

NY Courts Say Delayed Pay For Manual Labor Is Harmful


By **Daniela Porat**

Law360 (November 10, 2022, 9:53 PM EST) -- A critical mass of suits over the frequency of pay for manual workers in New York has survived employers' early dismissal bids, affirming that delayed but fully paid wages constitute an injury under the state's requirement to pay physical laborers weekly.



Employers are facing a rush of litigation alleging that they've failed to pay manual workers on a weekly basis as required by New York law. (iStock.com/Andrii Yalanskyi)

Retail giants Zara USA Inc. and Walmart are among the companies whose motions to dismiss frequency-of-pay suits have failed.

The **slew of litigation** stems from a 2019 opinion by the First Judicial Department of New York's Appellate Division in [Vega v. CM & Assoc. Constr. Mgt. LLC](#) . The court determined that "the moment that an employer fails to pay wages" in accordance with New York Labor Law Section 191, which requires weekly instead of biweekly pay for manual workers, "the employer pays less than what is required."

Notably, the appellate court recognized that workers have a private right of action for frequency-of-pay claims and they can recover liquidated damages.

New York's frequency-of-pay law is a recognition that workers in jobs that involve manual work are often making subsistence wages and get by paycheck to paycheck, said Hugh Baran, a worker-side attorney for Kakalec Law PLLC.

"I think what you're seeing now are a variety of efforts to close the courthouse doors to these lawsuits, and they are failing," he said. "Courts seem to be recognizing that factually it is very plainly a concrete injury for someone not to be paid their wages at the time that they are due."

Fact-Specific Inquiries Will Determine Manual Worker Status

The New York Department of Labor considers a manual worker someone who spends more than 25% of their work time doing "physical labor," which can include myriad tasks.

Department opinion letters have said chauffeurs can be considered manual workers because of the heavy lifting the job sometimes requires.

Potential discovery in various cases will bear out who among mechanics, retail workers, makeup artists and others are manual workers under the New York Labor Law.

Courts and juries regularly make such determinations about job duties, said Andrew Melzer, a partner at Sanford Heisler Sharp LLP and co-chair of the firm's wage and hour practice group.

"When it comes down to how much of [workers'] time is spent doing physical labor, physical tasks, that's fairly simple on the spectrum of what issues can be involved in labor and employment cases," he said.

Erin Torcello, a member of management-side firm Bond Schoeneck & King PLLC, said that evaluating job duties may reveal variations in responsibilities under the same position across an employer's different locations or establishments, introducing many unknowns into the analysis of whether workers are manual laborers.

"It could be that a cashier in one retail location is a manual worker for purposes of 191, but a [cashier] in another establishment is not a manual worker for purposes of 191 because they're doing it a little bit different," she said. "Until a court says, as a matter of law, this type of work is not physical labor, it is going to be a fact-specific analysis."

A Bright Line for Weekly Pay

A colorfully worded order in the New York federal court case [Levy et al. v. Endeavor Air Inc.](#) encapsulates why manual workers' claims against their employers for full but late pay are here to stay.

Regional airline Endeavor Air argued that a one-week delay in pay is not harmful enough to establish standing, but U.S. District Judge Eric Vitaliano described that assertion as "thoroughly meritless" in his Oct. 22 decision denying the airline's motion to dismiss.

The workers who filed the proposed class action against the airline, which operates connecting flights for Delta Air Lines, sufficiently alleged that they were harmed by being forced to wait for money that "compared with when they should have received it, was ... worth less," Judge Vitaliano determined.

"At its essence, defendant's attack is not one of law, but of economics," he wrote. "Endeavor refuses to recognize here what it must certainly recognize in the handling of its own business affairs: there is a time value to the possession of money."

Torcello said this decision is interesting because it essentially creates a bright line rule.

"If you weren't paid on a weekly basis, you suffered damage," Torcello said. "It doesn't matter that an employee didn't have any bills to pay that week. That money was due and owing to them and it should have been paid to them on the day that it was due and owing to them."

There is no de minimis rule when it comes to measuring harm for delayed pay, Melzer said.

Even though it might come down to a "matter of cents" earned on interest, for example, delayed pay is still "a concrete harm," Melzer said.

"You're entitled to money under the law and you weren't provided it," he said. "The delay has a value in itself."

Baran of Kakalec Law pointed to Judge Vitaliano's rejection of Endeavor's argument that the workers needed to show they were harmed by delayed payments.

"It flies in the face of the idea that a complaint in the federal court is supposed to provide enough facts to plausibly state a claim for relief" Baran said. "I think that the court here recognized that, that on its face, pleading that you were deprived of the time value of money to which you were entitled is a concrete injury."

A Challenge to the Vega Ruling

The Second Judicial Department of New York's Appellate Division will wrestle with whether the state's frequency-of-pay labor laws do, in fact, provide for a private right of action and liquidated damages on fully paid but late wages, as the Vega decision determined.

Besante Fitzgerald Grant, a former worker for Global Aircraft Dispatch Inc. at John F. Kennedy International Airport who handled baggage and performed customer service, appealed an April 2021 lower court decision finding that Section 191 does not provide a private right of action for late wages.

In an April 2022 reply brief, Global Aircraft Dispatch said that "Vega opened the floodgates" and was wrong.

"What extreme desecration of the law would justify such draconian damages, putting nearly every employer out-of-business?" the brief said.

The appellate court in October denied a motion by Retail Litigation Center Inc., the U.S. Chamber of Commerce and other industry groups to file a friend-of-the-court brief.

Melzer said the Vega decision was well-reasoned and should stand.

"When there's a right, there's got to be a remedy," he said.

The attempts by companies to fight frequency-of-pay claims are part of a broader pattern of employers seeking to prevent workers from enforcing their rights, as seen in the proliferation of forced arbitration, Baran said.

These trends raise a broader question about democratic values, he said.

"Many employers, it seems, are looking ... to block workers from actually pursuing their rights before judges and juries, whether they're turning to forced arbitration or class action waivers, or turning to extremely cramped views of standing," Baran said. "Are we as a democracy going to countenance that?"

--Editing by Abbie Sarfo.