

Is a Retail Salesperson Really a “Manual Worker”?

By Keith A. Markel and Alana R. Mildner

In this Labor and Employment column, Keith A. Markel and Alana R. Mildner discuss the rise of pay frequency litigation in New York, particularly within the retail industry, and what constitutes a manual worker.

When most people think of a manual worker, they tend to imagine a person pumping gas at a service station or wearing a hard hat on a construction site, not a retail sales associate wearing designer clothes working in a fashion boutique. With that said, more and more retail workers in New York are filing lawsuits arguing that they too should be considered manual workers, and thus paid on a weekly basis, pursuant to Section 191 of the New York Labor Law (Section 191).

Section 191 requires employers to issue weekly paychecks for those deemed “manual” workers, and provide at least semi-monthly paychecks for those who are considered “clerical and other” workers.

The New York Labor Law states that commissioned salespeople and employees who work in a bona-fide executive, professional or administrative capacity and earn over \$900 per week also do not need to be paid on a weekly basis.

The distinction between manual and clerical workers is the subject of several recent lawsuits involving retail salespeople and more cases seem likely. Since manual workers are entitled to be paid on a weekly basis pursuant to New York Labor Law, retail employees are asking courts to consider them manual workers, even if their jobs involve primarily clerical work.

The reasoning behind these cases stems from a 2019 decision of the New York Appellate Division First Department, *Vega v. CM & Associates Construction Management*, which found a private right of action for employees to bring lawsuits challenging the frequency of their pay.

Since then, dozens of cases have been filed, in which employees and retailers strenuously disagree over what constitutes “manual” work under New York Labor Law.

New York Labor Law defines a manual worker as “a mechanic, workingman or laborer,” which the New York State Department of Labor (NY DOL) interprets to

be any worker who spends more than 25% of their time performing physical labor.

However, because there are factual disputes over what exactly constitutes physical labor, and because there are often disputes between employers and employees concerning how much time is spent doing such work, these issues persist to be litigated.

What Constitutes Physical Labor?

Although pay frequency litigation in the retail industry is a relatively recent phenomenon, courts have been faced with questions regarding manual work for over a century. In a 1915 decision, *People ex rel. Mitchell v. Interborough Rapid Transit Co.*, a New York court analyzed various positions at a railroad company, finding that some jobs, such as bookkeepers, accountants and civil engineers, were undoubtedly clerical regardless of any physical work they performed.

In other circumstances, workers have been found to be manual employees even if they perform some clerical work. In 1997, New York's Appellate Division Second Department found that IKEA workers whose job duties were primarily manual, but who assisted customers occasionally, were indeed manual workers entitled to weekly paychecks. The court found that because physical labor, and not customer service, was their "principal" job function, these individuals were manual workers entitled to weekly paychecks. *IKEA U.S. v. Industrial Bd. of Appeals*, 241 A.D.2d 454 (2d Dep't 1997).

Based on the *Mitchell* and *IKEA* decisions, it would seem logical then that workers whose principal focus is customer service would fall under the category of "clerical and other workers," and thus can be paid on a biweekly or semi-monthly basis.

However, sales employees for retailers such as Levi's, Skechers and Old Navy have all filed lawsuits arguing that time spent on duties such as folding clothes or tending to fitting rooms should qualify them as manual workers.

In arguing that they are manual workers, retail employees often cite to opinions from the NY DOL, issued well over a decade ago regarding what constitutes physical labor.

From approximately 2007 to 2011, the NY DOL issued opinion letters to businesses and employees seeking guidance on such pay frequency matters. Many of these letters are fact-specific and take a very broad view of what constitutes physical labor, opining that based on their job duties, as conveyed to NY DOL,

hairdressers, pizzeria workers and airport chauffeurs should be considered manual workers and thus paid on a weekly basis.

Not all workers, however, have been found to be manual workers.

In March 2023, in *Balderramo v. Go N.Y. Tours*, a federal judge in New York found that drivers of “hop-on/hop-off” tour buses were not manual workers. The court noted that unlike airport chauffeurs, who spend much of their work time loading and unloading heavy luggage, tour bus drivers primarily drive and interact with customers, tasks that do not constitute physical labor.

Even though the tour drivers perform some physical tasks, like refueling buses, this constitutes a very small portion of their job duties, and thus the court held they were not entitled to be paid on a weekly basis.

In 2022, in *Davis v. Carlo’s Bakery 42nd & 8th LLC*, a New York court noted that a bakery cashier’s duties were “largely stationary, indistinguishable from working at a computer...and thus clerical as well.” The court left open the possibility that the cashier might ultimately be able to demonstrate that she spent more than a quarter of her time performing more physical duties beyond her cash register assignment, such as cleaning the store, but it noted that merely working at the register by itself was not a physical task.

Likewise, if courts continue to follow this logic, retail workers who spend more than three-quarters of their time assisting customers at a counter, cash register or other point of sale terminal should also be considered clerical, rather than manual, workers.

Recently, in *Pozo v. Bluemercury Inc.*, the court dismissed the complaint of a retail employee who alleged that 25% of his job *responsibilities* involved physical labor such as stocking the sales floor, organizing merchandise and cleaning the store but failed to allege how much of his time was actually spent on such activities.

The court nonetheless permitted the employee to amend his complaint to address this deficiency, which he promptly did and thus that litigation continues.

Is It Really a Job Anyone Can Perform?

The New York Industrial Board of Appeals uses a slightly different and more practical analysis than the NY DOL in determining who is a manual worker, looking not only to the amount of time spent on physical tasks, but also to whether the employee is a “common laborer.”

The board has found, for example, that dental assistants were not manual laborers, as their work was not “a low skilled job that anyone walking into [the workplace] can do.” *Hudson Valley Mall Dental v. Commissioner of Labor*, PR 12-034 (N.Y. Indus. Brd. App. Aug. 17, 2014). Although the dental assistants spent more than 25% of their time preparing dental instruments, their work did not fall within the intended definition of a manual worker.

Similarly, in 2014, a federal court in New York found that an assistant pre-school teacher was not a manual worker and was therefore not entitled to be paid on a weekly basis, even though she performed many physical tasks in attending to children's needs. *Gonzalez v. Gan Israel Preschool*, No. 12-CV-06304 (MKB)(VMS), 2014 U.S. Dist. LEXIS 34633 (E.D.N.Y. Feb. 5, 2014).

Is working in retail really a job that anyone could do?

Many retail workers would probably disagree. In particular, luxury retail workers likely have specialized skills and superior knowledge of seasonal design and style trends, fashion history, client relations, brand offerings and more.

Even if salespeople spend some of their time on tasks that may be deemed physical in nature, such as folding clothes, returning items to display shelves or carrying merchandise to a fitting room, retail employees, particularly those working in higher-end luxury environments, seem more like dental or teaching assistants than construction workers.

What Can Employers Do to Avoid These Claims?

Larger retailers with over 1,000 employees in New York can apply to the NY DOL for authorization to pay manual workers on a biweekly basis, thus avoiding the need altogether to analyze whether a particular employee is a manual worker. Several large retailers, including Abercrombie & Fitch, Coach and Nordstrom, have already applied for and received permission to pay manual workers on a biweekly basis.

Until there is greater clarity from the courts or the legislature, retailers should continue to be vigilant about the amount of physical labor their employees perform and consult with their counsel to adjust their pay frequency practices accordingly.

At least for now, however, much to the frustration of employers, it appears that pay frequency litigation is a fashion trend in New York that does not appear to be going out of style anytime soon.

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