

Highlights from the New York FY 2020 Budget

April 10, 2019

New York legislators passed into law the fiscal year 2020 \$175.5-billion budget on April 1, 2019, fully funding state government for the next fiscal year. Among the provisions enacted are many that affect labor and employment in general and the energy, media, finance, health care, and other industries in particular.

This is the first state Budget passed by a legislature with a Democratic majority in both houses since 2010. The Budget increases state funds spending by two percent, which is within the Governor's self-imposed state funds spending cap. It also enacts into law many provisions long-sought by Democratic lawmakers that in previous years failed in a Republican-controlled Senate. Some items not enacted are expected to be topics of discussion and debate during the remainder of the 2019 legislative session.

This article notes Budget highlights.

General Labor and Employment Enacted

Election Day Paid Time Off

The Budget includes a mandate that employers provide up to three hours of paid time off on Election Day for all New Yorkers to vote.

Extend the Workers with Disabilities Tax Credit

The Budget extends for three years the credits for qualified employers that employ individuals with developmental disabilities. The credit amounts up to \$2,100 for each employee. For-profit businesses are eligible for the credit.

New Employer-Provided Child Care Credit

The Budget includes an employer tax credit of up to \$150,000 for qualified child care expenditures paid or incurred with respect to a qualified child care facility in the state. The tax credit also is available for qualified child care resource and referral expenditures paid or incurred with respect to an employer's employees working in the state.

New Employer Recovery Hiring Tax Credit

The Budget creates the "Employer Recovery Hiring Tax Credit," a credit of up to \$2,000 per employee in drug-abuse recovery that a business employs. According to the Governor, the credit will help a vulnerable population and provide \$2 million annually to businesses in New York.

Agency Shop Fee Deductions Liability Protections

The Budget establishes new safeguards for public sector unions at the state and local government level after the U.S. Supreme Court's 2018 Janus decision. The Court ruled that public sector employees who are non-members of a union cannot be legally required to pay agency shop or "fair share" fees as a condition of employment. The new provisions include a liability shield for requiring, deducting, receiving, or retaining agency shop fee deductions from public employees, as well as disallowing claims from current or former public

employees if the fees were permitted or mandated at the time under New York laws prior to June 27, 2018. Moreover, the state government is prohibited from disclosing the personal information of public employees.

General Labor and Employment Not Enacted

Equal Pay; Salary History Ban

The Budget did not include legislation in the Governor's proposal that would broaden the definition of "equal pay for equal work" in both the public and private sectors to require that equal pay be provided for all substantially similar work. The proposal would have banned questions on salary history for all prospective employees.

Workplace Harassment Protections

The Budget did not include the Governor's proposal that would increase protections against sexual harassment in the workplace by eliminating the restriction that the complained-of harassment be "severe or pervasive," mandating that all pre-dispute non-disclosure agreements allow for filing a complaint, and requiring employers to conspicuously post an educational poster on sexual harassment.

Breastfeeding in the Workplace

The Budget did not include legislation in the Governor's proposal that would guarantee breastfeeding rights in the workplace and protect those rights under the state Human Rights Law. The legislation also would have required an employer to make reasonable accommodations to provide for breastfeeding in the workplace.

Increasing Criminal Penalties for Wage Theft

The Budget did not include changes to the penal law for wage theft by creating tiered felony offenses based on dollar amounts under controversy. Currently, the penal law for wage theft is based on repeat offenses.

Industry: Chemicals

Product Labeling Not Enacted

The Governor's proposal on new labeling requirements and chemical disclosure mandates for cleaning and personal care products was not enacted.

Industry: Construction

Prevailing Wage Not Enacted

The Budget did not include legislation in the Senate and Assembly One-House Budget Proposals that would require the payment of prevailing wage to all building service workers working in building projects that receive at least \$1 million in state financial aid, including tax incentives. The proposal would have increased significantly the cost of current and future construction. This legislation may become a major topic of discussion during the remainder of the 2019 legislative session.

The Budget also did not include requiring the payment of the prevailing wage to workers on private projects receiving any state money, including those that receive tax breaks from industrial development agencies. This proposal would have a chilling effect on construction and could add as much as 30 percent to the cost of construction. This topic likely will be

revisited in the remaining legislative session.

Minority and Women-Owned Business Enterprises (MWBE) Program Changes Not Enacted

Proposals to modify and strengthen the existing MWBE requirements for public contracts did not make it into the Budget, but they will be revisited in the remaining legislative session.

Industry: Energy and Utilities

Energy Service Company (ESCO) Commercial Customer Sales Tax Elimination

The Budget includes language that eliminates, effective June 1, 2019, the sales tax exemption for the delivery of natural gas and electric service purchased from an ESCO by commercial customers. This will be an effective increase in sales tax of seven-to-eight percent on ESCO commercial customers and is expected to generate more than \$120 million annually for the state.

Industry: Financial Services

Student Loan Servicing Licensing

The Budget includes a regulatory licensing framework for companies that service student loans held by New Yorkers. The new statute also prohibits student loan servicers from misleading a borrower or engaging in any predatory act or practice, misapplying payments, providing credit-reporting agencies with inaccurate information, or engaging in any other practices that may harm the borrower.

Industry: Government Contractors

Disclosure of Information

The Budget enacted the “Public Employees Fair Employment Act” to prohibit the disclosure of public employees’ personal information.

Comptroller Approval on Contracts Not Enacted

The Budget did not include language requiring that Office of General Services (OGS) Centralized Contracts be reviewed and approved by the New York State Comptroller. However, this additional review by the Comptroller is expected to be allowed outside of the legislative process through an OGS Memorandum of Understanding.

Net Neutrality Not Enacted

The Budget did not require principles of net neutrality be included into the state’s procurement process. However, the Governor’s Executive Order 175 already requires such principles in state contracts.

MWBE Not Enacted

Proposals to modify and strengthen the existing MWBE requirements for public contracts did not make it into the Budget, but they will be revisited in the remaining legislative session.

Industry: Health Care

Hospital and Nursing Home Cuts, Restorations

The Budget:

- Restores more than \$1.1 billion in Medicaid and other health care cuts that were proposed in the Governor’s budget proposal, including across-the-board Medicaid rate cuts, indigent care spending cuts to specific hospitals, elimination of a promised rate increase for hospitals and nursing homes, and a reduction related to potentially preventable admissions to certain hospitals.
- Restores the Population Health Improvement Program (PHIP) that had been eliminated in the Governor’s budget proposal.
- Eliminates \$24.5 million in funding for Major Academic Centers of Excellence.
- Includes additional funding for certain enhanced safety-net hospitals.
- Cuts nearly \$123 million from nursing home reimbursement related to a change in case-mix adjustment methodology and establishes a workgroup to review and make recommendations regarding the methodology.

Other Health Care Cuts, Restorations

The Budget:

- Restores Medicaid/Medicare crossover cuts that would have had a detrimental impact on the dually eligible population with regard to access to services provided by psychologists and ambulance providers.
- Reduces reimbursement to New York City for annual public health costs by nearly \$27 million.

Health Care Capital

The Budget authorizes the shift of \$300 million of Health Care Facility Transformation program: Statewide III capital grant funding to fund approved but unfunded applications already submitted under Health Care Facility Transformation program: Statewide II. The language also states that award recipients will be announced by May 1, 2019.

Consumer Directed Personal Assistance Program

The Budget:

- Modifies the regulation of Fiscal Intermediaries of the Consumer Directed Personal Assistance Program (FIs), including to add the requirement that FIs contract with the state.
- Establishes a stakeholder workgroup.

Other Health Care Enactments

The Budget:

- Codifies federal Affordable Care Act (ACA) provisions.
- Codifies the establishment and operation of the New York State of Health.
- Enacts behavioral health parity provisions.
- Requires a staffing study, with stakeholder input, related to enhanced staffing levels at hospitals and nursing home facilities.
- Eliminates a study related to universal access to health care that had been included in the Governor’s proposal.

Industry: Higher Education

Student Loan Servicing Licensing

The Budget includes a regulatory licensing framework for companies that service student loans held by New Yorkers. The new statute also prohibits student loan servicers from misleading a borrower or engaging in any predatory act or practice, misapplying payments, providing credit-reporting agencies with inaccurate information, or engaging in any other practices that may harm the borrower.

For-Profit College Accountability Not Enacted

Not included in the Budget is the Governor's "For-Profit College Accountability Act," which proposed a structure of limited revenue sources for for-profit colleges. Failure to comply with the proposed formula would have made the college unable to operate in New York.

Industry: Hospitality

Food Donation and Food Scraps Recycling

The Budget includes language requiring "designated food scraps generators," including hotels that generate an average of two tons of food scraps weekly, to separate their excess food scraps for donation for human consumption and deliver the remaining food scraps to an organic recycler (if they are located within 25 miles of an organic recycler) beginning in 2022. The legislation further requires "designated food scraps generators" to store food scraps on site, train employees in separating food scraps, and obtain a transporter or haul their own waste to an organics recycler. Many entities are excluded from these requirements, such as hospitals, nursing homes, adult care facilities, and elementary and secondary schools.

Industry: Insurance

Commercial Vehicle Minimum Insurance Limits

Provisions that seek to regulate the limousine industry were included in the Budget. All commercial vehicles with a seating capacity of at least eight passengers must carry insurance coverage of at least \$1.5 million. In addition, limousines must carry an additional \$1.5 million in supplemental insurance.

In-Vitro Fertility Mandate

The Budget requires large group (employers with at least 100 full-time staff) insurance policies in New York to provide coverage for three cycles of in-vitro fertilization. The new law also expands coverage for medically appropriate fertility preservation.

Industry: Manufacturing

Decouple from Federal Basis for State Manufacturing Test

The Budget decouples New York from the federal adjusted basis for property used to determine whether a manufacturer is a qualified New York manufacturer. Currently, the statutory test uses the federal adjusted basis of the taxpayer's property in the state. Recent federal law has increased the limitation on the amount expended on property that taxpayers may elect to treat as an expense under the Internal Revenue Code, potentially reducing the federal adjusted basis of such property. As a result, the basis amount used for purposes of the manufacturing test may not properly reflect the extent of the taxpayer's ownership of manufacturing property in New York.

Industry: Media

Empire State Commercial Production Tax Credit

The Budget streamlines and extends until 2023 the Empire State Commercial Production tax credit. Reforms include increasing the percentage of production cost allowed to be taken and modernizing the credit to capture forms of digital commercial production.

Film Tax Credit

The Budget includes provisions extending the Empire State Film Production credit and Empire State Film Post-Production credit for two years.

Industry: Pharmaceuticals

Opioid Tax

The Budget establishes a tax on opioids sold in New York and stipulates that at least \$100 million in “current revenues” be utilized for opioid treatment and prevention programs.

Limits on Pharmacy Benefit Managers Partially Enacted

The Budget did not include the Governor’s proposal to require regulation of Pharmacy Benefit Managers (PBMs) through registration, reporting, and licensing.

However, the Budget authorizes the Department of Health to limit the amount PBMs can charge Managed Care Organizations (MCOs) and add transparency provisions for PBMs and MCOs.

New Restrictions on Unlicensed Pharmacy Assistants Not Enacted

The Budget did not include the Governor’s proposal, which was in the Senate One-House Budget Proposal, that would have established parameters for unlicensed pharmacy assistants on the number of assistants that may be supervised by a pharmacist. It also would have authorized eligible assistants to compound, prepare, label, and dispense pharmaceuticals.

Industry: Real Estate

Additional New York City Real Estate Transfer Tax (Mansion Tax)

The Budget increases real property transfer taxes (RPTTs) on sales in New York City. An additional \$1.50 per \$500 of the sales price is applicable to residential properties valued at more than \$3 million and non-residential properties valued at more than \$2 million. Residential properties in New York City selling for more than \$2 million will be covered by a second “supplemental” RPTT tax.

Industry: Retail and Consumer Goods

Vapor Tax

The Budget includes a 20-percent tax on nicotine liquid-containing products that are not registered with the federal Food and Drug Administration (FDA) as medical devices or products.

Plastic Bag Ban

The Budget includes a ban on single-use plastic bags beginning March 31, 2020, with an optional county opt-in for a \$0.05 fee on the use of paper bags for retail. This legislation

may be revisited and amended before the end of the 2019 legislative session.

Sales Tax for Online Purchases

The Budget includes legislation requiring sales tax to be collected on all purchases of retail goods in New York, including online purchases, beginning June 1, 2019.

Cannabis Regulation and Tax Act Not Enacted

The Budget did not include legislation in the Governor's proposal that would create the Cannabis Regulation and Tax Act, which would have provided regulation on the manufacturing, wholesaling, retail production, distribution, and transportation of marijuana and cannabis products (including hemp) for retail. The proposed legislation included heavy taxes on cultivation and the sale of marijuana. This topic will continue to be discussed throughout the rest of the 2019 legislative session.

Industry: Transportation

Congestion Pricing

Funding in the Budget includes the creation of a Central Business District tolling program. This program will include the installation of electronic tolling devices on the perimeter of the Central Business District, defined as streets south of 60th Street in Manhattan. The program will be established, operated, and maintained by the Triborough Bridge and Tunnel Authority (TBTA). A six-member Traffic Mobility Review Board will be established by the TBTA to advise on tolls, exemptions, and credits. Tolls will vary and passenger vehicles will be charged only once per day. The tolling program will not be implemented before December 31, 2020.

Increase Regulation of Limousines

The Budget enacts new regulations for the limousine industry making it a Class E felony for knowingly operating a limo where such operation causes the death of another person, creating heightened civil penalties (including higher fines) for operating without state Department of Transportation (DOT) operating authority or violating DOT safety regulations. Additionally, State Police and DOT will have the authority to retrieve vehicle plates when limos are out of compliance. The Department of Motor Vehicles (DMV) will be able to refuse and revoke registrations for limos that do not meet federal safety standards. If an unauthorized vehicle seeks an inspection at a licensed inspection station, the inspection station will be required to report that vehicle to the DMV. Any inspection station found to have improperly issued inspections three times within an 18-month period will have its operating certificate suspended. Stretch limos will be prohibited from making U-turns.

Right-of-Way Fees

The DOT is authorized to impose unspecified right-of-way fees on fiber optic cable, above and beyond any costs incurred by the state.

Upstate Auto Rental Surcharge

The Budget raises new revenues for upstate transit systems by expanding an auto rental surcharge from the Metropolitan Commuter Transportation District (MCTD) to the entire state at a rate of six percent.

Please contact the authors or the Jackson Lewis attorney with whom you regularly work with any questions you may have regarding your New York State legal compliance.

The Jackson Lewis Government Relations practice monitors and tracks all legislation introduced in New York and advocates for client positions at all levels of city and state government.

©2019 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 1000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.