Provisions that incorrectly classify employees as independent contractors to avoid legal obligations owed to employees
- The DOL has long held that a contractual provision stating that a worker is an independent contractor is **not determinative** of whether that worker is an **employee** or **independent contractor** under the FLSA.
 - Rather, a worker's classification depends on the economic realities of the worker's relationship with the employer, which is assessed based on several factors. See *A.C. Castle Construction Co., Inc. v. Acosta*, 882 F.3d 34, 40-41 (1st Cir. 2018); *Absolute Roofing & Construction, Inc. v. Sec'y of Labor*, 580 Fed. App'x 357, 362 (6th Cir. 2014)

Indemnification Clauses

- Provisions that seek to shift workers liability for and/or the cost of the employer's own violations of employment laws
 - **Examples:**
 - Clauses requiring workers to reimburse the employer for any costs and expenses (including attorneys' fees) spent defending against a claim by the worker
 - Clauses requiring workers to cover any back wages and damages that the employer must pay due to its own violations
- Courts have consistently held that employers cannot seek indemnification or contribution under the FLSA by shifting their liability to the workers or another entity or individual (e.g. supervisors, independent contractors, etc.)

“Loser Pays” Clauses

- Provisions requiring the worker to pay the employer’s attorney’s fees and costs if the employer prevails in an employment dispute
 - DOL has held that these provisions have a chilling effect that prevents workers from bringing claims under worker protection laws
- The FLSA contains a one-way fee shifting provision, allowing a worker who wins against an employer to obtain an award of attorney’s fees from the employer. However, this provision does not apply in reverse; employers cannot recover attorney’s fees from workers if the employer prevails

“Stay or Pay” Clauses

- Provisions requiring workers to pay their employer if they quit before working for a specified length of time
 - **Examples:**
 - Employers attempting to hold workers liable for the costs of replacing them
 - Employers seeking to recover lost profits, attorneys’ fees, and the cost of training replacements
 - DOL regulations and several court cases have established that employers are generally not entitled to recover those costs from employees. Courts have classified such attempts as “unlawful kickbacks” of employee wages. *See Su v. Advanced Care Staffing*, 2024 WL 2053706

Confidentiality, Non-disclosure, and Non-disparagement Clauses

- Broadly worded confidentiality, non-disclosure, and non-disparagement provisions that workers may interpret as preventing them from reporting employment-related issues with the DOL or exercising their legal protections under the FLSA and the Occupational Safety and Health Act (OSH Act)
 - Non-Disclosure Agreements (NDAs) generally cannot limit individuals' ability to assist in investigations.
- Confidentiality, non-disclosure, and non-disparagement provisions that “chill” workers communication with the DOL are unenforceable and in conflict with their rights under the FLSA and OSH Act

Internal Reporting Provisions

- Provisions that prevent workers from reporting safety concerns or other issues to government agencies before reporting them to the employer
- The Solicitor of Labor (SOL) and the Occupational Safety and Health Administration (OSHA) have taken a firm stance against employer retaliation for reporting safety concerns directly to government agencies.
 - *See, e.g., Bakis v. Maersk Line, Ltd., 2023-SPA-003* (U.S. Dep’t of Lab. ALJ) (where the SOL argued that the employee had an unconditional right under the Seaman’s Protection Act (“SPA”) to report safety violations directly to the Coast Guard before reporting them to his supervisors)

Consequences of Using Coercive Contracting Provisions & Potential Changes Under New Federal Administration

- **Legal Risks:** lawsuits and enforcement actions by the DOL; penalties can include fines, back-pay, and damages
- **Reputation Damage:** unfair labor practices can damage a company's reputation among customers and the public
- **Employee Morale:** unfair labor practices can reduce employee morale and productivity
- **Impact of New Administration:** The appointment of a new Solicitor of the Department of Labor under President Trump's administration could lead to changes in the way these provisions are enforced

Key Takeaways for Employers

- **Consult Legal Counsel:** Work with legal counsel to draft employment agreements that avoid potentially ‘coercive’ language
- **Review Existing Agreements:** Review existing agreements for potentially ‘coercive’ language and bring any concerns to legal counsel
- **Promote Transparency:** Foster an open and transparent workplace culture where employees feel safe to report issues without fear of retaliation
- **Potential Changes in Enforcement:** Stay abreast of developments concerning changes in the DOL and existing policies

Questions?



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Post Election Preview of Potential Labor and Employment Changes

Special Edition Webinar
December 10, 2024
12:00 – 12:45 p.m.

In this webinar, we will cover potential changes in several areas regulated by the federal government, including:

- The NLRB and labor relations generally
- Employment laws and enforcement
- Immigration for employers



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(under the guidance of Gabriel Oberfield)

Sexual Harassment Prevention Training

To combat harassment in the workplace, every New York State employer must provide harassment prevention training for all employees annually.

For more information on Bond's online sexual harassment training [click here](#) or email bondonline@bsk.com

Thank You

The information in this presentation is intended as general background information.
It is not to be considered as legal advice.
Laws can change often, and information may become outdated.

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