

LABOR AND EMPLOYMENT

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INTRODUCTION

This *Survey* year was highlighted by several significant legislative developments at both the state and federal level. The New York State Labor Law was amended to deter employer violations and to require written notice of rate of pay, regular payday, and overtime rate. The New York Human Rights Law was amended to protect victims of domestic violence and to provide for the assessment of civil fines and penalties in cases of employment discrimination. The New York State Department of Labor (“DOL”) issued regulations on mandatory overtime for nurses and revised regulations regarding the New York State Worker Adjustment and Retraining Notification Act. Additionally, the legislature enacted an early retirement incentive for members of the New York State Teachers’ Retirement System, created a new tier of pension benefits for public employees, and passed two health reform bills extending health insurance coverage. At the federal level, the Family and Medical Leave Act’s military provisions were expanded and Title II of the Genetic Information Nondiscrimination Act of 2008 took effect.

In addition to the legislative developments, there were a number of significant court decisions on various labor and employment law issues. Notably, the Supreme Court found that the National Labor Relations Board had no authority to decide unfair labor practice and representation cases when only two of its five seats were filled. The Supreme Court also determined that a disparate impact discrimination

charge is timely if it is filed within 300 days of the application of a prior discriminatory practice. Additionally, the Second Circuit clarified the applicable standard for retaliation claims under Title VII and provided further guidance regarding an employee's complaint requirements under the *Faragher/Ellerth* defense.

The New York Court of Appeals also issued several decisions on various employment law issues, including whether a teacher is entitled to back pay for a Board of Education's failure to provide timely notice of termination and whether dismissal from employment for failure to possess a valid license or certification should be considered a disciplinary termination. The Court of Appeals also reaffirmed the narrow standard of judicial review with respect to arbitration decisions and enunciated the standard applicable in determining the validity of fee-splitting provisions in arbitration agreements.

Finally, recent decisions by the New York Court of Appeals, Second Circuit, and the First Department have continued to highlight the differences between the New York City and New York State Human Rights Laws. New York courts have also continued to address various issues surrounding the employment-at-will doctrine.

I. EMPLOYMENT-AT-WILL

A. *Post-Termination Commission*

In *Arbeeny v. Kennedy Executive Search, Inc.*, the appellate division allowed an at-will employee to proceed with a claim under a written commission agreement and New York Labor Law sections 191 and 198 for payment of commissions that he "arranged" before his termination.¹ The court found that while "generally an at-will employee is not entitled to post-termination commissions," the parties had provided otherwise in a written agreement.² The commission agreement between the employee and Kennedy Executive Search, Inc. ("KES") "provided that the plaintiff was eligible 'to earn commission compensation in respect of placements *arranged* by Employee . . .'"³ Another section of the agreement provided that "[n]o commission shall be due' in the event plaintiff 'is not in the employ of KES at the date the commission payment would otherwise be made.'"⁴ The appellate division interpreted these provisions to mean that the plaintiff was

1. 71 A.D.3d 177, 180, 893 N.Y.S.2d 39, 41-42 (1st Dep't 2010).

2. *Id.*, 893 N.Y.S.2d at 42.

3. *Id.* at 178-79, 893 N.Y.S.2d at 40.

4. *Id.* at 179, 893 N.Y.S.2d at 41.

entitled to commissions for placements arranged prior to his termination, but could not claim a right to prospective commissions after his termination.⁵ Construing the agreement against the drafter, KES, the court remarked that “[h]ad KES ‘meant to foreclose the possibility that plaintiff might earn a post-termination commission on a placement’ *arranged* by plaintiff, it ‘could have said so explicitly.’”⁶

The appellate division then broke with a number of federal district court decisions by applying the Second Circuit’s ruling in *Wakefield v. Northern Telecom, Inc.*⁷ that the at-will doctrine should not preclude an employee from claiming breach of the implied covenant of good faith and fair dealing where “‘necessary to enable one party to receive the benefits promised for performance.’”⁸ In *Wakefield*, the Second Circuit held that even though the at-will employee could not recover for his termination, he could recover under the implied covenant of good faith and fair dealing if he demonstrated that his employer fired him in order to avoid paying him commissions.⁹ In a footnote, the appellate division acknowledged that *Wakefield* has not been followed by several federal district courts,¹⁰ but countered that neither the Second Circuit nor the New York Court of Appeals has rejected it.¹¹

B. Tortious Interference Claims

In *McHenry v. Lawrence*, the appellate division dismissed a plaintiff’s claim of tortious interference with employment against her former co-workers, her former supervisor, and the human resource administrator for her former employer.¹² New York, the court stated “does not recognize a cause of action for the tort of abusive or wrongful discharge of an at-will employee, and this rule cannot be circumvented

5. *Id.* at 182-83, 893 N.Y.S.2d at 43-44.

6. *Arbeeny*, 71 A.D.3d at 182, 893 N.Y.S.2d at 43.

7. 769 F.2d 109 (2d Cir. 1985).

8. *Arbeeny*, 71 A.D.3d at 183-84, 893 N.Y.S.2d at 44 (quoting *Wakefield*, 769 F.2d at 112).

9. *Wakefield*, 769 F.2d at 112.

10. *See, e.g.*, *Baquer v. Spanish Broad. Sys., Inc.*, No. 04-CV-8393(KMK), 2007 U.S. Dist. LEXIS 70793, at *26-28 (S.D.N.Y. Sept. 25, 2007); *Plantier v. Cordiant*, No. 97 Civ. 8696 (JSM), 1998 U.S. Dist. LEXIS 15037, at *8-9 (S.D.N.Y. Sept. 24, 1998); *Collins & Aikman Floor Coverings Corp. v. Froehlich*, 736 F. Supp. 480, 486 (S.D.N.Y. 1990).

11. *Arbeeny*, 71 A.D.3d at 185 n.6, 893 N.Y.S.2d at 45 n.6. The court went on to explain that in the Court of Appeals’ decision *Gallagher v. Lambert*, 74 N.Y.2d 562, 549 N.E.2d 136, 549 N.Y.S.2d 945 (1989), the majority did not consider *Wakefield* and that decision is therefore distinguishable. *Arbeeny*, 71 A.D.3d at 185 n.6, 893 N.Y.S.2d at 45 n.6. Accordingly, the appellate division determined that “there is no reason to read into the majority’s decision [in *Gallagher*] any assessment of *Wakefield*.” *Id.*

12. 66 A.D.3d 650, 651, 652, 886 N.Y.S.2d 492, 493, 494 (2d Dep’t 2009).

by casting the cause of action in terms of tortious interference with employment.”¹³ However, the court found that “an at-will employee may assert a cause of action alleging tortious interference with employment where he or she can demonstrate that the defendant utilized wrongful means to effect his or her termination.”¹⁴ To meet that standard, a plaintiff must show “that the defendants acted with the sole purpose of harming plaintiff or used dishonest, unfair, improper or illegal means that amounted to a crime or an independent tort.”¹⁵ The court determined that the plaintiff failed to make such a showing, in part, because the “defendant former co-workers were acting within the scope of their employment when they brought their concerns about the plaintiff’s behavior and ability to perform her job to the attention of the managing attorney and the human resources administrator.”¹⁶

A similar conclusion was reached by the court in *Steinberg v. Schnapp*.¹⁷ In this case, a non-party attorney and primary executor retained the plaintiff and the defendant, both attorneys, with respect to all legal proceedings and asset administration concerning the estate of a deceased client.¹⁸ The plaintiff attempted to bring a claim for tortious interference against the defendant after he was terminated due to delays in the probate of the estate, claiming that the defendant shifted the blame for the delays to him.¹⁹ The court dismissed the claim finding that at best, the plaintiff suggested that the defendant “made an inaccurate statement about the quality of [his] work, which statement led [to the termination of] the attorney relationship Such statements would be neither tortious nor criminal.”²⁰

C. Breach of Fiduciary Duty Claim Against At-Will In-House Attorney

In *Keller v. Loews Corp.*, the plaintiff, a former in-house attorney with Loews, alleged religious discrimination in the termination of his employment.²¹ Loews’ counterclaim alleged breach of fiduciary duty by the disclosure of confidential information in the plaintiff’s

13. *Id.* at 651, 886 N.Y.S.2d at 494 (citations omitted).

14. *Id.*

15. *Id.* (citing *Schorr v. Guardian Life Ins. Co. of Am.*, 44 A.D.3d 319, 323, 843 N.Y.S.2d 24, 28 (1st Dep’t 2007)).

16. *Id.* at 652, 886 N.Y.S.2d at 494.

17. 73 A.D.3d 171, 899 N.Y.S.2d 167 (1st Dep’t 2010).

18. *Id.* at 173, 899 N.Y.S.2d at 168.

19. *Id.* at 173-74, 899 N.Y.S.2d at 169.

20. *Id.* at 176-77, 899 N.Y.S.2d at 171.

21. 69 A.D.3d 451, 451, 894 N.Y.S.2d 376, 377 (1st Dep’t 2010).

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complaint.²² The lower court dismissed the counterclaim, finding no fiduciary relationship between an employer and an at-will employee.²³ The appellate division concluded that finding was in error because “an in-house attorney, his status as an at-will employee notwithstanding, owes his employer-client a fiduciary duty.”²⁴

*D. Disclaimers in Employee Handbook and Application
Sufficient to Defeat Wrongful Termination Claim*

In *Thomas v. MasterCard Advisors, LLC*, the appellate division upheld a finding that an employee did not have a viable claim for wrongful termination against his former employer.²⁵ The plaintiff alleged that his termination “was in violation of [the] standards contained in the employee handbook.”²⁶ However, the plaintiff acknowledged that language in his employment application indicated he could be “terminated with or without cause and with or without notice, at any time.”²⁷ Furthermore, the code of conduct section of the employee handbook contained the following disclaimer: “the Code of Conduct, Employee Handbook . . . are not contracts of employment and are not intended to create any implied promises or guarantees of fixed terms of employment.”²⁸ The court determined that the plaintiff could not ignore these disclaimers in an attempt “to create a contractual obligation upon his employer not to exercise its otherwise unfettered right to terminate, at any time, an at-will employee with or without cause.”²⁹

II. NEW YORK STATE LEGISLATIVE AND REGULATORY DEVELOPMENTS

A. Civil Fines for Employment Discrimination

On April 7, 2009, the New York State Human Rights Law was amended to provide for the assessment of civil fines and penalties in cases of employment discrimination, discrimination in educational

22. *Id.*

23. *Id.*

24. *Id.* Additionally, the court noted that the plaintiff also had “a contractual duty pursuant to his employment agreement to maintain the confidentiality of confidential materials.” *Id.* at 451-52, 894 N.Y.S.2d at 377.

25. 74 A.D.3d 464, 465, 901 N.Y.S.2d 638, 639 (1st Dep’t 2010).

26. *Id.*

27. *Id.*

28. *Id.*, 901 N.Y.S.2d at 640.

29. *Id.* (citations omitted).

institutions, and discrimination in places of public accommodation.³⁰ This amendment “applies to unlawful discriminatory conduct occurring on or after July 6,” 2009.³¹ Previously, such civil fines and penalties “had been limited to cases of housing discrimination.”³²

Pursuant to the amendment, fines of up to \$50,000 may be assessed against an employer who has engaged in discriminatory conduct, and in cases where the conduct is found to be “willful, wanton or malicious,” fines of up to \$100,000 may be imposed.³³ These fines are payable to the state and are in addition to compensatory or other damages awarded to a prevailing complainant.³⁴ Where an employer has less than fifty employees, the civil fine or penalty may be paid in “reasonable installments” by the employer (not to exceed three years).³⁵

B. Amendment to Human Rights Law Protecting Victims of Domestic Violence

On July 7, 2009, Governor Paterson signed legislation amending the New York Human Rights Law, which prohibits employers from discriminating against an individual because of his or her actual or perceived status as a victim of domestic violence or stalking.³⁶ Effective immediately, the law prohibits employers from refusing to hire, to employ, to bar, to discharge from employment, or from discriminating against an individual in compensation or terms and conditions of employment because of his or her domestic violence status.³⁷

C. Labor Law Amended to Deter Employer Violations

On August 26, 2009, various sections of the New York Labor Law were amended to provide a greater deterrent effect on employers who violate the law.³⁸ These amendments took effect on November 24,

30. See Press Release, N.Y. Division of Human Rights, Human Rights Law is Amended to Provide for the Assessment of Civil Fines and Penalties (July 8, 2009), available at http://www.dhr.state.ny.us/doc/nysdhr_press_release_7-8-2009.pdf.

31. *Id.*

32. *Id.*

33. N.Y. EXEC. LAW § 297(4)(c)(vi) (McKinney Supp. 2011).

34. N.Y. EXEC. LAW 297(4)(e); Press Release, *supra* note 30.

35. N.Y. EXEC. LAW 297(4)(e).

36. Act of July 7, 2009, ch. 80, 2009 McKinney’s Sess. Laws of N.Y. 655 (codified at N.Y. EXEC. LAW § 296(1)(a) (McKinney 2010)).

37. *Id.*

38. Act of Aug. 26, 2009, ch. 372, 2009 McKinney’s Sess. Laws of N.Y. 1086 (codified at N.Y. LAB. LAW § 198-a (McKinney 2009)).

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2009 and apply to any violations occurring on or after that date.³⁹

First, section 215 of the Labor Law, which prohibits retaliation against employees who complain about wage underpayments or other labor law violations, was amended to increase the minimum civil penalty for retaliation from \$200 to \$1,000, the maximum penalty from \$2,000 to \$10,000, and to permit the Commissioner of Labor to order the employer to pay lost compensation to the employee.⁴⁰ The amendment also extends liability for retaliation to partnerships and limited liability companies.⁴¹ Additionally, the amendment expands the categories of conduct which are protected against retaliation to include providing information to the Commissioner or his or her representative, exercising rights protected under the Labor Law, and an employer's receipt of an adverse determination from the Commissioner involving the employee.⁴² The amendments to section 215 do not, however, apply to state employees or employees of any municipal subdivisions or departments of the state.⁴³

Second, sections 198(1-a) and 663 of the Labor Law were amended to expressly authorize the Commissioner of Labor to bring legal actions, including administrative proceedings, to collect wage underpayments.⁴⁴ These sections were also amended to permit the Commissioner of Labor to assess liquidated damages against employers equal to twenty-five percent of the underpayment, unless the employer can demonstrate a "good faith basis" for believing it was in compliance with the law.⁴⁵ Prior to this amendment, employees had the burden of proving that underpayments were willful in order to be entitled to liquidated damages.⁴⁶

*D. Amendment to Labor Law Requiring Written Notice of
Rate of Pay, Regular Payday, and Overtime Rate*

An amendment to section 195 of the New York Labor Law

39. *Id.*; see Kerry Langan, *Yet Another Amendment to the New York Labor Law*, N.Y. LAB. AND EMP'T L. REP. (Sept. 14, 2009, 9:47 AM), <http://www.nylaborandemploymentlawreport.com/2009/09/articles/wage-and-hour/yet-another-amendment-to-the-new-york-labor-law>.

40. Act of Aug. 26, 2009, ch. 372, 2009 McKinney's Sess. Laws of N.Y. 1086 (codified at N.Y. LAB. LAW § 215(1)(b) (McKinney Supp. 2011)).

41. *Id.* (codified at N.Y. LAB. LAW 215(1)(a)).

42. *Id.*

43. *Id.* at 1087 (codified at N.Y. LAB. LAW 215(1)(d)).

44. *Id.* at 1086 (codified at N.Y. LAB. LAW §§ 198(1-a), 663(2) (McKinney Supp. 2011)).

45. 2009 McKinney's Sess. Laws of N.Y. at 1086.

46. *Id.*

requires employers in New York to provide employees hired after October 26, 2009 with a written notice of their rate of pay, their regular pay date, and (for non-exempt employees) their overtime rate.⁴⁷ Previously, employers were only required to provide notice of the regular wage rate and pay date, and the notice did not have to be in writing.⁴⁸ The new law also requires employers to obtain a written acknowledgment from each employee that he or she received the required information.⁴⁹

At the outset, the New York State DOL published a problematic “one-size-fits-all” notice and acknowledgment form⁵⁰ and indicated that use of the form was mandatory.⁵¹ However, without acknowledging it was doing so, the DOL later reversed its position. It has since published a number of forms covering several different employee groups—including exempt employees and non-exempt employees paid by a number of methods—and has indicated that the forms are merely samples and no particular form is required to comply with the law.⁵²

E. Department of Labor Issues Revised Worker Adjustment and Retraining Notification Act Regulations

The New York State DOL issued revised emergency regulations⁵³ on February 12, 2010 regarding the New York State Worker Adjustment and Retraining Notification Act (the “NY WARN Act”).⁵⁴ The revised regulations replaced the first regulations published by the Agency in January of 2009 and became effective immediately.⁵⁵ The

47. Act of July 28, 2009, ch. 270, 2009 McKinney’s Sess. Laws of N.Y. 953 (codified at N.Y. LAB. LAW § 195(1) (McKinney Supp. 2011)).

48. *Id.*

49. *Id.*

50. N.Y. STATE DEP’T OF LABOR, LABOR LAW SECTION 195(1) NOTICE AND ACKNOWLEDGMENT OF WAGE RATE AND DESIGNATED PAYDAY HOURLY RATE PLUS OVERTIME (2009), *available at* http://www.labor.state.ny.us/workerprotection/laborstandards/PDFs/LS_52_Hourly_Rate_Plus_Overtime.pdf.

51. *See* N.Y. STATE DEP’T OF LABOR, NOTICE OF PAY RATE AND PAYDAY FOR NEW HIRES (2009), *available at* http://www.labor.state.ny.us/workerprotection/laborstandards/PDFs/P705_E.pdf.

52. *Compare id., and Wage and Hour Law*, N.Y. STATE DEP’T OF LAB., <http://www.labor.state.ny.us/workerprotection/laborstandards/workprot/lshmpg.shtm> (last visited May 1, 2011).

53. N.Y. COMP. CODES R. & REGS. tit. 12, § 921-1 (2010).

54. N.Y. LAB. LAW § 860 (McKinney Supp. 2011).

55. *WARN Information and Regulations*, N.Y. STATE DEP’T OF LAB., <http://www.labor.ny.gov/workforcenypartners/warn/warnportal.shtm> (last visited May 1, 2011).

NY WARN Act requires ninety days notice to employees and certain designated officials prior to a mass layoff, plant closing, relocation, or covered reduction in hours, which, in general, affects twenty-five or more employees.⁵⁶ The NY WARN Act applies to employers with fifty or more employees within New York State, excluding part-time employees.⁵⁷

Four events trigger coverage under the NY WARN Act. The first is a “mass layoff,” which is defined as a reduction in force that results in an employment loss at a single site of employment during any thirty-day period for (1) 250 employees or (2) twenty-five employees constituting at least thirty-three percent of employees at the site.⁵⁸

The second is a “plant closing” or the “permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment,” that results in an employment loss for twenty-five or more employees during any thirty-day period.⁵⁹ Like the federal WARN Act, the New York regulations define “operating unit” as “an organizationally or operationally distinct product, operation, or specific work function within or across facilities at a single site of employment.”⁶⁰

The third triggering event under the NY WARN Act, a “relocation,” is one that is unique to the New York law, and is not included in the federal WARN law. A relocation is defined as “the removal of all or substantially all of the industrial or commercial operations of an employer to a different location 50 miles or more away from the original site of operation where 25 or more employees . . . suffer an employment loss.”⁶¹

Finally, NY WARN Act coverage is triggered when there is a fifty percent or more reduction in the hours of work during each month of a consecutive six-month period.⁶² To be covered, the regulations specify that the reduction in hours must affect: (1) 250 or more employees or (2) at least twenty-five employees constituting at least thirty-three

56. N.Y. LAB. LAW § 860-b (McKinney Supp. 2001).

57. N.Y. LAB. LAW § 860-a(3) (McKinney Supp. 2011). An employer must count all non-part-time employees on temporary layoff or on leave, if the employee has a reasonable expectation of recall. N.Y. COMP. CODES R. & REGS. tit. 12, § 921-1.1(e)(7) (2010). Additionally, an employer is covered by the NY WARN Act if the employer has fifty or more employees, including all part-time employees, and those employees work in the aggregate of 2,000 or more hours per week. N.Y. LAB. LAW 860-a(3).

58. 12 NYCRR 921-1.1(i).

59. *Id.* § 921-1.1(m).

60. *Compare id.* § 921-1.1(k), and 20 C.F.R. § 639.3(j) (2010).

61. 12 NYCRR 921-1.1(n).

62. *Id.* § 921-1.1(f)(1)(iii).

percent of the employees at the site.⁶³ The regulations also specify that an employment loss does not occur where an employer participates in the New York DOL's Shared Work Program.⁶⁴

The revised regulations clarify that employers cannot avoid their notice obligations by continuing to pay employees without requiring them to come to work. Specifically, the regulations define "day of layoff" as "the last day an employee is eligible or permitted to work for his/her employer."⁶⁵ The regulations further explain that "[p]ayments to an employee subsequent to the date of layoff, whether continuing to pay an employee's normal weekly wage, or for severance pay, vacation pay, personal leave, and other similar benefits, shall not extend the employee's date of layoff."⁶⁶

The regulations also provide guidance regarding the required aggregation of employment losses over a ninety-day period. Generally, an employer should look backward ninety days and look forward ninety days to assess whether actions, "both taken and planned," each of which separately is not sufficient size to trigger the notice requirements, "will, in the aggregate," reach the minimum number to trigger notice.⁶⁷

The revised regulations allow for the option of delivery of notice via e-mail, in addition to first-class mail and "personal delivery with optional signed receipt."⁶⁸ However, additional requirements apply in order to use e-mail notice, including that all affected employees have regular e-mail access through personal computers in the workplace, that notice must be sent via the employer's computer network and to an employer-provided e-mail network, that the e-mail must be marked "urgent," and that the employer must demonstrate that the e-mail notice was received by each affected employee.⁶⁹

In addition to the affected employees, their representatives, the Commissioner of Labor, and the Local Workforce Investment Board (LWIB) must also receive notice.⁷⁰ The revised regulations make clear

63. *Id.*

64. *Id.* § 921-1.1(f)(1)(iii)(b). The Shared Work Program permits an employer to reduce the hours of work of employees, up to a maximum of sixty percent, and the employees are able to supplement the lost income with partial unemployment insurance benefits from the Department of Labor. *See Shared Work—The Layoff Alternative*, N.Y. STATE DEP'T OF LAB., <http://www.labor.state.ny.us/ui/dande/sharedwork1.shtm> (last visited May 1, 2011).

65. 12 NYCRR 921-1.1(c).

66. *Id.*

67. *Id.* § 921-2.1(e).

68. *Id.* § 921-2.2(a), (b)(2).

69. *Id.* § 921-2.2(b)(2).

70. N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.2(d) (2010).

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that notice upon the “chief elected official of the local unit of government,” as required by the federal WARN statute, does not constitute notice to the LWIB under the NY WARN Act, and vice versa.⁷¹ The language that must be included in the notice to these recipients has also been revised.⁷²

Finally, the revised regulations also make clear that employers need not provide temporary and seasonal employees with notice at the completion of their particular project or season, provided that the employer can demonstrate that it informed each employee at the time of hire that the job was temporary or seasonal.⁷³

F. Department of Labor Issues Regulations on Mandatory Overtime for Nurses

The New York State DOL issued regulations,⁷⁴ effective July 15, 2009, regarding the provisions of Labor Law section 167, which prohibits health care employers from requiring nurses to work more than their regularly scheduled work hours.⁷⁵ This prohibition is subject to certain exceptions, including a “health care disaster,” a federal, state, or county declaration of emergency, a health care employer’s determination of a “patient care emergency,” and the nurse’s active engagement in an ongoing medical or surgical procedure where his or her continued presence is needed to ensure the health and safety of the patient.⁷⁶

For the most part, the regulations reiterate and explain section 167, however, they also impose a new requirement not found in the statute. Under the regulations, all health care employers were required to establish and implement a written nurse coverage plan (the “Plan”), which must have been in place by October 13, 2009.⁷⁷ According to the regulations, the Plan must take “into account typical patterns of staff absenteeism” and “the health care employer’s typical level and types of patients served by the health care facility.”⁷⁸ Additionally, the “[Plan] shall identify and describe as many alternative staffing methods as are available to the health care employer to ensure adequate staffing

71. Compare N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.2(d)(4) (2010), and 20 C.F.R. § 639.6 (2010).

72. See N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.3 (2010).

73. N.Y. COMP. CODES R. & REGS. tit. 12, § 921-5.1, -5.2 (2010).

74. N.Y. COMP. CODES R. & REGS. tit. 12, § 177.1 (2010).

75. N.Y. LAB. LAW § 167(a)(2) (McKinney 2009).

76. N.Y. COMP. CODES R. & REGS. tit. 12, § 177.3(b)(1)–(4) (2010).

77. See N.Y. COMP. CODES R. & REGS. tit. 12, § 177.4(d), (f) (2010).

78. *Id.* § 177.4(a).

through means other than use of mandatory overtime.”⁷⁹ Finally, the Plan must require documentation of all attempts to secure alternative staffing and to avoid mandatory overtime during a “patient care emergency.”⁸⁰ The Plan is to be made readily available to the nursing staff, either through distribution or posting. It is also to be provided to any collective bargaining agent representing nurses at the health care facility and to the Commissioner of Labor, upon his or her request.⁸¹

G. State Increases Minimum Wage

Effective July 24, 2009, New York State minimum wage increased from \$7.15 per hour to \$7.25 per hour due to an increase in the federal minimum wage.⁸²

H. State Salary Threshold Increase for Administrative and Executive Exemptions

Both New York law and the Federal Fair Labor Standards Act (“FLSA”) require employers to pay non-exempt employees a minimum wage and one and one-half times an employee’s “regular rate” for all hours worked in excess of forty hours in a work week.⁸³ Additionally, both laws have categories of “exempt” employees, such as executive, administrative and professional employees, to whom the minimum wage and overtime requirements do not apply.⁸⁴ In order to fall within those categories, certain criteria must be met. Namely, employees must be paid on a salaried basis at a particular salary level and must satisfy certain duties tests. While the duties tests under New York law and the FLSA are very similar, the salary amounts necessary to satisfy the salary level requirements are different.

Effective July 24, 2009, the minimum salary that an employee must receive to qualify for the administrative or executive exemptions under New York law increased from \$536.10 to \$543.75 per week.⁸⁵

79. *Id.* § 177.4(b).

80. *Id.* § 177.4(c).

81. *Id.* § 177.4(d).

82. See N.Y. STATE DEP’T OF LABOR, MINIMUM WAGE INFORMATION (2009), available at http://www.labor.state.ny.us/formsdocs/wp/LS207_2009.pdf; see also *Minimum Wages*, N.Y. STATE DEP’T OF LAB., <http://www.labor.state.ny.us/workerprotection/laborstandards/workprot/minwage.shtm> (last visited May 1, 2011).

83. Compare N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2 (2010), and 29 U.S.C. §§ 201, 213 (2006).

84. Compare NYCRR 142-2.2, and 29 U.S.C. §§ 201, 213.

85. N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.14(c)(4)(i)(e)(5), (c)(4)(ii)(d)(5) (2010).

There is no minimum salary requirement for the professional exemption under New York law.⁸⁶ The salary requirement for all three of these exemptions under the FLSA is \$455 per week.⁸⁷ According to the New York State DOL's interpretation of New York's General Wage Order, when an employee meets the duties tests for the administrative or executive exemption, but meets only the federal salary requirement, the employee is only entitled to receive one and one-half times the state minimum wage (and not the "regular rate") for each overtime hour in a work week, up to a cap of \$543.75 in total wages for the week.⁸⁸

I. Extension of Health Insurance Coverage

In July 2009, Governor Paterson signed into law two significant health reform bills. The first extended the period of time a former employee can elect continuation coverage under an insured medical plan from eighteen to thirty-six months.⁸⁹ The New York Insurance Law provisions that govern continuation coverage (New York's "mini-COBRA" provisions) formerly provided that employers with insured group health plans covering less than twenty employees in New York were required to provide continuation coverage for eighteen months.⁹⁰ However, under the new legislation, all employers, regardless of size, are required to offer continuation coverage of an insured medical plan to New York employees for up to thirty-six months, despite the reason that the person lost eligibility for coverage.⁹¹ Thus, employees who lose coverage and have exhausted their eighteen-month federal COBRA entitlement are entitled to eighteen months of additional coverage under

86. *See id.* § 142-2.14(c)(4)(iii).

87. Amount of Salary Required, 29 C.F.R. § 541.600(b) (2010).

88. N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.2 (2010).

89. Act of Nov. 19, 2009, ch. 498, 2009 McKinney's Sess. Laws of N.Y. 1294, 1295 (codified at N.Y. INS. LAW §§ 3221(m), 4304(k), 4305(e) (McKinney Supp. 2011)); *see* Darcie Falsioni, *New York Insurance Law Changes Extend Continuation Coverage and Dependent Coverage Under Insured Medical Plans*, N.Y. LAB. AND EMP'T L. REP. (Sept. 10, 2009, 10:54 AM), <http://www.nylaborandemploymentlawreport.com/2009/09/articles/employee-benefits/new-york-insurance-law-changes-extend-continuation-coverage-and-dependent-coverage-under-insured-medical-plans>.

90. Falsioni, *supra* note 89.

91. *Id.*; *see also* Circulation Letter No. 5 from Eugene Bienskie, Assistant Deputy Superintendent & Chief, Health Bureau, N.Y. State Ins. Dep't, to All Insurers Authorized to Write Accident and Health Insurance in New York, Article 43 Corporations, Article 45 Corporations, Article 47 Corporations and Health Maintenance Organizations (Feb. 17, 2010), *available at* http://www.ins.state.ny.us/circltr/2010/cl2010_5.htm [hereinafter Circulation Letter No. 5].

New York's mini-COBRA.⁹² This additional coverage, however, does not apply to dental, vision, or employee assistance programs, nor does it apply to self-insured group health plans.⁹³ Furthermore, although this legislation initially only applied to group health plans that were issued, renewed, modified, altered, or amended on or after July 1, 2009, Governor Paterson signed legislation on November 19, 2009 which extended the applicability of this law to every group health insurance policy or contract in effect on or after November 1, 2009, regardless of when it was issued, renewed, modified, altered, or amended.⁹⁴

The second piece of health reform legislation, signed in July 2009, requires health insurance providers to offer continuation coverage to an insured employee's unmarried children through age twenty-nine, regardless of whether they are financially dependent.⁹⁵ In particular, when an employee's child ceases to be an eligible dependent under the employee's health insurance plan, the child may elect continuation coverage up until age twenty-nine.⁹⁶ If the child elects continuation coverage, he or she would then be responsible for payment of any applicable coverage premium.⁹⁷ This legislation applies to insurance contracts issued, renewed, or amended on or after September 1, 2009, and does not apply to dental, vision, employee assistance programs, or self-insured group health plans.⁹⁸

J. Department of Labor Issues Opinion on Section 193 of the Labor Law

On January 21, 2010, the New York State DOL issued an opinion letter in which it reversed its prior position with respect to an employer's ability to recover overpayments of wages under section 193 of the New York Labor Law.⁹⁹ Section 193 prohibits employers from making deductions from an employee's wages unless such deductions are required by law or authorized in writing by the employee and are for the benefit of the employee.¹⁰⁰ The types of deductions that can be

92. Falsioni, *supra* note 89.

93. *Id.*

94. See Circulation Letter No. 5, *supra* note 91.

95. N.Y. INS. LAW §§ 3216(a), 3221(r), 4235(f), 4304(d) (McKinney Supp. 2011); see also Falsioni, *supra* note 89.

96. Falsioni, *supra* note 89.

97. *Id.*

98. See Act of July 28, 2009, ch. 240, 2009 McKinney's Sess. Laws of N.Y. 926-932 (codified at N.Y. INS. LAW §§ 3216(a), 3221(r), 4235(f), 4304(d) (McKinney Supp. 2011).

99. Request for Opinion: Wage Deductions—Over payments, 09 Op. Dep't of Labor 1 (2009).

100. *Id.* at 1-2; see also N.Y. LAB. LAW § 193(1)(a), (b) (McKinney 2009).

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authorized by the employee must be limited to “payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and *similar payments for the benefit of the employee.*”¹⁰¹

The DOL had previously taken the position that an employer could make a deduction for overpayments provided that the deduction did not exceed ten percent of the employee’s gross wages.¹⁰² The DOL now, however, relying on the Court of Appeals’ decision in *Angello v. Labor Ready, Inc.*,¹⁰³ finds that such deductions are no longer permissible under section 193 because they are neither required by law nor are they a “similar payment.”¹⁰⁴ Specifically, the DOL relied on the Court’s statement in *Angello* that the deductions authorized by section 193 are all either monetary (“investments of money for the later benefit of the employee”) or supportive (used by someone other than the employee to support a purpose of the employee).¹⁰⁵ The DOL further relied on the Court’s statement that, because “such payments go directly to the employer, they violate ‘both the letter of the statute and the protective policy underlying it.’”¹⁰⁶

Although the DOL now takes the position that making deductions from an employee’s wages to recover overpayments would violate section 193, it provides two options for an employer who is looking to recoup an overpayment.¹⁰⁷ The employer can request that the employee separately pay back the overpayment, but must accompany such request with a statement that the employee’s refusal to repay the money owed “will not, in any way, result in any form of disciplinary or retaliatory action.”¹⁰⁸ Alternatively, the employer could institute a legal proceeding to collect the money.¹⁰⁹

III. FEDERAL LEGISLATIVE DEVELOPMENTS

A. Family and Medical Leave Act Military Leave Provisions Amended

On October 28, 2009, President Obama signed into law the

101. *Id.* at 2; *see also* N.Y. LAB. LAW § 193(1)(b) (emphasis added).

102. *Id.* at 2.

103. 7 N.Y.3d 579, 585, 859 N.E.2d 480, 484, 825 N.Y.S.2d 674, 677 (2006).

104. Request for Opinion, *supra* note 99, at 2.

105. *Id.*

106. *Id.* (quoting *Angello*, 7 N.Y.3d at 586, 859 N.E.2d at 484, 825 N.Y.S.2d at 678).

107. *Id.* at 2-3.

108. *Id.* at 3.

109. Request for Opinion, *supra* note 99, at 3.

National Defense Authorization Act for Fiscal Year 2010.¹¹⁰ This legislation amended the Family and Medical Leave Act (FMLA) by expanding the availability of “qualifying exigency” and “military caregiver leave.”¹¹¹

The FMLA provides eligible employees with up to twelve weeks of job-protected leave in a single twelve-month period for certain “qualifying exigencies.”¹¹² Prior to the October 28, 2009 amendments, “qualifying exigency” leave was limited to family members of certain individuals serving in the National Guard or Reserves.¹¹³ The most recent amendments, however, expand the scope of “qualifying exigency” leave to include active duty members in the regular Armed Forces.¹¹⁴ The covered military member must be on “covered active duty” (or notified of an impending call or order to covered active duty).¹¹⁵ For military members in a regular component of the Armed Forces, “covered active duty” is defined as duty during deployment to a foreign country.¹¹⁶ With respect to members of a reserve component of the Armed Forces, “covered active duty” is defined as duty during deployment to a foreign country under a call or order to active duty.¹¹⁷

In addition to “qualifying exigency” leave, the FMLA provides eligible employees with up to twenty-six weeks of leave in a single twelve-month period to care for a “covered servicemember” with a “serious injury or illness.”¹¹⁸ Pre-amendment, the term “covered servicemember” was defined as a current member of the Armed Forces, National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.¹¹⁹ The new legislation expands this definition of “covered service member” to include a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a

110. National Defense Authorization Act for Fiscal Year 2010, H.R. 2647, 111th Congress (2009).

111. *Id.* § 565(b)(E); see also Kerry Langan, *New Legislation Expands FMLA Leave Provisions Related to Members of the Military*, N.Y. LAB. & EMP'T L. REP. (Dec. 9, 2009), <http://www.nylaborandemploymentlawreport.com/2009/12/articles/family-and-medical-leave-act/new-legislation-expands-fmla-leave-provisions-related-to-members-of-the-military>.

112. 29 C.F.R. §§ 825.112(a)(5), 825.126 (2010).

113. 29 C.F.R. § 825.126(b)(2)(i) (2010).

114. H.R. 2647, § 565(b)(E).

115. *Id.*; 29 C.F.R. § 825.126(b)(2).

116. H.R. 2647, § 565(a)(14)(A).

117. *Id.* § 565(a)(14)(B).

118. 29 C.F.R. §§ 825.112(a)(6), 825.127(a)(1),(c) (2010).

119. 29 C.F.R. § 825.127(a).

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member of the Armed Forces, National Guard or Reserves at any time in the five years preceding the date on which the veteran undergoes such treatment, recuperation or therapy.¹²⁰

Additionally, the new legislation also expands upon the definition of “serious injury or illness.” Prior to the amendment, a “serious injury or illness” must have been incurred by the servicemember in the line of duty while on active duty.¹²¹ Now, however, a “serious injury or illness” also includes injuries or illnesses that existed prior to the beginning of the covered servicemember’s active duty and were aggravated by service in the line of duty.¹²² With respect to a veteran who was a member of the Armed Forces, a “serious injury or illness” is defined as a “qualifying injury or illness” that was incurred in the line of duty (or that existed prior to the beginning of the individual’s active duty and was aggravated by service in the line of duty while on active duty) and that manifested itself before or after the individual became a veteran.¹²³

B. Genetic Information Nondiscrimination Act Takes Effect

Title II of the Genetic Information Nondiscrimination Act of 2008 (“GINA”) took effect November 21, 2009, eighteen months after it was signed into law by President Bush.¹²⁴ Title II prohibits employment discrimination based on genetic information, and imposes confidentiality obligations on employers who obtain such information.¹²⁵ Specifically, Title II prohibits employers from using genetic information in making any decisions about hiring, firing, promotions or any other term or condition of employment.¹²⁶ It also forbids employers from intentionally acquiring genetic information, imposes strict confidentiality obligations on those who do come into possession of such information,¹²⁷ and prohibits retaliation against individuals who challenge acts made illegal by GINA or who have filed a charge or otherwise participated in an investigation, proceeding or hearing under the law.¹²⁸ The term “genetic information” encompasses not only information about an employee’s own genetic tests, but also

120. H.R. 2647, § 565(a)(2).

121. 29 C.F.R. § 825.127(a)(1).

122. H.R. 2647, § 565(a)(18)(A).

123. *Id.*

124. Pub. L. No. 110-233, § 2, 122 Stat. 881, 920 (2008) (codified at 42 U.S.C. §§ 2000ff to 2000ff-11 (Supp. 2008)).

125. 42 U.S.C. § 2000ff-1(a)(1).

126. *Id.*

127. 42 U.S.C. § 2000ff-5(a).

128. 42 U.S.C. § 2000ff-6(f).

information about the tests of the employee's family members and family medical history.¹²⁹

IV. EMPLOYMENT DISCRIMINATION

A. Developments Under the New York City Human Rights Law

Recent decisions by the New York Court of Appeals, the Second Circuit, and the First Department have continued to highlight the differences between the New York City Human Rights Law ("NYCHRL") and the New York State Human Rights Law ("NYSHRL"). In particular, these cases demonstrate that although the NYSHRL, NYCHRL and federal anti-discrimination laws are analyzed under a similar legal framework, the NYCHRL is not equivalent and requires a distinct analysis. As the cases that follow will illustrate, the NYCHRL has been interpreted more broadly than its state and federal counterparts and provides more protection for employees.

1. Faragher/Ellerth Affirmative Defense Does Not Apply to Certain Claims Under the New York City Human Rights Law

In a decision which will have far-reaching implications, the New York Court of Appeals in *Zakrzewska v. The New School* ruled that the *Faragher/Ellerth* affirmative defense to employer liability, which is commonly invoked by employers under federal and state anti-discrimination laws, does not apply to sexual harassment and retaliation claims under the NYCHRL.¹³⁰ This ruling highlights a major difference between the NYCHRL and the NYSHRL and Title VII of the Civil Rights Act ("Title VII").

The *Faragher/Ellerth* affirmative defense, which is used by employers to shield themselves from liability for an employee's unlawful discriminatory acts, was articulated by the Supreme Court in *Faragher v. City of Boca Raton*¹³¹ and *Burlington Industries, Inc. v. Ellerth*.¹³² The defense provides that an employer will not be liable under Title VII for sexual harassment committed by a supervisory employee if the employer proves that:

- (1) no tangible employment action... was taken [against the employee],
- (2) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
- (3) the plaintiff

129. 42 U.S.C. § 2000ff(4)(A).

130. 14 N.Y.3d 469, 475, 928 N.E.2d 1035, 1036, 902 N.Y.S.2d 838, 839 (2010).

131. 524 U.S. 775 (1998).

132. 524 U.S. 742 (1998).

employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.¹³³

The employee in *Zakrzewska* alleged that her supervisor subjected her to sexually harassing e-mails and, after she complained to school officials about his conduct, covertly monitored her internet usage at work in retaliation for her allegations.¹³⁴ With this factual scenario as a backdrop, the Court of Appeals was tasked with determining whether the *Faragher/Ellerth* affirmative defense was available to employers under the NYCHRL.¹³⁵ The Court found that unlike the NYSHRL, the NYCHRL, through section 8-107(13), “creates an interrelated set of provisions to govern an employer’s liability for an employee’s unlawful discriminatory conduct in the workplace.”¹³⁶ Specifically, section 8-107(13) of the NYCHRL imposes liability on an employer in three instances: (1) where the employee “exercised managerial or supervisory responsibility;” (2) where the “employer knew of the employee’s [unlawful conduct] and acquiesced in such conduct or failed to take immediate and appropriate corrective action;” and (3) where the “employer should have known of the employee’s . . . discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.”¹³⁷ With respect to the first two instances, the Court noted that pursuant to section 8-107(13)(e) of the NYCHRL, “an employer’s antidiscrimination [*sic*] policies and procedures [which are central to the *Faragher/Ellerth* affirmative defense] may be considered ‘in mitigation of the amount of civil penalties or punitive damages’ recoverable in a civil action.”¹³⁸ Thus, even where mitigation applies, “compensatory damages, costs and reasonable attorneys’ fees are still recoverable.”¹³⁹ According to the Court’s reading of the NYCHRL, the only time the *Faragher/Ellerth* affirmative defense can be a shield against liability is “where an employer should have known of a *non-supervisory* employee’s unlawful discriminatory acts.”¹⁴⁰

Accordingly, the Court determined that the plain language of the

133. *Zakrzewska*, 14 N.Y.3d at 476, 928 N.E.2d at 1037, 902 N.Y.S.2d at 840 (citation omitted).

134. *Id.* at 475-76, 928 N.E.2d at 1036-37, 902 N.Y.S.2d at 839-40.

135. *Id.* at 475, 928 N.E.2d at 1036, 902 N.Y.S.2d at 839.

136. *Id.* at 479, 928 N.E.2d at 1039, 902 N.Y.S.2d at 842.

137. N.Y. CITY ADMIN. CODE § 8-107(13)(b)(1-3) (2010), available at <http://www.nyc.gov/html/cchr/html/ch1.html#2>; *Zakrzewska*, 14 N.Y.3d at 479, 928 N.E.2d at 1039, 902 N.Y.S.2d at 842.

138. *Zakrzewska*, 14 N.Y.3d at 479-80, 928 N.E.2d at 1039, 902 N.Y.S.2d at 842.

139. *Id.* at 480, 928 N.E.2d at 1039, 902 N.Y.S.2d at 842.

140. *Id.*

NYCHRL, as well as its legislative history, precludes the *Faragher/Elleerth* affirmative defense and imposes strict liability on an employer for sexual harassment and retaliation claims committed by supervisory employees.¹⁴¹ Therefore, while section 8-107(13) of the NYCHRL is consistent with section 296 of the NYHRL in that both prohibit discrimination, the NYCHRL creates a greater penalty for unlawful discrimination.¹⁴²

2. Obesity May Constitute A Disability Under the New York City Human Rights Law

In *Spiegel v. Schulmann*, the United States Court of Appeals for the Second Circuit left open the possibility that obesity may be considered a disability under the NYCHRL.¹⁴³ In this case, two karate instructors sued their employer alleging that they had been terminated from their positions on the basis of their weight in violation of the Americans with Disabilities Act (“ADA”), the NYSHRL and the NYCHRL.¹⁴⁴ In reaching its decision, the Second Circuit highlighted the differences between the NYSHRL’s and NYCHRL’s definitions of disability, and the expansive reach of the NYCHRL.

The Second Circuit noted that under the NYSHRL, disability is defined as “‘a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.’”¹⁴⁵ The Court pointed out that New York courts have determined that weight, in and of itself, does not constitute a disability under the NYSHRL.¹⁴⁶ Accordingly, “[i]n order to succeed on a weight-based discrimination claim under the NYSHRL, a plaintiff must ‘proffer evidence or make a record establishing that [he is] medically incapable of meeting [the employer’s] weight requirements due to some cognizable medical condition.’”¹⁴⁷ The Second Circuit held that the district court correctly concluded that the plaintiffs failed to state a claim under the NYSHRL because they could not demonstrate that their

141. *Id.* at 480-81, 928 N.E.2d at 1039-40, 902 N.Y.S.2d at 842-43.

142. *Id.* at 481, 928 N.E.2d at 1040, 902 N.Y.S.2d at 843.

143. 604 F.3d 72, 76 (2d Cir. 2010).

144. *Id.* at 75.

145. *Id.* at 80 (citing N.Y. EXEC. LAW §§ 292(21), 296(1)(a) (McKinney 2005 & Supp. 2010)).

146. *Id.* at 81 (quoting *Delta Air Lines v. N.Y. State Div. of Human Rights*, 91 N.Y.2d 65, 73, 689 N.E.2d 898, 902, 666 N.Y.S.2d 1004, 1008 (1997)).

147. *Id.*

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weight was the result of a medical condition.¹⁴⁸

The Second Circuit also agreed with the district court's theory that unlike the NYSHRL, obesity alone may constitute a disability under the NYCHRL because the definition of disability is broader under the NYCHRL.¹⁴⁹ Under the NYCHRL, disability is defined as "any physical, medical, mental or psychological impairment," which is further defined as an

"impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system."¹⁵⁰

The Second Circuit acknowledged that despite this expansive language and the broad remedial purposes of the NYCHRL, neither the Court of Appeals nor any intermediate New York appellate court has addressed whether obesity alone constitutes a disability for purposes of the NYCHRL.¹⁵¹ Accordingly, the Second Circuit left open this possibility and remanded the issue back to the district court for a determination.¹⁵² Alternatively, the Second Circuit noted that the district court could decline to exercise supplemental jurisdiction over this claim and leave it to the state courts to determine whether obesity constitutes a disability under the NYCHRL.¹⁵³

3. New York City Human Rights Law Expanded to Place New Burden on Employers

In *Phillips v. City of New York*, the Appellate Division, First Department, in examining the reasonable accommodation provisions of the New York State and City Human Rights Law, further expanded the scope of the NYCHRL by placing the burden on the employer to prove that the employee could not perform the essential functions of his or her job with a reasonable accommodation.¹⁵⁴

Phillips was employed by the Department of Homeless Services

148. *Spiegel*, 604 F.3d at 76, 81.

149. *Id.* at 82.

150. *Id.* (quoting N.Y. CITY ADMIN. CODE § 8-102(16)(a)-(b) (2010) (citation omitted), available at <http://www.nyc.gov/html/cchr/html/ch1.html#2>).

151. *Id.* at 83.

152. *Id.*

153. *Spiegel*, 604 F.3d at 83.

154. 66 A.D.3d 170, 184, 884 N.Y.S.2d 369, 379 (1st Dep't 2009).

“DHS”) in a non-competitive civil service title.¹⁵⁵ After she was diagnosed with breast cancer, Phillips was granted a twelve-week medical leave of absence under the FMLA.¹⁵⁶ While on leave, Phillips requested a one-year leave of absence to continue her medical treatment.¹⁵⁷ This request was denied by DHS because Phillips was a civil service employee in a non-competitive title and additional unpaid medical leave was only granted to permanent civil service employees.¹⁵⁸ Phillips then modified her request for leave, asking if she could obtain any further extension of leave.¹⁵⁹ This request was also denied and Phillips was ultimately terminated when she did not return to work upon the expiration of her approved twelve-week FMLA leave of absence.¹⁶⁰

The court first noted that under both the NYSHRL and NYCHRL, engagement in the interactive process is itself an accommodation, and the failure to so engage is an unlawful failure to make a reasonable accommodation.¹⁶¹ Accordingly, DHS could not avoid engaging in the interactive process by simply citing its policy that it will only entertain requests for additional medical leave (beyond the twelve-week FMLA leave) from permanent civil service employees.¹⁶² Therefore, the court held that by failing to engage in the interactive process, DHS was in violation of both the NYSHRL and NYCHRL.¹⁶³

The court then went on to separately analyze Phillips’ claim under the NYSHRL and NYCHRL.¹⁶⁴ In doing so, it noted that the NYCHRL is different from both the NYSHRL and the ADA in that “there is no accommodation (whether it be indefinite leave time or any other need created by a disability) that is categorically excluded from the universe of reasonable accommodation.”¹⁶⁵ Furthermore, unlike the ADA, “there are no accommodations that may be ‘unreasonable’ if they do not cause undue hardship.”¹⁶⁶ Instead, under the NYCHRL, all accommodations are deemed reasonable unless the defendant can prove that such

155. *Id.* at 172, 884 N.Y.S.2d at 371.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Phillips*, 66 A.D.3d at 172, 884 N.Y.S.2d at 371.

160. *Id.*

161. *Id.* at 176, 884 N.Y.S.2d at 373.

162. *Id.* at 177-78, 884 N.Y.S.2d at 374-75.

163. *Id.* at 178, 884 N.Y.S.2d at 375.

164. *Phillips*, 66 A.D.3d at 178-83, 884 N.Y.S.2d at 375-79.

165. *Id.* at 182, 884 N.Y.S.2d at 378.

166. *Id.*

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accommodation constitutes an undue hardship.¹⁶⁷ Furthermore, the court noted that unlike under the NYSHRL where the plaintiff must show that she could perform the essential functions of the job with reasonable accommodation, the NYCHRL places the burden on the employer “to prove, *as an affirmative defense*, that even with reasonable accommodation, a plaintiff could not perform the essential requisites of a job.”¹⁶⁸

*B. United States Supreme Court and Second Circuit Developments**1. Plaintiffs Challenging Use of Earlier Employment Practice Make Timely Claim of Disparate Impact*

In *Lewis v. City of Chicago*, the United States Supreme Court reversed the holding of the lower court and found that a disparate impact employment discrimination charge will be timely if it is filed with the Equal Employment Opportunity Commission (“EEOC”) within 300 days of the *application* of the discriminatory practice.¹⁶⁹ The practice at issue in that case was a written examination given to applicants seeking firefighter positions with the City of Chicago in July 1995.¹⁷⁰ In January 1996, the City announced it would draw randomly from those who scored in the top tier, i.e., those deemed “well qualified” by scoring an eighty-nine or above.¹⁷¹ Those who scored sixty-five or below were notified that they had failed the test and would not be considered for the firefighter position.¹⁷² Those who scored between sixty-five and eighty-eight were deemed “qualified” and notified that they had passed the examination, and while it was “not likely they would be called for further processing” their names “would be kept on the eligibility list maintained by the Department of Personnel.”¹⁷³

The City proceeded to select three classes of applicants from the top scorers on the eligibility list.¹⁷⁴ Six African-American applicants filed charges of discrimination with the EEOC in early 1997 and received right-to-sue letters on July 28, 1998.¹⁷⁵ Two months later, they

167. *Id.* at 181-82, 185, 884 N.Y.S.2d at 377, 380 (citing N.Y. CITY ADMIN. CODE § 8-102(18) (2010), available at <http://www.nyc.gov/html/cchr/html/ch1.html#2>).

168. *Id.* at 184, 188, 884 N.Y.S.2d at 379, 382.

169. 130 S. Ct. 2191, 2197, 2201 (2010).

170. *Id.* at 2195.

171. *Id.*

172. *Id.*

173. *Id.* at 2195-96.

174. *Lewis*, 130 S. Ct. at 2196.

175. *Id.*

filed suit alleging disparate impact on behalf of 6,000 African-Americans who scored in the “qualified” range on the 1995 examination, but had not been hired.¹⁷⁶

The City filed a motion for summary judgment, arguing that the plaintiffs failed to file charges with the EEOC within 300 days after their claims accrued.¹⁷⁷ The district court disagreed, concluding that the City’s “ongoing reliance” on the test results constituted a “continuing violation.”¹⁷⁸ The Seventh Circuit reversed, holding that the suit was untimely because the only discriminatory act was the sorting of the scores into the three tiers and the charges were not filed within 300 days of that act.¹⁷⁹ The later hiring decisions were immaterial, according to the Seventh Circuit, because “[t]he hiring only of applicants classified ‘well qualified’ was the automatic consequence of the test scores rather than the product of a fresh act of discrimination.”¹⁸⁰

The Supreme Court reversed, explaining that “a plaintiff establishes a prima facie disparate-impact claim by showing that the employer ‘uses a particular employment practice that causes a disparate impact’ on one of the prohibited bases.”¹⁸¹ Thus, while the adoption of the three tiers of scores in January 1996 might give rise to “a freestanding disparate-impact claim . . . it does not follow that no new violation occurred—and no new claims could arise—when the City implemented that decision down the road. If petitioners could prove that the City ‘use[d]’ the ‘practice’ that ‘causes a disparate impact,’ they could prevail.”¹⁸² The Court found that the plaintiffs stated a cognizable disparate impact claim by alleging that the City “made use of the practice of excluding those who scored 88 or below each time it filled a new class of firefighters.”¹⁸³

The Supreme Court acknowledged that, as a result of their reading of the statute, “[e]mployers may face new disparate-impact suits for practices they have used regularly for years,” and that “[e]vidence essential to their business-necessity defenses might be unavailable (or in the case of witnesses’ memories, unreliable) by the time the later suits are brought.”¹⁸⁴ However, the Court explained that its “charge is to

176. *Id.*

177. *Id.*

178. *Id.*

179. *Lewis*, 130 S. Ct. at 2198.

180. *Id.* at 2196 (quoting *Lewis v. City of Chicago*, 528 F.3d 488, 491 (7th Cir. 2008)).

181. *Id.* at 2197 (quoting 42 U.S.C. § 2000e-2(k) (2006)).

182. *Id.* at 2199.

183. *Id.* at 2198.

184. *Lewis*, 130 S. Ct. at 2200.

give effect to the law Congress enacted” and that if this “effect was unintended it is a problem for Congress, not one that federal courts can fix.”¹⁸⁵

2. *Second Circuit Explains Reasonableness Under Faragher/Ellerth*

In *Gorzynski v. JetBlue Airways Corp.*, the Second Circuit found that, for purposes of the *Faragher/Ellerth* defense, it is not unreasonable as a matter of law for an employee to complain of sexual harassment to his or her harasser if that person is designated by the employer as one of several persons with whom complaints of harassment may be lodged.¹⁸⁶ In that case, the plaintiff, a customer service agent for the defendant, alleged that her supervisor created a hostile work environment by making sexually inappropriate comments and statements and by inappropriately touching her and other female crewmembers.¹⁸⁷ Gorzynski complained to the supervisor she alleged was harassing her, but to no avail.¹⁸⁸

Under Title VII, when the “alleged harasser is in a supervisory position over the plaintiff, the objectionable conduct is automatically imputed to the employer.”¹⁸⁹ However, an employer may raise the *Faragher/Ellerth* affirmative defense to liability where it can show that it: (1) exercised reasonable care to prevent and promptly correct any harassing behavior and (2) the plaintiff unreasonably failed to take advantage of the corrective opportunities provided by the employer.¹⁹⁰ JetBlue argued that it was entitled to judgment as a matter of law because “it was unreasonable for Gorzynski not to take advantage of the alternate avenues that JetBlue provided, such as complaining to other members of management or the [defendant’s human resources division].”¹⁹¹

The Second Circuit rejected that reading of the *Faragher/Ellerth* defense, explaining that “[w]e do not believe that the Supreme Court, when it fashioned this affirmative defense, intended that victims of sexual harassment, in order to preserve their rights, must go from manager to manager until they find someone who will address their

185. *Id.*

186. 596 F.3d 93, 96 (2d Cir. 2010).

187. *Id.* at 102.

188. *Id.* at 104.

189. *Id.* at 103 (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998)).

190. *Id.* at 103 (citing *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765).

191. *Gorzynski*, 596 F.3d at 104.

complaints.”¹⁹² According to the Second Circuit, “[t]here is no requirement that a plaintiff exhaust all possible avenues made available where circumstances warrant the belief that some or all of those would be ineffective or antagonistic.”¹⁹³ The Second Circuit further explained:

In some instances, it may be unreasonable for a victim of harassment to complain only to the harasser because, as a realistic and practical matter, there are other channels that are adequately indicated and are accessible and open. But, in other cases, there may be reasons why the plaintiff failed to complain to those other than the harasser, who are listed as available. And in such cases, a genuine issue of fact may be raised as to whether it was reasonable not to pursue other options.¹⁹⁴

In this case, the court determined that a question of fact existed as to whether it was reasonable for the plaintiff not to pursue other avenues of complaint because there was evidence that the other managers were not receptive to complaints.¹⁹⁵ Accordingly, whether the plaintiff’s actions were reasonable or unreasonable was a question for the jury and not one that could be determined as a matter of law on a motion for summary judgment.¹⁹⁶

3. Employers May Be Liable for Acts of Independent Contractors

The Second Circuit made clear in *Halpert v. Manhattan Apartments, Inc.*, that an employer may be liable for the discriminatory conduct of its independent contractors.¹⁹⁷ In that case, the plaintiff interviewed for a position at Manhattan Apartments, Inc. (“MAI”).¹⁹⁸ The person who interviewed the plaintiff, an independent contractor of MAI, told him that he was “too old.”¹⁹⁹ Halpert, who was not hired for the position, sued MAI alleging age discrimination in violation of the Age Discrimination in Employment Act (“ADEA”).²⁰⁰ The district court, relying on the Second Circuit’s decision in *Robinson v. Overseas Military Sales Corp.*,²⁰¹ dismissed the complaint, finding that MAI could not be liable for the acts of the independent contractor who made

192. *Id.* at 104-05.

193. *Id.* at 105.

194. *Id.*

195. *Id.* at 105.

196. *Gorzynski*, 596 F.3d at 105.

197. 580 F.3d 86, 88 (2d Cir. 2009).

198. *Id.* at 87.

199. *Id.*

200. *Id.*

201. 21 F.3d 502, 509 (2d Cir. 1994).

the decision not to hire the plaintiff.²⁰²

The Second Circuit reversed, finding that the issue was not controlled by *Robinson*.²⁰³ The court explained that *Robinson* only held that an independent contractor cannot bring a claim under the ADEA, whereas the issue at hand was whether an employer can be liable for the acts of its independent contractor.²⁰⁴ The ADEA's prohibition against age discrimination in hiring decisions "applies regardless of whether an employer uses its employees to interview applicants for open positions, or whether it uses intermediaries, such as independent contractors, to fill that role."²⁰⁵ The court clarified that a "company is not, of course, liable for the hiring decisions made by independent contractors who are hiring on their own behalf."²⁰⁶ However, "[i]f a company gives an individual authority to interview job applicants and make hiring decisions on the company's behalf, then the company may be held liable if that individual improperly discriminates against applicants on the basis of age."²⁰⁷ Finally, the court explained that "[g]eneral principles of agency law determine whether the independent contractor . . . has been given actual authority to hire on behalf of the company, or whether the company, through its own words or conduct, has created apparent authority in that individual in the eyes of the job applicant."²⁰⁸

4. Second Circuit Clarifies Title VII Retaliation Standard

In *Hicks v. Baines*, the Second Circuit made clear that retaliation claims under Title VII²⁰⁹ will be governed by the Supreme Court's decision in *Burlington Northern & Santa Fe Railroad Co. v. White*²¹⁰ and not the more stringent tests employed in previous Second Circuit decisions.²¹¹ The plaintiffs in *Hicks* alleged that their supervisor retaliated against them after they cooperated in an investigation into the

202. *Halpert*, 580 F.3d at 87.

203. *Id.*

204. *Id.*

205. *Id.* at 88.

206. *Id.*

207. *Halpert*, 580 F.3d at 88.

208. *Id.*

209. The plaintiffs in *Hicks* sued under 42 U.S.C. §§ 1981, 1981a, 1983 (2006), the New York State Human Rights Law; however, the retaliation claims under those statutes are analyzed pursuant to Title VII principles. *Hicks v. Baines*, 593 F.3d 159, 161, 164 (2d Cir. 2010) (citing *Patterson v. Cnty. of Oneida*, 375 F.3d 206, 225 (2d Cir. 2004)).

210. 548 U.S. 53 (2006).

211. *Hicks*, 593 F.3d at 165.

supervisor's racial discrimination against a co-worker.²¹² The district court granted summary judgment dismissing the plaintiffs' claims because none of the alleged retaliatory acts resulted in any "meaningful change in the terms and conditions of [plaintiffs'] employment."²¹³ The Second Circuit reversed, explaining that *White* makes "clear that Title VII's anti-discrimination and anti-retaliation provisions 'are not coterminous;' anti-retaliation protection is broader" and applies to employer actions that would dissuade a reasonable employee from making or supporting a charge of discrimination.²¹⁴ Thus, "[p]rior decisions of this Circuit that limit unlawful retaliation to actions that affect the terms and conditions of employment, e.g., *Williams v. R.H. Donnelley, Corp.*²¹⁵ and *Galabya v. New York City Board of Education*,²¹⁶ no longer represent the state of the law."²¹⁷ The Court went on to find that, under the particular work setting in that case, claims of workplace sabotage and punitive scheduling could constitute adverse employment actions under *White* and, accordingly, summary judgment was inappropriate.²¹⁸

V. ARBITRATION

A. *Court of Appeals Enunciates Standard for Determining Validity of Fee-Splitting Provisions*

In *Brady v. Williams Capital Group, L.P.*, the New York Court of Appeals enunciated the standard that New York courts should apply in determining the validity of a fee-splitting provision in an arbitration agreement.²¹⁹ In that case, the employer, a financial services company, had required the employee, a highly paid investment banker, to sign an arbitration agreement providing for the parties "to equally share the fees and costs of the arbitrator."²²⁰ After the employee's services were terminated, she filed a demand for arbitration with the American Arbitration Association ("AAA"), alleging employment discrimination on the basis of race and sex.²²¹ At the time of the demand, the AAA

212. *Id.* at 161.

213. *Id.* at 162.

214. *Id.* at 165.

215. 368 F.3d 123, 128 (2d Cir. 2004).

216. 202 F.3d 636, 640 (2d Cir. 2000).

217. *Hicks*, 593 F.3d at 165.

218. *Id.* at 166.

219. 14 N.Y.3d 459, 467, 928 N.E.2d 383, 387-88, 902 N.Y.S.2d 1, 6 (2010).

220. *Id.* at 463, 928 N.E.2d at 384, 902 N.Y.S.2d at 2.

221. *Id.*, 928 N.E.2d at 385, 902 N.Y.S.2d at 3.

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rules required employers to pay all fees and costs.²²² The employer refused to pay the entire \$42,300 invoice, and the employee commenced an Article 78 proceeding seeking to compel the employer to pay the entire fee or to compel the AAA to enter a default judgment against the employer.²²³

The Court of Appeals initially agreed with the lower courts that “the terms of the parties’ Arbitration Agreement, rather than the AAA rules, controlled.”²²⁴ However, the Court determined that neither lower court applied the appropriate standard in determining the enforceability of the agreement’s fee and cost sharing provision.²²⁵ Essentially adopting the federal rule, the Court of Appeals held that the validity of a fee-splitting provision should be determined on a case-by-case basis and that the inquiry should, at minimum, consider: “(1) whether the litigant can pay the arbitration fees and costs; (2) what is the expected cost differential between arbitration and litigation in court; and (3) whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum.”²²⁶ Additionally, the Court determined that “[a]lthough a full hearing is not required in all situations, there should be a written record of the findings pertaining to a litigant’s financial ability.”²²⁷

B. Dismissal for Not Possessing Valid Certification Is Not Disciplinary Termination

In *New York State Office of Children and Family Services v. Lanterman*, the New York Court of Appeals held that a dismissal from employment because an individual does not possess a valid required license or certification is not a disciplinary termination.²²⁸ Lanterman, who was terminated after her provisional teaching certificate expired and she failed to obtain a new one, filed a grievance, claiming her dismissal violated the disciplinary procedures set forth in the collective bargaining agreement.²²⁹ The agency responded that the grievance was not subject to arbitration because the dismissal was not for disciplinary reasons, but for the employee’s failure to have the qualifications

222. *Id.*

223. *Id.* at 464, 928 N.E.2d at 385, 902 N.Y.S.2d at 3.

224. *Brady*, 14 N.Y.3d at 465, 928 N.E.2d at 386, 902 N.Y.S.2d at 4.

225. *Id.* at 465, 928 N.E.2d at 386, 902 N.Y.S.2d at 4.

226. *Id.* at 467, 928 N.E.2d at 387-88, 902 N.Y.S.2d at 6 (citing *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001)).

227. *Id.*, 928 N.E.2d at 388, 902 N.Y.S.2d at 6.

228. 14 N.Y.3d 275, 282, 926 N.E.2d 233, 236, 899 N.Y.S.2d 726, 729 (2010) (decided with *New York State Office of Alcoholism and Substance Abuse v. Ortiz*).

229. *Id.* at 280-81, 926 N.E.2d at 235, 899 N.Y.S.2d 728.

necessary for her job.²³⁰ Lanterman contended that this itself is an arbitrable question.²³¹

Citing its decision in *Felix v. New York City Department of Citywide Administrative Service*,²³² the Court found that the employee's dismissal for failing to maintain a valid teaching certificate appropriate to her specialty was "clearly . . . not disciplinary, and the employee's assertion that [it was] does not have a relationship with [her] collective bargaining agreement sufficient to justify arbitration of the issue."²³³ In *Felix*, "a New York City employee was dismissed for failing to establish city residence, which was a prerequisite to his employment under a local law."²³⁴ The employee's claim for a hearing under Civil Service Law section 75 was rejected by the Court because "an employee's failure to meet a residence requirement 'is separate and distinct from an act of misconduct'" and, thus, the disciplinary procedures of section 75 could not be invoked.²³⁵ Similarly, Lanterman's claim was not arbitrable because "despite the breadth of the arbitration clause in the [collective bargaining agreement], it cannot be construed to extend to arbitration of grievances which, as a matter of law, do not effectively allege any breach of the collective bargaining agreement."²³⁶

C. Court of Appeals Reaffirms Narrow Standard of Judicial Review

In *New York City Transit Authority v. Transport Workers Union of America*, the Court of Appeals reinstated a disciplinary arbitration award, finding that, contrary to the holdings of the lower courts, the arbitrator did not exceed his authority by modifying the penalty from termination to reinstatement without back pay.²³⁷ The Transit Authority ("TA") terminated an employee after he was involved in a physical altercation with a member of the public on a subway platform.²³⁸ The arbitrator modified the penalty, determining the action of the TA to be "excessive in light of the employee's record and past precedent."²³⁹ In

230. *Id.* at 281, 926 N.E.2d at 235, 899 N.Y.S.2d 728.

231. *Id.*

232. 3 N.Y.3d 498, 821 N.E.2d 935, 788 N.Y.S.2d 631 (2004).

233. *Lanterman*, 14 N.Y.3d at 280, 926 N.E.2d at 234, 899 N.Y.S.2d 727.

234. *Id.* at 282, 926 N.E.2d at 236, 899 N.Y.S.2d 729; *Felix*, 3 N.Y.3d at 501, 821 N.E.2d at 936, 788 N.Y.S.2d at 632.

235. *Lanterman*, 14 N.Y.3d at 282, 926 N.E.2d at 236, 899 N.Y.S.2d 729; *Felix*, 3 N.Y.3d at 505, 821 N.E.2d at 939, 788 N.Y.S.2d at 635.

236. *Lanterman*, 14 N.Y.3d at 283, 926 N.E.2d at 237, 899 N.Y.S.2d 730.

237. 14 N.Y.3d 119, 122-23, 924 N.E.2d 797, 798-99, 897 N.Y.S.2d 689, 690 (2010).

238. *Id.* at 122, 924 N.E.2d at 798, 897 N.Y.S.2d at 690.

239. *Id.* at 123, 924 N.E.2d at 798, 897 N.Y.S.2d at 690.

upholding the award, the Court of Appeals explained that while

the [collective bargaining agreement] provides that the arbitrator . . . is to be guided by “past precedent” and the employee’s record, . . . it is certainly not the role of the courts to chart a course as to how the arbitrator is to apply “past precedent” or determine if the arbitrator strayed from the best route in the guise of declaring that he exceeded his power.²⁴⁰

According to the Court of Appeals, vacating the arbitrator’s award “would entail the kind of ‘inapt flirtation with the merits’ . . . that ‘[h]istory, legislation, and experience,’ not to mention our case law, dictate that we refrain from.”²⁴¹

VI. LABOR LAW

A. Supreme Court Rules on Validity of Two-Member Board Decisions

In 2007, the National Labor Relations Board (“NLRB”), which is ordinarily comprised of five members, found itself with only four members, with two more vacancies anticipated by the end of the year as the terms of two members were about to expire.²⁴² In order to preserve its ability to function, the Board’s four sitting members made a delegation of authority “to Members Liebman, Schaumber and Kirsanow, as a three-member group, [granting them] all of the Board’s powers”²⁴³ The Board made the delegation with the intent that after two members’ terms expire, the remaining two members, Liebman and Schaumber, would be able to continue to exercise the power of the Board as a quorum of the three-member group.²⁴⁴

However, the United States Supreme Court, in *New Process Steel v. National Labor Relations Board*, disagreed and held that once the NLRB’s membership fell to two members, the remaining two members could not exercise the NLRB’s authority, which had previously been delegated to a three-member group.²⁴⁵ In a five to four decision, the Court determined that the language of section 3(b) of the National

240. *Id.* at 124, 924 N.E.2d at 799, 897 N.Y.S.2d at 691 (citing *In re Bd. of Educ. of Watertown City Sch. Dist.*, 93 N.Y.2d 132, 143, 710 N.E.2d 1064, 1071, 688 N.Y.S.2d 463, 471 (1999)).

241. *Id.* (quoting *In re Watertown City Sch. Dist.*, 93 N.Y.2d at 143, 710 N.E.2d at 1071, 688 N.Y.S.2d at 471).

242. *New Process Steel, L.P. v. Nat’l Labor Relations Bd.*, 130 S. Ct. 2635, 2638 (2010).

243. *Id.*

244. *Id.*

245. *Id.* at 2644.

Labor Relations Act²⁴⁶ requires that no fewer than three members be vested with the Board's full authority, concluding that this interpretation "is the only way to harmonize and give meaningful effect to all of the provisions" in section 3(b).²⁴⁷ Furthermore, the Court reasoned, "if Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language."²⁴⁸ Finally, the Court determined its interpretation was supported by "the longstanding practice of the Board."²⁴⁹

After the Court's decision in *New Process Steel*, it remains to be seen what will become of the near 600 decisions issued during the twenty-seven month period in which the Board only had two members.²⁵⁰

B. *New Appointees to the National Labor Relations Board*

On March 27, 2010, President Obama announced fifteen recess appointments to administrative posts, including attorneys Craig Becker and Mark Gaston Pearce to fill two vacancies on the NLRB.²⁵¹ Recess appointees serve through the end of the current Congress unless they receive Senate confirmation in the meantime.²⁵²

Mark Pearce, whose nomination was confirmed by the Senate on June 22, 2010,²⁵³ practiced union side labor and employment law at a

246. 29 U.S.C. § 153(b) (2006).

247. *New Process Steel*, 130 S. Ct. at 2640.

248. *Id.* at 2641.

249. *Id.*

250. See, e.g., Kevin Russell, *Fall-Out From Today's Decision in New Process Steel*, SCOTUSBLOG (June 17, 2010, 12:01 PM), <http://www.scotusblog.com/?p=21672> (discussing the possibility that res judicata principles, which "ordinarily preclude the reopening [of] final judgments," might not apply where the "final judgment [was] issued by a body lacking jurisdiction to enter the judgment," and discussing how the jurisdictional defect might be considered equivalent to a lack of subject-matter jurisdiction, which ordinarily cannot be waived).

251. Press Release, Nat'l Labor Relations Bd., White House Announces Recess Appointments of Two Attorneys to Fill Bd. Vacancies (Mar. 27, 2010), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458032151f>; Press Release, White House, President Obama Announces Recess Appointments to Key Admin. Positions (Mar. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions>.

252. HENRY B. HOGUE, CONG. RESEARCH SERV., RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 4 (Mar. 29, 2010), available at <http://www.senate.gov/reference/resources/pdf/RS21308.pdf>.

253. *Board Members Since 1935*, NAT'L LAB. REL. BD., <http://nlrb.gov/who-we-are/board/board-members-1935> (last visited May 1, 2011).

law firm in Buffalo, New York.²⁵⁴ In 2008, he was appointed to the Industrial Board of Appeals.²⁵⁵ Pearce has taught at Cornell University's School of Industrial Labor Relations Extension, and from 1979 to 1994, he was an attorney and District Trial Specialist for the NLRB in Buffalo, New York.²⁵⁶

Craig Becker, who has yet to be confirmed by the Senate,²⁵⁷ served as in-house counsel to both the Service Employees International Union (SEIU) and the American Federation of Labor & Congress of Industrial Organizations (AFL-CIO).²⁵⁸ From 1989 to 1994, he was a Professor of Law at the UCLA School of Law and has also taught at the University of Chicago and Georgetown law schools.²⁵⁹ Becker has also published a number of scholarly articles on labor and employment law in journals such as the Harvard Law Review and the Chicago Law Review.²⁶⁰ Many have viewed the nomination of Becker to be especially controversial due to his previous employment with the SEIU and the AFL-CIO and some of his past academic writings, which have taken a critical approach of the existing labor law.²⁶¹

A third nominee, Brian Hayes, was confirmed by the Senate on June 22, 2010.²⁶² Hayes represented management clients in labor and employment law for twenty-five years before serving as Republican Labor Policy Director for the U.S. Senate Committee on Health, Education, Labor and Pensions.²⁶³

C. New National Labor Relations Act Posting Requirements for Federal Contractors

The United States Department of Labor (U.S. DOL) published a final rule, effective June 21, 2010, requiring covered federal contractors and subcontractors to inform employees of their rights under the

254. *Mark G. Pearce*, NAT'L LAB. REL. BD., <http://nlrb.gov/who-we-are/board/mark-g-pearce> (last visited May 1, 2011).

255. *Id.*

256. *Id.*

257. *Craig Becker*, NAT'L LAB. REL. BD., <http://nlrb.gov/who-we-are/board/craig-becker> (last visited May 1, 2011).

258. *Id.*

259. *Id.*

260. *Id.*

261. *See, e.g.*, Peter Jones, *President Obama Makes Recess Appointments to NLRB and EEOC*, N.Y. LAB. & EMP'T L. REP. (Mar. 30, 2010, 1:30 PM), <http://www.nylaborandemploymentlawreport.com/2010/03/articles/national-labor-relations-board-1/president-obama-makes-recess-appointments-to-nlrb-and-eeoc>.

262. *Brian Hayes*, NAT'L LAB. REL. BD., <http://www.nlrb.gov/who-we-are/board/brian-hayes> (last visited May 1, 2011).

263. *Id.*

National Labor Relations Act (NLRA).²⁶⁴ The final rule implements Executive Order 13496, signed by President Obama on January 30, 2009, which repealed the previous notice requirement (the “Beck Poster”), and prescribed a new notice requirement.²⁶⁵ Whereas the former Beck Poster informed employees of their right to not join a union and to opt out of paying a portion of their union dues used for non-representational activities, the new rule requires that employees be informed of their rights to organize and bargain collectively, and to engage in other protected concerted activity under the NLRA.²⁶⁶ Additionally, the final rule requires that the notice provide examples of illegal employer conduct, and information on where employees may file complaints with the NLRB.²⁶⁷

VII. PUBLIC SECTOR EMPLOYMENT

A. Tier V Pension Classification and Early Retirement Incentive

On December 10, 2009, Governor Paterson approved the creation of a new tier of pension benefits for public employees.²⁶⁸ This new Tier V classification applies to members of the New York State Teachers’ Retirement System (“TRS”) State and Local Employees’ Retirement System (“ERS”), and Police and Fire Retirement System (“PFRS”) who joined the state pension system on or after January 1, 2010.²⁶⁹ This new tier, among other things, increases the years of service that employees need to qualify for a service retirement benefit, increases the length of time employees are required to make contributions (and in certain instances, increases the amount of the contribution), raises the minimum retirement age, increases the penalties employees must pay for early

264. Notification of Employee Rights Under Federal Labor Laws, 75 Fed. Reg. 28,368 (May 20, 2010) (to be codified at 29 C.F.R. pt. 471).

265. Exec. Order No. 13,496, 74 Fed. Reg. 6107, 6110-6111 (Feb. 4, 2009).

266. Notification of Employee Rights Under Federal Labor Laws, 75 Fed. Reg. at 28,399-28,400; Exec. Order No. 13201, 66 Fed. Reg. 11221 (Feb. 22, 2001).

267. Notification of Employee Rights Under Federal Labor Laws, 75 Fed. Reg. at 28,400.

268. Act of December 10, 2009, ch. 504, 2009 McKinney’s Sess. Laws of N.Y. 1337-1349; *see also* Press Release, Assembly Speaker Sheldon Silver, Assembly Approves Tier V Pension Reform, Saving Tax Payers \$35 Billion Over Three Decades (Dec. 2, 2009), available at <http://assembly.state.ny.us/Press/20091202c> [hereinafter Silver Press Release]; Governor, *Legislature Establish Tier 5: Law Includes ‘Legislative Intent’ for 55/25 Retirement Incentive in 2010*, N.Y. STATE TEACHERS’ RET. SYS. (Dec. 18, 2009), http://www.nystrs.org/main/headlines/tier5_12.18.09.html [hereinafter *Legislature Establish Tier 5*].

269. 2009 McKinney’s Sess. Laws of N.Y. at 1337-49; *see also* *Legislature Establish Tier 5*, *supra* note 268.

retirement, and “caps the amount of overtime that can be considered in the calculation of pension benefits”²⁷⁰ These changes vary depending on whether the employee is a member of the TRS, ERS, and PFRS.²⁷¹ In all, the changes are expected to save the state and local governments thirty-five billion dollars over the next thirty years.²⁷²

One other notable aspect to this Tier V legislation was that it included legislative intent to offer an early retirement incentive to TRS members.²⁷³ On April 14, 2010, Governor Paterson signed this early retirement incentive into law.²⁷⁴ This incentive provided a short window in 2010 where certain individuals who were fifty-five years of age or older and had at least twenty-five years of creditable service could elect to retire without any reduction in their benefits.²⁷⁵ Shortly after the passage of this 55/25 retirement incentive, a lawsuit was brought challenging its constitutionality because it only applied to employees represented by collective bargaining units affiliated with the New York State United Teachers Employee Organization (“NYSUT”).²⁷⁶ On January 20, 2011, the Appellate Division, Third Department upheld the law as constitutional.²⁷⁷ According to the Third Department, the State had a rational basis for distinguishing between NYSUT members and nonmembers—namely, the legislation targeted a group of individuals (the NYSUT classroom teachers and teacher’s assistants) who, if encouraged to retire, would provide greater cost-savings than supervisory or administrative personnel who were not NYSUT members.²⁷⁸

B. Supreme Court Rules that Employer’s Audit of Employee Text Messages Did Not Violate Fourth Amendment Rights

In *City of Ontario v. Quon*, the Supreme Court determined that a public employer did not violate its employee’s Fourth Amendment

270. 2009 McKinney’s Sess. Laws of N.Y. at 1337-49; *Legislature Establish Tier 5*, *supra* note 268.

271. 2009 McKinney’s Sess. Laws of N.Y. at 1337-49; *see also* Silver Press Release, *supra* note 268.

272. Silver Press Release, *supra* note 268.

273. *Legislature Establish Tier 5*, *supra* note 268.

274. Act of April 14, 2010, ch. 45, 2010 McKinney’s Sess. Law News of N.Y. 116; *see also Chapter 45 Retirement Incentive Fact Sheet*, N.Y. STATE TEACHERS’ RET. SYS., http://www.nystrs.org/main/2010_Incentive/Ch.45_facts.html (last visited May 1, 2011).

275. 2010 McKinney’s Sess. Laws of N.Y. at 116-18; *Chapter 45 Retirement Incentive Fact Sheet*, *supra* note 274.

276. *Sullivan v. Paterson*, No. 510143, 2011 N.Y. Slip Op. 327(U), at 1 (3d Dep’t 2011); *Chapter 45 Retirement Incentive Fact Sheet*, *supra* note 274.

277. *Sullivan*, 2011 N.Y. Slip Op. 327(U), at 1.

278. *Id.* at 3.

rights when it reviewed text messages the employee sent and received on a pager owned by the employer and issued to the employee for work-related purposes.²⁷⁹

The plaintiff in this case, Jeffery Quon, was a police sergeant with the Ontario Police Department (“OPD”) and a member of OPD’s SWAT Team.²⁸⁰ The City issued pagers to Quon and other members of the SWAT Team in order to aid the SWAT Team in mobilizing and responding to emergency situations.²⁸¹ Each pager was allotted a limited number of characters it could send or receive each month without the City incurring additional overage fees.²⁸² All employees, including Quon were aware of and were subject to the City’s Computer Policy which clearly stated that the City reserved “the right to monitor and log all network activity including e-mail and Internet use, with or without notice.”²⁸³ Although the Computer Policy did not apply to text messaging on its face, the City informed all employees, including Quon, that text messages would be treated in the same manner as e-mails.²⁸⁴

Within the first few months after issuance, Quon exceeded his character allotment and was told by his supervisor that if he reimbursed the City for the cost of the overage, the City would not audit his messages.²⁸⁵ However, when Quon and the other officers continued to incur overage fees, the City decided to audit transcripts of the messages to determine whether the character limit was too low and the officers were being forced to pay for sending work-related messages, or whether the overages were the result of personal messages.²⁸⁶ As a result of the audit, the City discovered that most of Quon’s messages were not work-related and that some of them were sexually explicit.²⁸⁷ Consequently, Quon was disciplined.²⁸⁸ Quon sued the City, claiming that reviewing his text messages violated his Fourth Amendment right against unreasonable searches and seizures.²⁸⁹ The Ninth Circuit found that Quon had a reasonable expectation of privacy in the content of his text messages, and that the City’s search was not reasonable in scope.²⁹⁰

279. 130 S. Ct. 2619, 2633 (2010).

280. *Id.* at 2624.

281. *Id.* at 2625.

282. *Id.*

283. *Id.*

284. *Quon*, 130 S. Ct. at 2625.

285. *Id.*

286. *Id.* at 2626.

287. *Id.*

288. *Id.*

289. *Quon*, 130 S. Ct. at 2626.

290. *Id.* at 2627.

The Supreme Court, wishing to avoid deciding on the issue of an employee's privacy expectations with respect to employer-provided technological equipment, simply assumed that Quon had a reasonable expectation of privacy in the content of his text messages.²⁹¹ The Court then applied its established principles with respect to a government employer's search of an employee's physical office space to its search of electronic communications.²⁹² It held that "the search was justified at its inception because there were 'reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose'" because the search was undertaken to determine whether the character limit on the text messaging plan was sufficient to meet the City's needs.²⁹³ Additionally, the Court found that the scope of the search was permissible because auditing the transcripts was an efficient way to determine whether the overages were work-related or due to personal use.²⁹⁴ Furthermore, because the audit was limited to two months, it was not excessively intrusive.²⁹⁵ Therefore, because the City had a legitimate work-related reason for the search and the search was not excessive in scope, the Supreme Court concluded that it was reasonable and did not violate Quon's Fourth Amendment rights.²⁹⁶

C. Teacher's Grievance Is Not Protected Speech Under The First Amendment

The Second Circuit, relying on the Supreme Court's decision in *Garcetti v. Ceballos*,²⁹⁷ held that filing a grievance was pursuant to a public school teacher's official duties, and thus not protected speech under the First Amendment.²⁹⁸ The teacher, Weintraub, filed a grievance with his union challenging the assistant principal's decision not to discipline a fifth grade student who threw books at him during class on two occasions.²⁹⁹ Weintraub alleged that school officials retaliated against him as a result of this grievance.³⁰⁰

The Second Circuit analyzed this case in light of the Supreme Court's decision in *Garcetti*. In *Garcetti*, the Supreme Court held that "when public employees make statements pursuant to their official

291. *Id.* at 2630.

292. *Id.* at 2630-32.

293. *Id.* at 2631 (quoting *O'Connor v. Ortega*, 480 U.S. 709, 726 (1987)).

294. *Quon*, 130 S. Ct. at 2631.

295. *Id.*

296. *Id.* at 2632-33.

297. 547 U.S. 410, 421 (2006).

298. *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 198 (2d Cir. 2010).

299. *Id.* at 198-99.

300. *Id.* at 199.

duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”³⁰¹ The Second Circuit, joining with other circuits, concluded that “under the First Amendment, speech can be ‘pursuant to’ a public employee’s official job duties even though it is not required by, or included in, the employee’s job description, or in response to a request by the employer.”³⁰² Specifically, the Second Circuit concluded that “Weintraub’s grievance was ‘pursuant to’ his official duties because it was ‘part-and-parcel of his concerns’ about his ability to ‘properly execute his duties’ . . . as a public school teacher—namely, to maintain classroom discipline, which is an indispensable prerequisite to effective teaching and classroom learning.”³⁰³ Furthermore, the court explained that:

The lodging of a union grievance is not a form or channel of discourse available to non-employee citizens, as would be a letter to the editor or a complaint to an elected representative or inspector general. Rather than voicing his grievance through channels available to citizens generally, Weintraub made an internal communication pursuant to an existing dispute-resolution policy established by his employer As with the speech at issue in *Garcetti*, Weintraub could only speak in the manner that he did by filing a grievance with his teacher’s union as a public employee His grievance filing, therefore, lacked a relevant analogue to citizen speech and “retain[ed no] possibility” of constitutional protection.³⁰⁴

Therefore, the Second Circuit, following *Garcetti*, ultimately concluded, that because the grievance was filed pursuant to Weintraub’s official job duties as a public school teacher, it had no relevant analogue to citizens speech and thus, Weintraub was not speaking as a citizen for purposes of the First Amendment.³⁰⁵ Accordingly, his speech was not protected.³⁰⁶

D. Court of Appeals Upholds Teacher’s Right to Pay for Failure to Provide Timely Notice of Termination

In *Vetter v. Board of Education*, the Court of Appeals held that a probationary teacher was entitled to back pay for the Board of Education’s (“Board”) failure to provide timely notice of his

301. *Garcetti*, 547 U.S. at 421.

302. *Weintraub*, 593 F.3d at 203.

303. *Id.* (citations omitted).

304. *Id.* at 204 (citations omitted).

305. *Id.* at 198, 205.

306. *Id.*

termination, even though the notice period fell during summer vacation when the teacher would not otherwise have received compensation.³⁰⁷ In this case, the Board voted to terminate Vetter, a probationary teacher, based upon allegations of misconduct.³⁰⁸ The Board did not provide Vetter with written notice of his termination until two days before his termination, almost a month after its decision.³⁰⁹ Under section 3019-a of the Education Law, probationary teachers must be given written notice of their termination at least thirty days before the effective date of the termination.³¹⁰ Vetter argued that he was entitled to twenty-eight days of pay because the Board failed to provide him with adequate notice.³¹¹ The Board admitted that it failed to comply with section 3019-a, but argued that twenty-eight days pay was not an appropriate remedy “because the 28 days fell during summer vacation” when Vetter would not have been paid any salary even if he had received timely notice.³¹² The Court of Appeals disagreed with the Board’s reasoning and held that Vetter was entitled to twenty-eight days’ salary—“one day’s pay for each day the notice was late”—despite the fact that the notice period occurred during summer vacation.³¹³

VIII. DEVELOPMENTS UNDER THE FAIR LABOR STANDARDS ACT

A. Department of Labor Issues Guidance on Internship Programs

In April 2010, the U.S. DOL issued guidance for determining whether interns working for employers in the “for-profit” private sector are subject to the minimum wage and overtime provisions of the Fair Labor Standards Act (“FLSA”).³¹⁴ According to the U.S. DOL, such interns are considered employees and are entitled to compensation unless the following six factors are met: (1) the internship must be similar to training given in an education environment; (2) the internship must be for the benefit of the intern; (3) the intern must not displace the employer’s regular employees and should be closely supervised by

307. 14 N.Y.3d 729, 731-32, 926 N.E.2d 589, 590, 900 N.Y.S.2d 235, 236 (2010).

308. *Id.* at 730, 926 N.E.2d at 589, 900 N.Y.S.2d at 235.

309. *Id.*

310. *Id.* at 731, 926 N.E.2d at 590, 900 N.Y.S.2d at 236; N.Y. EDUC. LAW § 3019-a (McKinney 2009).

311. *Vetter*, 14 N.Y.3d at 730-31, 926 N.E.2d at 589, 900 N.Y.S.2d at 235.

312. *Id.* at 731, 926 N.E.2d at 590, 900 N.Y.S.2d at 236.

313. *Id.* at 731-32, 926 N.E.2d at 590, 900 N.Y.S.2d at 236 (citing *Tucker v. Bd. of Educ.*, 82 N.Y.2d 274, 277-78, 624 N.E.2d 643, 645, 604 N.Y.S.2d 506, 508 (1993)).

314. WAGE AND HOUR DIV., U.S. DEP’T. OF LAB., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (April 2010), available at <http://www.dol.gov/whd/regs/compliance/whdfs71.htm>.

existing staff; (4) the employer must not derive an immediate advantage from the services of the intern; (5) the intern should not be guaranteed a job at the conclusion of the internship; and (6) the employer and intern must both understand that the intern is not entitled to wages.³¹⁵ If all six of these factors are satisfied, “an employment relationship does not exist under the FLSA, and the Act’s minimum wage and overtime provisions do not apply to the intern.”³¹⁶

B. Second Circuit Rules on the Scope of the Professional Exemption

In *Young v. Cooper Cameron Corp.*, the Second Circuit was tasked with determining whether an employee who performed professional duties, but did not have an advanced degree in a specialized field, could be classified as an exempt professional under the FLSA.³¹⁷

Andrew Young was hired by Cooper Cameron as a Product Design Specialist II (“PDS II”).³¹⁸ Applicants for this position were required to have twelve years experience, but no particular level of education was necessary.³¹⁹ Although the position required technical expertise and experience, and entailed significant responsibility and discretion, no PDS II, including Young, had any formal education beyond a high school diploma.³²⁰ Young did, however, have roughly twenty years of engineering experience.³²¹

When Young lost his job during a reduction-in-force, he sued Cooper Cameron alleging that it had improperly classified him as an exempt employee.³²² The court noted that for an employee to be an exempt professional, his primary duty must consist of “the performance of [w]ork requiring knowledge of an advance type in a field of science or learning *customarily acquired by a prolonged course of specialized intellectual instruction and study.*”³²³ According to the court, “customarily” merely “makes the exemption applicable to the rare individual who, unlike the vast majority of others in the profession, lacks the formal educational training and degree.”³²⁴ Therefore, the court reasoned that “[i]f a job does *not* require knowledge customarily

315. *Id.*

316. *Id.*

317. 586 F.3d 201, 202 (2d Cir. 2009).

318. *Id.*

319. *Id.* at 203.

320. *Id.* at 202.

321. *Id.*

322. *Young*, 586 F.3d at 204.

323. *Id.* at 205-06 (citing 29 C.F.R. § 541.3(a)(1) (2010)).

324. *Id.* at 206.

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acquired by an advanced educational degree—as for example when many employees in the position have no more than a high school diploma—then, regardless of the duties performed, the employee is not an exempt professional under the FLSA.”³²⁵ Accordingly, the court held that Young was not an exempt professional despite the fact that he performed “professional” duties, because his position did not require advanced educational training or instruction.³²⁶

C. Second Circuit Affirms Dismissal of Donning and Doffing Class Action

In *Albrecht v. Wackenhut Corp.*, the Second Circuit affirmed a decision issued by the Western District of New York in which the court held that the time security guards spent arming up, clearing security, and arming down was non-compensable preliminary and postliminary activity and/or de minimis in nature.³²⁷

In this case, the plaintiffs, current and former security guards at a nuclear power plant, brought a class action suit against Wackenhut alleging that it violated the FLSA and New York Labor Law by failing to pay them for time spent before and after scheduled work shifts arming up, clearing security, and arming down.³²⁸ The record demonstrated that the average time the security guards spent obtaining/returning their firearm and radio was between thirty to ninety seconds before and after each shift.³²⁹ The Second Circuit noted that when a task “concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded” as a de minimis principal activity.³³⁰ Accordingly, the Second Circuit affirmed the district court’s decision on the ground that the time spent arming up and arming down was a de minimis principal activity, and as such, non-compensable.³³¹ The Second Circuit also affirmed the district court’s conclusion that the time the security guards spent walking between the armory to their assigned post was non-compensable.³³² Presumably, the court did so because a de minimis principal activity, such as arming up, does not trigger the continuous workday rule.³³³

325. *Id.*

326. *Id.*

327. No. 07-CV-6162, 2009 U.S. Dist. LEXIS 88073, at *26-27 (W.D.N.Y. Sept. 24, 2009), *aff’d*, 379 F. App’x 65, 66 (2d Cir. 2010).

328. *Id.* at *2-3.

329. *Albrecht*, 379 F. App’x at 67.

330. *Id.* (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946)).

331. *Id.*

332. *Id.*

333. *Id.* (quoting *Singh v. City of N.Y.*, 524 F.3d 361, 371 n.8 (2d Cir. 2008)).

IX. DEPARTMENT OF LABOR WAGE AND HOUR ADMINISTRATOR
INTERPRETATIONS

On March 24, 2010, the Wage and Hour Division (“WHD”) of the U.S. DOL announced that it would cease its long-standing practice of issuing “opinion letters” in response to employer inquiries.³³⁴ Instead, the WHD has decided to issue “Administrator Interpretations” when it determines that “further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate.”³³⁵ These Administrator Interpretations are intended to “set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue.”³³⁶ The WHD believes that this new approach, clarifying the law as it applies to entire industries and categories of employees rather than attempting to provide opinion letters in response to fact-specific employer inquiries, will be a much more efficient use of its resources.³³⁷

A. *The Fair Labor Standard Act’s Administrative Exemption and Mortgage Loan Officers*

On March 24, 2010, in connection with its announcement, the WHD issued its first Administrator’s Interpretation applying the administrative exemption under section 13(a)(1) of the FLSA to employees who perform the typical job duties of a mortgage loan officer.³³⁸ In order for an employee to be exempt from the FLSA’s minimum wage and overtime requirements under the FLSA’s administrative exemption, the employee’s salary and job duties must meet all three of the following tests:

- (1) The employee must be compensated on a salary or fee basis . . . at a rate not less than \$455 per week;
- (2) The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
- (3) The employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.³³⁹

334. See *Wage and Hour Highlights*, U.S. DEP’T OF LAB. (Mar. 24, 2010), <http://www.dol.gov/whd/Hightlights/archived.htm>.

335. *Id.*

336. *Id.*

337. *Id.*

338. Dep’t of Lab. Administrator’s Interpretation No. 2010-1 (Mar. 24, 2010), *available at* http://www.dol.gov/WHd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.htm.

339. *Id.* (quoting 29 C.F.R. § 541.200 (2010)).

The Administrator's Interpretation focused on the second test: "[w]hether the primary duty of employees who perform the typical job duties of a mortgage loan officer is office or non-manual work directly related to the management or general business operations of their employer or their employer's customers."³⁴⁰ After a detailed analysis of the applicable case law and regulations, the Administrator concluded that employees who perform the typical job duties of a mortgage loan officer have a primary duty of making sales for their employers and, therefore, do not qualify as administrative employees exempt from the minimum wage and overtime requirements under section 13(a)(1) of the Fair Labor Standards Act.³⁴¹

B. "Changing Clothes" Under the Fair Labor Standards Act

Since the WHD's March announcement and first Administrator's Interpretation, the WHD has issued two subsequent Administrator's Interpretations. On June 16, 2010, the WHD issued an Administrator's Interpretation interpreting section 3(o) of the FLSA and the definition of "clothes."³⁴²

Section 3(o) of the FLSA, 29 U.S.C. § 203(o), provides that "time spent 'changing clothes or washing at the beginning or end of each workday' is excluded from compensable time under the FLSA if the time is excluded from compensable time pursuant to 'the express terms or by custom or practice' under a collective bargaining agreement."³⁴³

The Administrator, after a detailed review of section 203(o), its legislative history and relevant case law, determined that the section 203(o) exemption "does not extend to protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job" because such protective equipment does not fit within the definition of "clothes" under section 203(o).³⁴⁴ Accordingly, the time workers spend donning and doffing protective equipment is compensable.³⁴⁵ Additionally, the Administrator concluded that clothes changing that is covered by section 203(o) (i.e., clothes changing that is non-compensable) may nonetheless be considered a principal

340. *Id.* at 2.

341. *Id.* at 9.

342. U.S. Dep't of Lab. Administrator's Interpretation No. 2010-2 (June 16, 2010), *available at* http://www.dol.gov/WHd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.htm.

343. *Id.* at 1 (quoting 29 U.S.C. § 203(o) (2006)).

344. *Id.* at 3-4.

345. *Id.* at 3.

activity.³⁴⁶ Activities that occur after the first principal activity of the day and before the last principal activity, are compensable.³⁴⁷ Thus, where clothes changing is considered a principal activity, subsequent activities, including walking and waiting, are compensable.³⁴⁸

C. Definition of “Son or Daughter” Under the Family and Medical Leave Act

On June 22, 2010, the WHD issued an Administrator’s Interpretation clarifying the definition of “son or daughter” under the FMLA as it applies to employees standing *in loco parentis* to a child.³⁴⁹ Essentially, this Interpretation extends FMLA rights to any individual who assumes the role of caring for a child, regardless of the legal relationship.³⁵⁰

The definition of “son or daughter” under the FMLA includes not only a biological or adopted child, but also a “foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis”³⁵¹ Although the FMLA regulations define persons standing *in loco parentis* as individuals with day-to-day responsibilities to care for *and* financially support a child, the Administrator has determined that “the regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand in loco parentis to a child.”³⁵² Instead, “either day-to-day care *or* financial support may establish an *in loco parentis* relationship where the employee intends to assume the responsibilities of a parent with regard to a child.”³⁵³ Such intent is derived from the acts of the parties.³⁵⁴ Whether an employee stands in loco parentis depends on multiple factors, such as the child’s age, the child’s dependence on the employee, the amount of support provided by the employee, and the extent to which the employee performs duties commonly associated with

346. *Id.* at 4-5.

347. Administrator’s Interpretation No. 2010-2, *supra* note 342, at 4 (citing *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005)).

348. *Id.* at 5.

349. U.S. Dep’t of Lab. Administrator’s Interpretation No. 2010-3 (June 22, 2010), *available at* http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm.

350. *Id.* at 2.

351. *Id.* at 1 (quoting 29 U.S.C. § 2611(12) (2006)).

352. *Id.* at 2.

353. *Id.* at 3 (emphasis added).

354. Administrator’s Interpretation No. 2010-3, *supra* note 349, at 2.

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parenthood.³⁵⁵ Furthermore, the Administrator's Interpretation makes clear that "[n]either the statute nor the regulations restrict the number of parents a child may have under the FMLA."³⁵⁶

355. *Id.* at 2.

356. *Id.* at 3.