

Employment Law Basics for Small Business Owners

Prepared for: Park Slope Fifth Ave. BID
Feb. 5, 2020

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Agenda

- Intro to Start Small Think Big
- Participant Introductions
- Employment Law Overview
- Questions



**Start Small Think Big:
An Introduction**

Overview

Who We Are

- Start Small Think Big believes that access to high-quality legal, financial management, and marketing services is an essential part of starting or growing a successful small business
- A nonprofit organization that focuses on pairing entrepreneurs positioned to grow their businesses with top pro bono attorneys, as well as financial and marketing experts

Who We Serve

- We currently work exclusively with low to moderate income business owners in NYC and the Bay Area

What We Do

Legal Assistance

- Provide clients access to legal assistance by referring our clients to firms for pro bono counsel
- Volunteer attorneys address various issues including *e.g.* forming an appropriate legal structure for the business, contract review and drafting, and commercial lease review

Financial Assistance

- Provide access to in-house staff as well as pro bono financial advisors through a referral program to assist with small business financial management

Marketing Assistance

- Provide access to pro bono marketing advisors through a referral program and hands-on workshops
- Connect clients to vending opportunities such as tastings, Pop Up shops, street markets/fairs, and business-to-business sales

Eligibility Criteria

1. Business stage

- We serve applicants who are currently selling goods and/or services (defined as having sales over the past 3 months of \$500) OR have a legal need that is keeping them from selling

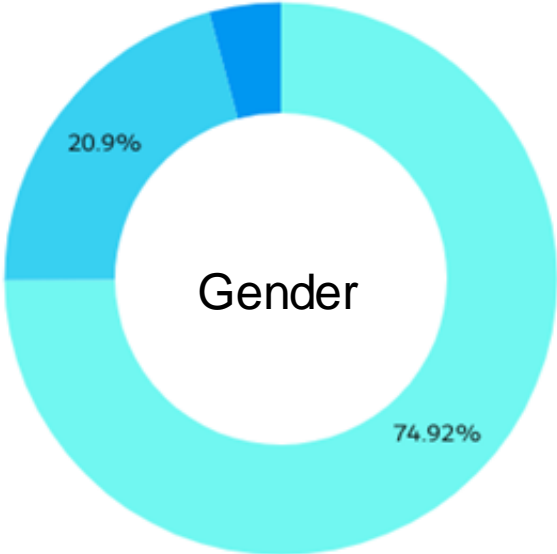
2. Household Income and Assets

- Household income must be less than 500% of the Federal Poverty Guidelines, i.e., \$62,450/year for a one-person household and \$128,750/year for a family of four
- Client's household must have less than \$50,000 in eligible assets
- See our website for full guidelines

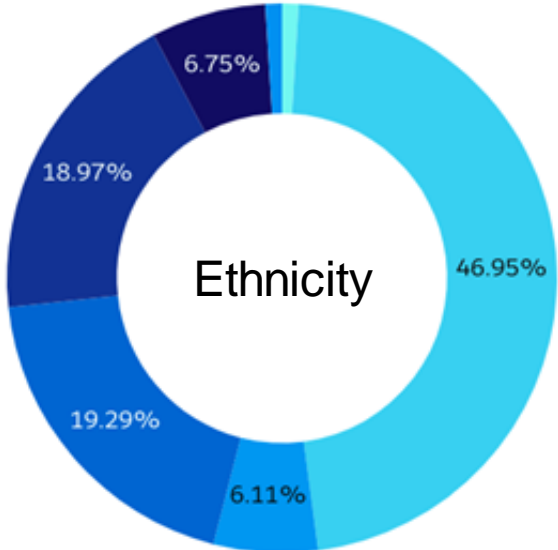
3. Location

- Currently, eligible applicants must either live or operate a business that is physically located in one of the five boroughs of New York City or within Alameda, San Francisco, San Mateo, Santa Clara, or Contra Costa counties in Northern California

Who are our Clients?

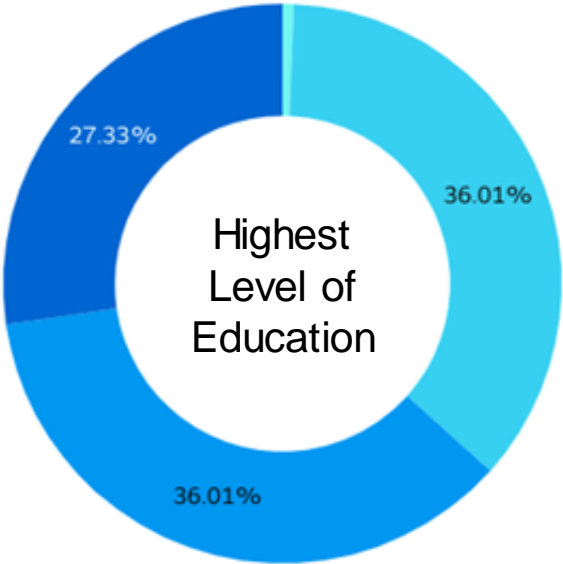


- Female
- Male
- Other

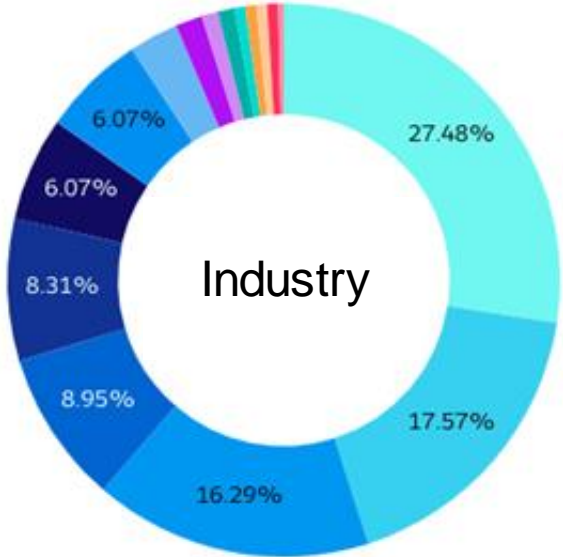


- African American / Black
- Asian / Pacific Islander
- Caucasian
- Latino / Hispanic
- Other / Multiracial
- Middle Eastern

Who are our Clients?



- < Bachelor's Degree
- Bachelor's Degree
- Graduate Degree



- Food
- Professional Services
- Personal services
- Clothing, Jewelry, and Accessories
- Other Retail Products
- Child Care or Education
- Arts and entertainment
- Health care



Employment Law Basics

Topics to be Covered

- Regulatory Overview
- Employees
- Hiring
- Wages & Payroll
- Employee Management, Discipline, & Termination
- Compliance



Regulatory Overview

Source of Employment Laws

There are many labor and employment laws that effect small businesses. Here are some examples:

Federal

- Title VII of the Civil Rights Act of 1964 (“Title VII”)
- Age Discrimination in Employment Act (“ADEA”)
- Americans with Disabilities Act. (“ADA”)
- Fair Labor Standards Act (“FLSA”)

State

- The NYS Worker Adjustment and Retraining Notification Act (“WARN”)
- The Consolidated Omnibus Budget Reconciliation Act (“COBRA”)
- Gender Expression Non-Discrimination Act (“GENDA”)
- The Wage Theft Prevention Act (“WTPA”)
- Construction Industry Fair Play Act

City

- The New York City Human Rights Law (“NYCHRL”)
- Grocery Worker Retention Act
- Stop Sexual Harassment in NYC Act (Local Law 96 of 2018)

Agencies with Regulatory Authority

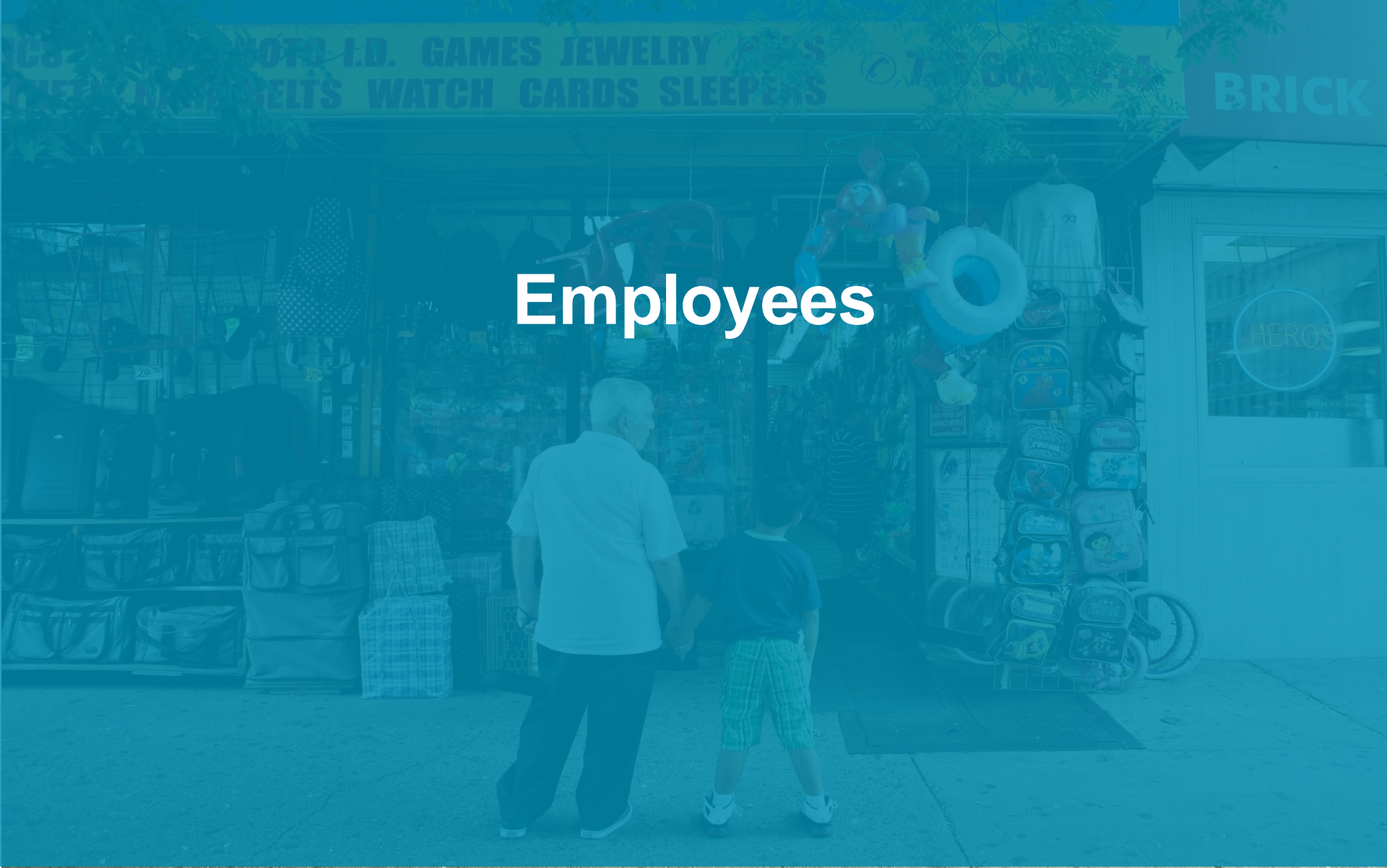
In addition to specific laws, there are countless agencies that issue regulations affecting the labor and employment practices of small businesses. These include:

- Internal Revenue Service (“IRS”)
- National Labor Relations Board (“NLRB”)
- Equal Employment Opportunity Commission (“EEOC”)
- Occupational Safety and Health Administration (“OSHA”)
- Department of Labor (“DOL”)
- Worker’s Compensation Board
- NYC Commission of Human Rights
- NYC Dept. of Consumer Affairs Office of Labor & Policy Standards

PENALTIES FOR VIOLATION

If an employer violates the law, fines and penalties can be levied against the employer by the government.

In addition to these fines, some laws give the employees the right to sue to employer, which is called a private right of action. Under many of these laws, the employer, if found to be in violation, is responsible for the employee's legal fees.



Employees

Who is an Employee?

Different laws have different criteria; the following can be treated as employees in certain circumstances:

- Employees (part time & probationary)
- Independent Contractors
- Undocumented Workers
- “Off the Books” Workers
- Interns
- Volunteers

Independent Contractors

The NYS Department of Labor takes all factors into account about the relationship between the business and the individual to determine independent contractor status.

An employer-employee relationship *may* exist if the business:

- Chooses when, where, and how they perform services
- Provides facilities, equipment, tools, and supplies
- Directly supervises the services
- Sets the hours of work
- Requires exclusive services (e.g. insisting an individual cannot work for your competitors while working for you.)
- Sets the rate of pay
- Requires attendance at meetings and/or training sessions
- Asks for oral or written reports
- Reserves the right to review and approve the work product
- Evaluates job performance
- Requires prior permission for absences
- Has the right to hire and fire

Independent contractor status is indicated if the worker:

- Has an established business
- Advertises in the electronic and/or print media
- Buys an ad in the Yellow Pages
- Uses business cards, stationery, and billheads/invoices
- Carries insurance
- Keeps a place of business and invests in facilities, equipment, and supplies
- Pays their own expenses
- Assumes risk for profit or loss
- Sets their own schedule
- Sets or negotiates their own pay rate
- Offers services to other businesses (competitive or non-competitive)
- Is free to refuse work offers
- May choose to hire help

Penalties for Misclassifying Workers

When you misclassify an employee as an independent contractor, you deny them the option of enrolling in benefits programs, like health insurance and retirement plans. You also fail to comply with employment law requirements, such as providing overtime wages and withholding and contributing necessary payroll taxes.

If you misclassify workers, you will be forced to pay the IRS back taxes, penalties, and interest and significantly increase the risk of an audit. States will require you to pay back payments for unemployment insurance and Workers' Compensation premiums.

Worker's Compensation

All employers must carry Worker's Compensation Insurance.

Under the Workers' Compensation Law, most individuals providing services to a for-profit business will be deemed an employee of that business and therefore must be covered by the employer for workers' compensation insurance.

Whether or not an individual will be treated as an employee can be very complicated.

If there is any question as to an individual's status you should consult an attorney.



Hiring

Protected Characteristics

Federal: Race, color, sex (including pregnancy, childbirth, and related medical conditions), religion, national origin, age, citizenship, disability, certain veterans, genetic information

NY State: Marital status, sexual orientation, gender identity, AIDS/HIV status, military status or service, political activities, domestic violence victim status, conviction record (with exceptions), familial status

NY City: Hair, immigration status, arrest or conviction record, caregiver status, credit history, salary history, marital or partnership status, national origin, sexual orientation, status as a current or former military service member, status as victim of domestic violence, sexual violence, or stalking, and unemployment status.

Harassment, Discrimination & Disparate Treatment

Harassment: Affects day to day, environmental issues in the workplace.

Discrimination: Affects decisions regarding the “terms and conditions” of employment.

Disparate treatment: Occurs when an employer treats an individual less well than others because of a protected characteristic.

Interview Questions to Avoid

- Are you a US citizen?
- How old are you?
- How old are your children?
- Are you planning on getting pregnant?
- What does your spouse do for a living?
- What is your sexual orientation?
- Where did you grow up?
- What is your native language?
- What is your religion? What holidays do you observe?
- Are you healthy? Do you have any specific medical conditions?
- How much did you make at your last job?
- Do you have a worker's comp claim history?

Permissible Interview Questions

- Can you perform a specific job function?
- Are you authorized to work in the US?
- Can read/speak a language fluently? (if a job requirement)
- Can you work nights and weekends, if necessary?

Fair Chance Act (NYC)

You cannot withhold a job offer because prospective employee has a criminal record.

If, after a job offer, an employer wants to revoke the offer based on the existence of criminal record, the employer must explain why, using the Fair Chance Notice, provide a copy of any background check conducted by the employer or third-party vendor, and give the applicant three business days to respond. Employers must also provide the applicant with a copy of the criminal record information that the employer relied on.

Credit Checks

Credit checks can only be used in the hiring of certain executive level employees, for example individuals with oversight over the finances, computer security, or trade secrets of the business.

Reasonable Accommodation

Disability discrimination includes the failure to make reasonable accommodations for the employee or denying employment to avoid having to make such reasonable accommodations.

Immigration Status/National Origin

- An employer should only ask for documents reasonably required to establish work authorization
- Re-verification of employment is unlawful if it is based on discriminatory animus or used as a tool to retaliate

New Employees

- Keep records of applications/resumes (do not include photos)
- Withholding & employment eligibility forms (W4; IT-2104)
- Written Pay Notice/Offer Letter
 - rate of pay/overtime
 - basis of wage payment (hourly, weekly, commission, piece rate)
 - allowance claims (tip, meal, lodging)
 - employer's regular payday
 - employer's name, physical address & telephone number
 - benefits (vacations days, sick days, health insurance etc.)
- Acknowledgement of employee handbook & policies
- Harassment training acknowledgement

Employment Agreement

Typically reserved for upper management

Employment Agreements may include:

- Term of Employment
- Pay and Benefits (employees w/ less than 50 employees do not have to offer health care)
- Non-compete clauses
- Confidentiality clauses
- Work-for-hire/intellectual property clauses
- Severance eligibility
- Bonus eligibility
- Termination clauses



Wages & Payroll

Pay Stubs

- Dates of work covered
- Employee's name, address & telephone number
- Pay rates, basis, gross wages, deductions, allowances claimed, and net wages
- For non-exempt employees
 - Hourly rates/overtime rates
 - Regular hours worked/overtime hours worked
- Deductions
- Pay stubs must be kept for 6 years

Deductions

Pay stubs should specify any deductions from the gross pay, including:

- Federal, State, Local Taxes
- FICA (Medicare & Social Security)
- Insurance Premiums
- Pension Payments

Minimum Wage

- \$15 in NYC
- Nassau, Suffolk & Westchester \$15 by 2021
- Remainder of NYS will reach \$12.50 by 2020
- Future increased indexed for inflation

Overtime Basics

- All time over 40 hours must be compensated at a rate not less than one and one-half times the regular rates
- Each work week stands alone
- Administrative, professional and executive employees exempt from overtime provided they exceed overtime exempt salary threshold (NYC - \$1,125 as of 12/31/19)

NYC Commuter Benefits Law

Requires employer to offer the full-time employees the opportunity to use up to \$255 per month in pre-tax income to purchase “qualified transportation fringe benefits”

Applicable to businesses w/ 20 + employees



Employee Management, Discipline & Termination

Meal-Times and Breaks

- Workers entitled to 30-minute break between 11 am and 2 pm for shifts 6 hours or longer
- All workers entitled to an additional 20-minute meal break between 5 pm & 7 pm for workdays that extended from before 11 am to after 7 pm
- Meal periods are not required to be counted as “hours worked”
- Employer may require employee to remain on site, but the meal period must be free of all work responsibilities
- Employee can voluntarily consent to waive required meal breaks
- Employers are required to give bathroom breaks

NYC Earned Sick Time Act

- Up to 40 hours per year of paid sick leave (5 + employees)
- Unpaid Leave (less than 5 employees)
- Applies to full-time, part-time and temporary employees who work more than 80 hours per year.
- One hour of paid sick time for every 30 hours worked
- Employer must provide notice of the employee's right to sick leave, including accrual and use of sick leave, the right to file a complain and the right to be free from retaliation

Paid Family Leave

- Employee who have been employed for 26+ weeks
- Required regardless of employer's size
- Provides 12 weeks of paid leave for
 - Caring for family member
 - Bonding with a new child
- Returning employees are entitled to be restored to the same position
- Employers must maintain health care benefits
- Funded by payroll tax

COVID PAID SICK LEAVE

Mandatory or Precautionary Quarantine

Order

Small Business (< 10 employees; income < \$1M)

- Job protection for the duration quarantine
- Compensation through existing Paid Family Leave & Disability Benefits

Small Business (<10 employees; income > \$1M); Employers with 11-99 employees

- Job protection for the duration quarantine
- 5 days of paid sick leave
- Compensation through existing Paid Family Leave & Disability Benefits

Employees who can work from home do not qualify for these benefits.

NYC Fair Workweek Law

Under the Fair Workweek Law, retail employees have the right to:

- 72 hours' advance notice of work schedule
- No on-call shifts
- No shift additions with less than 72 hours' notice
- No shift cancellations with less than 72 Hours' notice
- Workers may trade shifts voluntarily

NYC Pregnant Workers Fairness Act

All private employers must provide reasonable accommodations to pregnant and breastfeeding employees.

Possible accommodations include time off for prenatal appointments, time off to recover from childbirth and time to pump breast milk in a private and clean space.

NYS Sexual Harassment Policy

Every employer is required to adopt a sexual harassment prevention policy.

The policy must:

- prohibit sexual harassment
- provide examples of prohibited conduct
- include a complaint form
- include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties
- inform employees of their rights of redress
- clearly state that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue
- clearly state that retaliation is unlawful

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The Stop Sexual Harassment Act in NYC

Employers with 15 or more employees are required to conduct annual anti-sexual harassment training for all employees.

Employers should communicate internal complaint process available to employees through their employer to address sexual harassment claims.

Employers shall keep a record of all trainings, including a signed employee acknowledgement. These may be kept electronically.

Employers are required to conspicuously display anti-sexual harassment rights and responsibilities notices in both English (Legal size, Letter size) and Spanish (Legal size, Letter size) and distribute a factsheet to individual employees at the time of hire which may be included in an employee handbook.

Retaliation

Employers cannot punish, penalize, retaliate, or take any action against employees that might stop or deter them from exercising their rights under the law.

Disciplinary Measures

- Conduct performance evaluations
- Clearly communicate job expectations
- Progressive discipline except for serious misconduct
- Keep written records of misconduct
- Consider treatment of similarly situated, past, present and future employees
- Carefully document all disciplinary measures with factual information, not mere conclusions

At-Will Employment

New York is an “employment-at-will” state. Therefore, an employer may generally terminate an employment relationship at any time and for any reason, unless a law or agreement provides otherwise.

Termination

Before termination:

- Evaluate any potential legal & financial liability
- Provide advance notice if required by law (Warn Act) or contract
- Carefully document the reasons for termination
- Plan the termination meeting

New York employers must provide written notice to discharged employees stating the date of termination and the date that employee benefits, such as health insurance, if applicable, will be cancelled. This notice must be given to the employee no later than 5 working days after the discharge.

Unemployment Claims

After termination employee may file an unemployment claim.

Here are some reasons for **legitimate unemployment claims**:

- You laid off the employee due to a lack of work
- You laid off the employee because of financial constraints
- The employee was terminated or quit because of something you did wrong

Here are some reasons a worker is **ineligible for unemployment benefits**:

- The employee was fired for misconduct
- The employee quit to take another job that fell through
- The employee included false information on their claim form

Unemployment Insurance & COVID

- Due to COVID there is expanded eligibility for the self-employed and independent contractors.
- Expanded unemployment benefits, an additional \$300/week for weeks ending 1/3/2021 to 3/14/2021.
- US Dept. of Labor has clarified that if an employee refuses work due to unsafe working conditions, they will not lose their benefits.

COVID Related Employee Complaints

Employees can file employer complaints with NYS for the following reason:

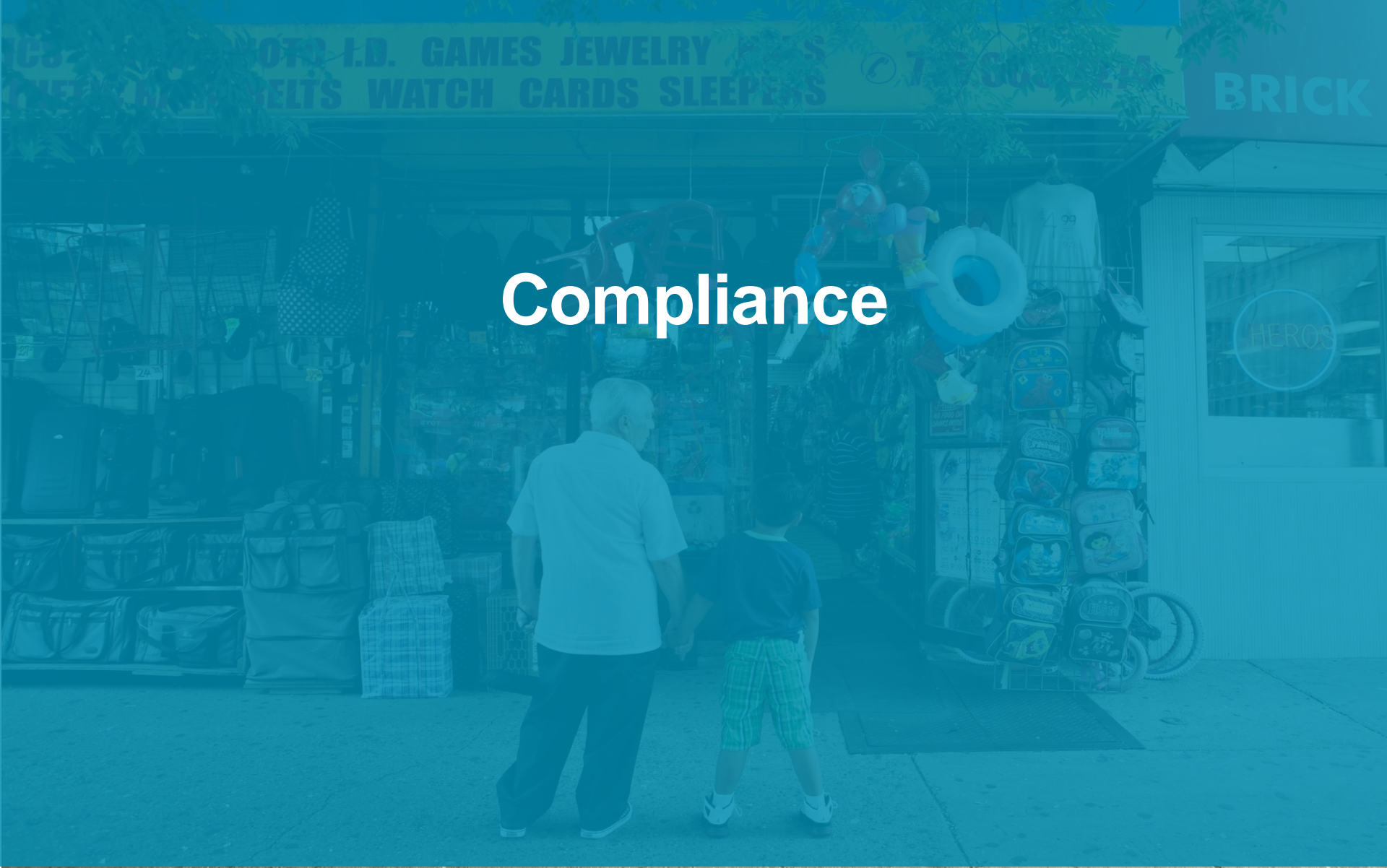
- Business is open in violation of the law
- Employer is not taking proper safety and health precautions
- Employer is forcing you to work when you are sick
- Employer is not properly paying your wages/sick leave

Further COVID Considerations

- Employers must provide PPE for its employees
- Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA
- Employers may measure employee body temperature
- Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19, and ask if they have been tested for COVID-19
- Employers may require people with COVID-19 symptoms to stay home
- Employers can require a doctor's note for fitness for duty
- Employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others
- Requiring antibody testing before allowing employees to re-enter the workplace is not allowed
- Employers can require COVID-19 vaccinations

All COVID-19 policies must comply with the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 (Title VII) and other workplace laws.

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Compliance

Required Postings

Several laws require you to post notices to employees.

For more information:
<https://labor.ny.gov/workerprotection/laborstandards/employer/posters.shtm>
<https://www.dol.gov/whd/resources/posters.htm>



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Employee Handbook

- Provides guidance and explanation of employer practices
- Helps employer insure the employee receive legally required disclosures
- Helps employer effectively communicate disciplinary violations to employees
- Provides template for consistency enabling the employer to make sure policies and procedures are uniformly applied

L & E Documentation

- Payroll records & time-cards
- Personnel records & employee files
- Records of required trainings & notices
- Whistleblower reports/complaints
- Incident & accident log
- Employee handbook
- Employer is responsible for keeping accurate books and records for the time periods prescribed by law

Small Business Resources for Labor & Employment Compliance

Labor & employment law is complicated and is constantly changing. Small businesses should avail themselves of every resource to keep current, including but not limited to:

- Accountants
- Attorneys
- Payroll Services
- Insurance Brokers
- Industry Trade Associations
- Government Resources (NYS Dept. of Labor; NYC Human Rights Commission)
- Press



Questions?

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Thank You!

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