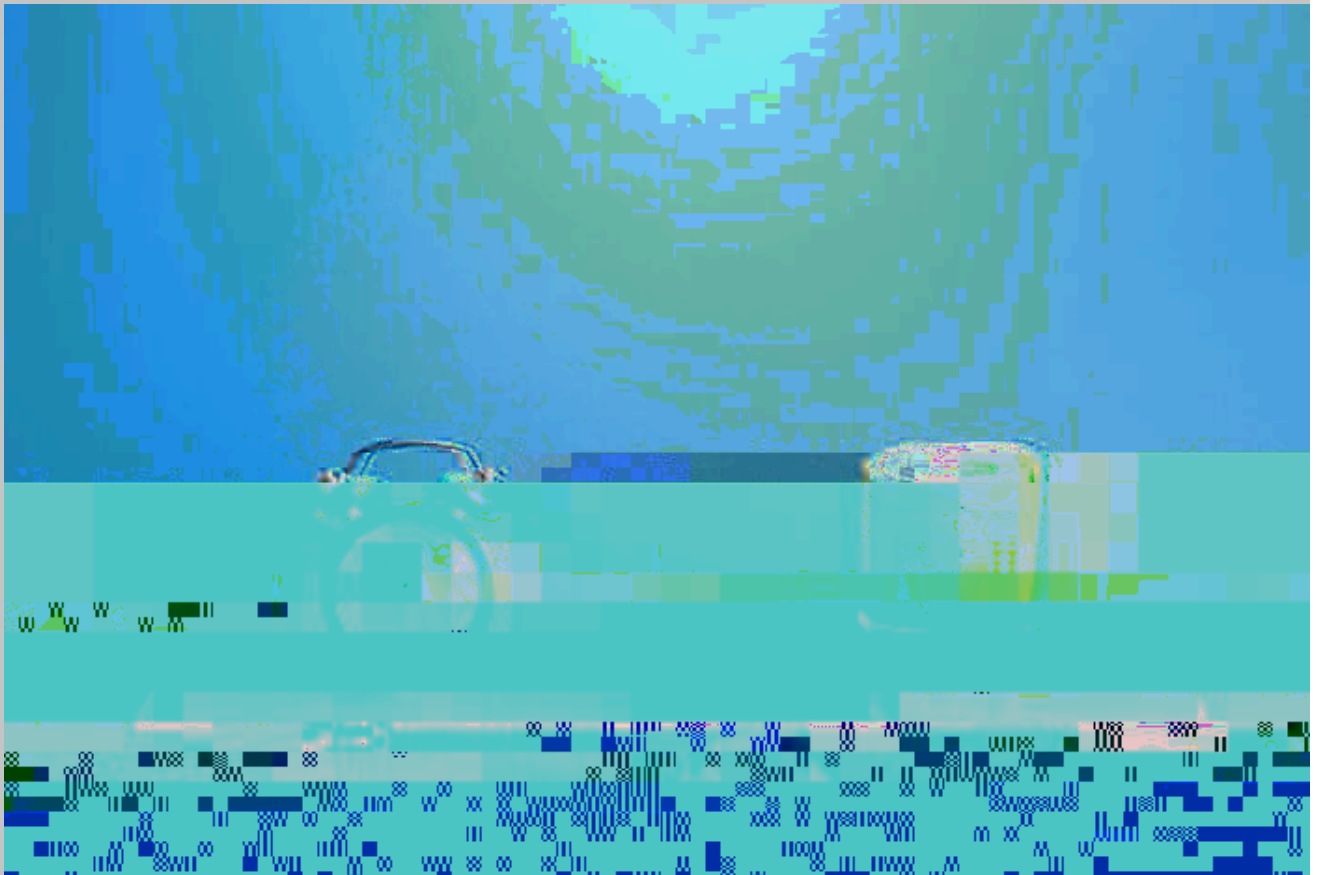




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By Daniela Porat

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.

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