

Labor and Employment Law Journal

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How To Calculate Damages in Wage-and-Hour Cases in New York State

By Gianfranco J. Cuadra

Calculating damages in wage-and-hour cases can be daunting. At times, the federal and state laws seem at odds, and even determining an employee's regular hourly rate can prove difficult. This article summarizes the basics of damages calculations under the New York Labor Law (NYLL) and the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (FLSA), the two laws that govern wage-and-hour matters in New York State.

Minimum Wage Rates, Overtime Pay Requirements, and the 'Regular Rate'

The federal minimum hourly wage rate has been \$7.25 since July 2009.¹ The New York State minimum hourly wage rate varies by region and industry. It is \$15.00 per hour in New York City, Long Island, and Westchester County,² and \$14.20 per hour in the rest of New York State.³ Regardless of region, all workers in New York State's fast food industry must be paid at least \$15.00 per hour.⁴

Both the FLSA and NYLL require non-exempt employees to be paid one-and-one-half times their "regular rates" of pay per hour worked over forty per workweek.⁵ The FLSA defines the "regular rate" as the hourly amount that an employee is actually paid in fact for work performed. In other words, the "regular rate" is "all remuneration paid to, or on behalf of, the employee" on an hourly basis without considering certain types of payments, such as health insurance benefits and discretionary bonuses, that are specifically excluded under the Act.⁶ An employee's regular rate of pay can never be less than the greater applicable minimum wage rate.⁷ In other words, the regular rate of non-exempt employees in New York State can never be less than the applicable New York State minimum wage rate.

Calculating the Regular Rate and Overtime Wages in Different Scenarios

Damages calculations are relatively simple when non-exempt employees are paid on an hourly basis. Their regular rates equal their hourly wage rates paid. As such, their overtime wages due are equal to one-and-one-half times their regular rates of pay. Except for New York State's hospitality industry; however, the FLSA and NYLL do not require employees to be paid on an hourly basis.⁸ Complications quickly arise when employees are paid on a different basis, such as at different hourly wage rates within the same work-

week, shift or day rates, piece rates, commissions, salaries, or a combination of these.

The regular rate is generally calculated by dividing an employee's total remuneration for a workweek, excepting statutory exclusions, by his or her total hours worked in that workweek.⁹ Overtime wages are owed to the employee at the half-time rate because the employee was already compensated at the regular or straight time rate for overtime hours worked. Some examples follow:

1. Piece Rate: A non-exempt delivery worker in New York City is paid on a piece rate basis of \$1.50 per package delivered. He delivered 600 packages and worked 45 hours in a workweek. His total remuneration is \$900, equal to \$1.50 per package delivered times 600 packages. His regular wage rate is \$20, equal to \$900 divided by 45 hours. He would be owed \$50 more in overtime wages, equal to his regular rate of \$20 divided by two (i.e., \$10, the half-time rate) times five overtime hours worked.¹⁰

2. Weighted Average: A non-exempt construction worker in Buffalo, New York is paid at different hourly rates depending on the task that he performs: \$25 per hour for general laborer work; \$30 per hour for electrical work; and \$27 per hour for concrete work. In a workweek, he performs 25 hours of general laborer work, 10 hours of electrical work, and 15 hours of concrete work, for total compensation of \$1,330 for 50 hours worked. His regular rate is \$26.60 per hour, equal to \$1,330 divided by 50 hours. He would be owed \$133 more in overtime wages, equal to his regular rate of \$26.60 divided by two (i.e., \$13.30, the half-time rate) times 10 overtime hours worked.¹¹

3. Day or Job/Shift Rates: A non-exempt cashier in a convenience store in Albany, New York is paid \$200 per day worked. She worked five days, totaling 55 hours, and was paid \$1,000 in a workweek. Her regular rate is \$18.18, equal to her \$1,000 paid divided by 55 hours. She would be owed \$136.35 in overtime wages, equal to her regular rate of \$18.18 divided by two (i.e., \$9.09, the half-time rate) times 15 overtime hours worked.¹²

4. Commissions are added to a non-exempt employee's other earnings for the workweek and calculated into the regular rate. For example, a non-exempt sales employee is paid \$15 per hour plus weekly commissions. She worked

45 hours one week, for which she was already paid \$712.50 (i.e., \$15 x 40 hours plus \$22.50 x 5 overtime hours). She earned and was paid \$300 in commissions that week. The \$300 in commissions would be divided by 45 hours worked, resulting in \$6.67 added to the regular rate. She would be owed half this amount, or \$3.34, per overtime hour worked, meaning \$16.68 more in overtime wages for the workweek.¹³ This same rule applies to non-discretionary bonuses paid to non-exempt employees.

Non-exempt salaried employees are in a special category. Under the FLSA, their regular rate is calculated by dividing their weekly salary by the number of hours that the salary was intended to cover, meaning the number of hours that the employer and employee agreed for the salary to cover. For example, if the employer and employee understood a salary of \$900 to cover the employee's first 30 hours of work per workweek, the employee's regular rate is \$30 if she only worked 30 hours in a workweek.¹⁴ Under the New York State's Miscellaneous Industries Wage Order, however, a non-exempt salaried employee's regular rate is calculated by dividing the salary by all hours worked in the workweek.¹⁵

The New York State Hospitality Industry Wage Order, 12 N.Y.C.R.R. Part 146, is an exception to the foregoing rules. Non-exempt employees in the "hospitality industry," defined as restaurants and hotels, must be paid on an hourly basis.¹⁶ "If an employer fails to pay an employee an hourly rate of pay, the employee's regular hourly rate of pay *shall be calculated* by dividing the employee's total weekly earnings, not including exclusions from the regular rate, by the lesser of 40 hours or the actual number of hours worked" in the workweek.¹⁷ As courts have explained, the Hospitality Industry Wage Order's requirement is unique because, unlike the FLSA and other NYLL regulations, it mandates calculation of the regular rate by dividing non-hourly pay by the lesser of 40 or the number of hours worked in a workweek.¹⁸

Hospitality industry employees paid on non-hourly bases in New York State can recover significantly higher damages than their counterparts in other industries. For example, a non-exempt restaurant cook and a non-exempt warehouse porter in Long Island are both paid a salary of \$1,000 per workweek regardless of how many hours they work. They both worked 50 hours in a workweek. The porter's regular rate would be \$20, equal to his \$1,000 salary divided by his 50 hours worked. He would be owed \$100 in overtime wages, equal to his 10 overtime hours worked times his \$10 half-time rate (i.e., \$20 divided by two). However, the cook's regular rate would be \$25, equal to his \$1,000 salary divided by his first 40 hours worked in the workweek. He would be owed one and one-half times the regular rate per hour worked over 40, or \$37.50. This is because his

salary compensated him for only the first 40 hours worked in the workweek. He would therefore be owed \$375 more in unpaid overtime wages, equal to his overtime wage rate of \$37.50 times his 10 overtime hours worked. In other words, the cook's damages are more than triple the porter's damages, even though both employees were subjected to identical overtime pay violations. Notably, these amounts due are before adding other categories of damages, including liquidated damages, Wage Theft Prevention Act statutory damages, and pre-judgment interest discussed below.

Liquidated Damages

Both the FLSA and NYLL allow employees to recover an additional amount equal to their unpaid wages as liquidated damages.¹⁹ In other words, employees owed unpaid wages can recover double damages. Liquidated damages are always awarded unless the employer can show good faith and, under the FLSA, reasonable grounds for its wage-and-hour violations.²⁰ The Second Circuit has "characterized the employer's burden [to avoid liquidated damages under Section 260] as 'a difficult one,' emphasizing that 'double damages [are] the norm and single damages the exception.'"²¹

The Wage Theft Prevention Act

The New York State's Wage Theft Prevention Act (WTPA) creates two requirements embodied in Sections 195(1), 195(3), 198(1-b), and 198(1-d) of the NYLL. First, the law requires employers to furnish their employees at the time of hiring and whenever there is a change in pay rates with a written notice reflecting, among other items, their rate or rates of pay, the basis of pay, allowances claimed as part of the minimum wage, the employer's name and business name, the employer's address, and the frequency of payments.²² For non-exempt employees, the notice must also reflect the employee's overtime wage rate. The notice must be provided in English and in the employee's primary language if the New York State Department of Labor makes the notice available in that language.²³ Employees may recover \$50 per workday as statutory damages, up to a cap of \$5,000, for failure to receive a wage notice.²⁴

Second, the WTPA requires employers to provide employees with a wage statement, commonly referred to as a "pay stub," with each payment of wages. The pay stubs must accurately reflect the dates covered by the wage payment, the name of the employee, the name of the employer, the rate or rates of pay, the basis of pay, tax deductions and withholdings, and allowances taken against the minimum wage.²⁵ For non-exempt employees, the paystubs must also reflect the overtime wage rate and the number of overtime hours worked in the pay period. For piece rate employees, the paystub must include the applicable piece rate and the number of pieces completed in the pay period. Employ-

ees may recover \$250 per workday, up to a maximum of \$5,000, for failure to receive required wage statements.

Employers have two affirmative defenses under the WTPA. They can prove that they made “complete and timely payment of all wages due pursuant to” the NYLL or that they acted in good faith believing that notices or statements were not required.²⁶ With respect to wage notice claims, it bears noting that employees have a private right of action to sue for failure to receive wage notices at any time of hiring only.²⁷ However, the New York State Department of Labor can issue fines against employers who fail to comply with the WTPA’s wage notice requirements at times after hiring.

NYLL Pre-Judgment Interest

The FLSA bars employees from recovering pre-judgment interest simultaneously with liquidated damages under the FLSA.²⁸ The NYLL, however, allows employees to recover pre-judgment interest at the rate of 9% per annum on the principal of their unpaid wages due even if liquidated damages are awarded.²⁹ Pre-judgment interest under the NYLL is “calculated from the midpoint of [the employee’s] employment to the date of entry of judgment at an interest rate of nine percent per year.”³⁰

The following steps apply to calculating pre-judgment interest using the midpoint formula: (1) calculate the number of days between the first and last dates within the liability period in which damages were accrued; (2) determine the midpoint between those two dates; (3) determine the number of days between the midpoint date and the date judgment is entered; (4) determine a per diem pre-judgment interest amount due by multiplying the principal amount due in unpaid wages times 9% and dividing the resulting number by 365 days (i.e., one year); (5) multiply the per diem pre-judgment interest amount by the number of days between the midpoint date and the date judgment is entered.

For example, an employer failed to pay an employee a total of \$15,000 in overtime wages at different points between July 9, 2020, and September 16, 2021. There are 434 days between these two dates. The midpoint between these two dates is February 11, 2021, equal to 217 days after the start date of July 9, 2020. The employee obtains a judgment on October 14, 2022, for \$15,000 in unpaid overtime wages. The judgment date is 610 days after the midpoint date of February 11, 2021. The employee would be owed a per diem pre-judgment interest amount of \$3,698, equal to \$15,000 times 9% divided by 365 days. As such, he would be owed \$2,255.78 in pre-judgment interest, equal to 610 days multiplied by \$3,698.

Conclusion: Putting It All Together in a Final Example

In New York, damages in wage-and-hour cases can be breathtaking. A single employee may be owed significant amounts, and the damages total can be exponentially increased in a collective or class action.

One example can illustrate the risk to employers in wage-and-hour cases: A non-exempt cook is paid a \$1,000 weekly salary and works an average of 50 hours per workweek for a full year, from February 3, 2020, to February 5, 2021. He would be owed \$19,500 in unpaid overtime wages (i.e., \$375 in overtime wages times 52 workweeks). He would be owed an additional \$19,500 in liquidated damages. Assuming he did not receive wage notices or wage statements, he would be entitled to recover \$10,000 more in WTPA statutory damages, bringing his subtotal damages to \$49,000. Finally, assuming his judgment was entered on October 14, 2022, he would also be entitled to recover \$3,848 in pre-judgment interest, bringing his total damages for a single year to approximately \$52,848. This is correct—the employee’s damages in this example are greater than the employee’s actual salary.

Because FLSA cases comprise more than 10% of the federal court docket in the Eastern and Southern Districts of New York, it behooves employment law attorneys in New York State to understand at least the basics of FLSA math. Hopefully, this article has provided the reader with a start.

Gianfranco J. Cuadra is a partner at Pechman Law Group PLLC who represents employers and employees in various labor and employment law matters, including over 100 wage-and-hour litigations.

Endnotes

1. 29 U.S.C. § 206(a)(1)(C).
2. N.Y. Lab. L. § 652(1).
3. 12 N.Y.C.R.R. § 142–2.1(a)(3). The \$14.20 per hour rate began on December 31, 2022. See <https://www.ny.gov/new-york-states-minimum-wage/new-york-states-minimum-wage> (last visited Feb. 7, 2023).
4. 12 N.Y.C.R.R. § 146–1.2(a)(2).
5. 29 U.S.C. § 207(a)(1); see, e.g., 12 N.Y.C.R.R. § 142–2.2.
6. 29 U.S.C. § 207(e).
7. 29 C.F.R. § 778.5 (requiring an employee’s regular rate to be at least equal to state minimum wage rates that exceed the federal minimum wage rate).
8. *Id.* § 778.109.
9. *Id.*; see also 12 N.Y.C.R.R. § 142–2.16.

10. See, e.g., 29 C.F.R. § 778.111.
11. See, e.g., *id.* § 778.115.
12. See, e.g., *id.* § 778.112.
13. See, e.g., *id.* § 778.118.
14. See, e.g., *id.* § 778.113(a).
15. 12 N.Y.C.R.R. § 142–2.16.
16. 12 N.Y.C.R.R. § 146–2.5.
17. *Id.* § 146–3.5(b) (emphasis added).
18. See, e.g., *Yu Wei Cao v. Miyama, Inc.*, No. 15-CV-0266 (JS)(ARL), 2019 WL 4279407, at *9 (E.D.N.Y. Sept. 10, 2019); *Canaveral v. Midtown Diner NYC, Inc.*, No. 19-CV-635 (GBD)(JLC), 2019 WL 4195194, at *4 n. 3 (S.D.N.Y. Sept. 5, 2019) (“[U]nder the NYLL, Canaveral’s regular hourly rate would be determined by dividing his weekly salary by 40 hours. This calculation differs from the approach under the FLSA.”) *Rowe v. CC Rest. & Bakery, Inc.*, No. 17-CV-01423 (CBA)(PK), 2019 WL 4395158, at *8 (E.D.N.Y. Aug. 15, 2019) (“Unlike the FLSA and those NYLL provisions concerning the non-hospitality industry, the Hospitality Order contains no mechanism for rebutting the calculation based on a maximum 40-hour work week with evidence that the employee had an agreement with the employer to work more than 40 hours.”).
19. 29 U.S.C. § 216(b); N.Y. Lab. L. § 198(1–a).
20. 29 U.S.C. § 260; see also, e.g., *Elghourab v. Vista JFK, LLC*, No. 19-2834-cv, 2020 WL 3526374, at *2–3 (2d Cir. 2020).
21. *Elghourab*, 2020 WL 3526374, at *2 (quoting *Barfield v. N.Y.C. Health & Hosps., Corp.*, 537 F.3d 132, 150 (2d Cir. 2008)); see also *Ramirez v. Lin*, No. 19–1868–cv, at *2 (2d Cir. Oct. 13, 2020) (“The burden necessary to avoid liquidated damages is a difficult one; ‘double damages are the norm and single damages the exception.’” (quoting *Barfield*, 537 F.3d at 150)).
22. N.Y. Lab. L. § 195(1)(a).
23. The notice, known as the “LS 54,” is available in various languages at the New York State’s Department of Labor’s website: <https://dol.ny.gov/notice-pay-rate#:~:text=Notice%20and%20Acknowledgement%20of%20Pay,time%20of%20commitment%20to%20hire> (last visited Feb. 7, 2023). The Department of Labor’s website provides different types of notices, including notices for overtime-exempt employees and employees entitled to prevailing wages.
24. N.Y. Lab. L. § 198(1–b).
25. *Id.* § 195(3).
26. *Id.* §§ 198(1–b), 198 (1–d).
27. See, e.g., *id.* § 198(1–b); *Gamero v. Koodo Sushi Corp.*, 272 F. Supp. 3d 481, 510 n. 13 (S.D.N.Y. 2017).
28. See, e.g., *Begum v. Ariba Disc., Inc.*, No. 12-V-662, 2015 WL 223780, at *3 (S.D.N.Y. Jan. 16, 2015).
29. See N.Y. Lab. L. § 198(1–a); N.Y. Civ. Prac. L. & Rules §§ 5001(b), 5004).
30. *Pineda v. Frisolino, Inc.*, No. 15 Civ. 3774 (GBD), 2017 WL 3835882, at *13 (S.D.N.Y. Aug. 29, 2017).

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