LABOR & EMPLOYMENT LAW

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INTRODUCTION

During the *Survey* year, several significant legislative developments occurred in New York, including increases to the minimum wage, reforms to the unemployment insurance law, amendments to the State's laws on wage deductions and social security number protections, promulgation of new regulations governing child performers, and changes to the interest arbitration rules for certain public employers. The New York Court of Appeals also issued two significant decisions impacting public employers. The first decision upheld amendments to the controversial Wicks Law, while the second provided guidance to distinguish "critical evaluation" letters that may be issued to public employees without a due process hearing from "formal reprimands" which require a hearing. At the appellate level, in a case of first impression, the Second Department found that employers who hire undocumented immigrants in violation of the Immigration Reform and Control Act of 1986 are still entitled to the protections of the State's Workers' Compensation Law.

The *Survey* also highlights certain legislative developments at the federal level, including amendments to the Family Medical and Leave Act regulations and changes to the I-9 verification and federal Fair Credit Reporting Act disclosure forms. In addition, the U.S. Supreme Court and Second Circuit both issued notable decisions. In a landmark decision with cultural implications far beyond the employment relationship, the U.S. Supreme Court ruled unconstitutional the Defense of Marriage Act's definitions of the terms "marriage" and "spouse" to include only members of the opposite sex.

Another decision from the Supreme Court clarified the definition of a "supervisor" under Title VII. The Second Circuit Court of Appeals confronted Title VII as well, issuing decisions finding that an employer can be liable for same-sex harassment claims and claims of harassment perpetrated by non-employees.

The *Survey* year also saw significant developments at the National

Labor Relations Board (the "Board" or "NLRB"), including the Board's first decisions addressing social media policies and discipline for an employee's social media activity. The Board also issued decisions and guidance relating to employer confidentiality rules, at-will employment provisions, union dues-checkoff provisions, and employer obligations to turn over investigatory witness statements. However, federal court decisions invalidating President Obama's recess appointments to the Board call into question a number of these Board decisions that were issued during the tenure of the recess appointees.

The New York City Council was particularly active during the *Survey* year, enacting two groundbreaking pieces of legislation: a paid sick leave law covering most private sector employers in New York City and a law prohibiting discrimination against unemployed job applicants. In addition to legislative activity benefiting city employees, the Second Circuit Court of Appeals clarified the broad scope of protection from employment discrimination to which these employees are entitled under the New York City Human Rights Law.

I. WAGE AND HOUR DEVELOPMENTS IN NEW YORK

A. New York State Increases the Minimum Wage

On December 31, 2013, New York State's minimum wage increased from $7.25 per hour to $8.00 per hour.[1] The wage rate will increase to $8.75 per hour on December 31, 2014, and to $9.00 per hour on December 31, 2015.[2] The legislation implementing these increases attempts to offset the impact of the increases on employers by providing tax subsidies to employers who employ workers who are sixteen to nineteen years old.[3]

Notably, the legislation does not provide a minimum wage increase for food service workers and other tipped employees.[4] However, it does require the Commissioner of Labor to convene a wage board to study whether wage changes are warranted for these workers and provides the Commissioner with the authority to administratively increase the minimum wage based on the results of this report.[5]

1. N.Y.S. 2607, 236th Sess. (2013) (enacted).
2. *Id.*
3. N.Y.S. 2609, 236th Sess. (2013) (enacted) (effective January 1, 2014, New York State taxpayers will pay $.75 per hour for each eligible teenaged employee; taxpayers will pay $1.31 per hour effective January 1, 2015, and $1.35 per hour effective January 1, 2016, through 2018).
4. N.Y.S. 2607, 236th Sess. (2013) (enacted).
5. *Id.*

B. New York State Legislature Amends Section 193 of the New York Labor Law

Legislation that went into effect on November 6, 2012 significantly expanded the list of permissible deductions that employers may make from the wages of New York employees under Section 193 of the New York Labor Law ("NYLL").[6]

Section 193 generally prohibits deductions from employee wages except for: (1) those made in accordance with law (e.g., taxes, social security, etc.); or (2) those authorized by the employee in writing, which are for the benefit of the employee and fall under a list of payments enumerated in the statute.[7] Deductions under this latter category were previously limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues to a labor organization, and "other similar payments" which are for the benefit of the employee.[8]

The New York State Department of Labor ("NYDOL") has narrowly interpreted the "similar payments" provision, taking the position that even with the employee's written consent, employers could not deduct for items such as: accidental wage overpayments, advances, or loans; purchases from employer cafeterias, gift shops, or vending machines; payments for gym club memberships or similar fees; or the repayment of employer-provided tuition reimbursements.[9]

Reversing some of these restrictive interpretations, the 2012 wage deduction amendments allow New York employers to make a wider scope of payroll deductions but also impose new deduction-related authorization and notification requirements relating to those deductions. It is important to note that the amendments contain a sunset provision and will expire on November 6, 2015, unless further action is taken by the legislature at that time.[10]

The amendments expand the enumerated list of permissible deductions under Section 193 to include: prepaid legal plans; discounted parking or discounted passes, tokens, fare cards, vouchers, or other items that enable employees to use mass transit systems; fitness center,

6. N.Y.A. 10785, 2011-2012 Gen. Assemb. (2012) (enacted).

7. *See generally* N.Y. LAB. Law § 193 (McKinney 2013).

8. *Id.*

9. *See* NYDOL Opinion Letter, RO-09-0152 (Jan. 21, 2010); NYDOL Opinion Letter, RO-09-0006 (Aug. 3, 2009); NYDOL Opinion Letter, RO-09-0088 (Aug 13, 2009); NYDOL Opinion Letter, RO-07-0003 (Oct. 23, 2008).

10. *See* N.Y. LAB. LAW § 193 (McKinney 2013).

health club and/or gym membership dues; cafeteria and vending machine purchases made at the employer's place of business; purchases made at the employer's gift shops where the employer is a hospital, college, or university; pharmacy purchases made at the employer's place of business; tuition, room, board and fees for pre-school, nursery, primary, secondary, and/or post-secondary educational institutions; day care, before-school and after-school child care expenses; purchases made at events sponsored by a bona-fide charitable organization affiliated with the employer, where at least twenty percent of the profits from the event are contributed to a bona-fide charitable organization; and payments for housing provided at no more than market rates by non-profit hospitals or affiliates thereof.[11]

The 2012 amendments also impose the following notice, recordkeeping, and authorization requirements as applied to the enumerated list of permissible deductions: all terms and conditions of the payment or its benefits and the details and the manner in which the deduction will be made must be provided to employees in advance; employers must give employees advance notice if there is going to be a substantial change in any terms or conditions of a payment (i.e., a change in the amount of the deduction or a change in the benefits of the deduction); employers must retain written authorizations for deductions for the employee's entire period of employment plus an additional six years following the end of the employment relationship; and, unless a deduction is required or authorized by a collective bargaining agreement, an employee is free to revoke his or her authorization at any time.[12] In such case, the employer must stop the wage deduction "as soon as practicable," but not later than four pay periods (or eight weeks) after the employee's revocation, whichever is sooner.[13]

Perhaps most significant, the amendments permit wage deductions for accidental wage overpayments due to a mathematical or clerical error and deductions to repay wage advances given to employees.[14] The amendments specifically required the NYDOL to promulgate regulations to govern these deductions.[15] The regulations must govern the size of overpayments that may be deducted, the timing, frequency, duration, and method of the deductions, limitations on the periodic amount of such deductions, a requirement that employers implement a

11. *See* N.Y. LAB. LAW § 193(1)(b)(i),(iii)-(iv), (vii)-(xiii).
12. *Id.* § 193(1)(b), (3)(c).
13. *Id.* § 193(3)(c).
14. *Id.* § 193(1)(c), (1)(d).
15. *Id.*

procedure for employees to dispute the amount of a deduction or seek to delay the deduction, and a requirement that an employer notify employees of the terms and content of the dispute procedure prior to making a deduction for an overpayment, and for advances, at the time the advance is made.[16]

After a fairly lengthy delay, the NYDOL announced proposed regulations to govern these deductions on May 22, 2013.[17] In addition to providing for the terms and contents of deductions for wage advances and overpayments, the proposed regulations also provided: a list of payments that may be allowed under the Section 193 catch-all provision "similar payments" made for the benefit of the employee; an enumerated list of illegal wage deductions; and the format and method of transmission for authorizations and notifications.[18]

II. OTHER NEW YORK LEGISLATIVE, REGULATORY, AND JUDICIAL DEVELOPMENTS

A. Amendments to New York State's Social Security Number Protection Law to Strengthen Privacy and Protection of Personal Information

On August 14, 2012, Governor Andrew Cuomo signed into law amendments to section 399-dd of the New York General Business Law, commonly referred to as the New York Social Security Number Protection Law ("SSN Protection Law").[19] Prior to these amendments, the SSN Protection Law was focused on limiting the use of an individual's social security number only after the number was obtained by or given to a third party, such as prohibiting the third-party from making the social security number publicly available.[20] In contrast, the new amendments seek to protect New Yorkers before they reveal their

16. N.Y. LAB. LAW § 193(1)(c), (1) (d).

17. N.Y. St. Reg., pp. 6-7, May 22, 2013.

18. *Id.*; Final regulations similar but not identical to the proposed regulations were issued and enacted after the period covered by this *Survey* year and are therefore not covered in detail in this *Survey*. *See* 12 NYCRR § 195-5.1 *et. seq.*

19. Press Release, N.Y. State Governor Andrew M. Cuomo, Governor Cuomo Signs Bills to Better Protect New Yorkers' Privacy and Combat Consumer Scams (August 12, 2013) [hereinafter Press Release], *available at* https://www.governor.ny.gov/press/08142012-protect-ny-privacy. The amendments re-codified the original SSN Protection Law from § 399-dd to § 399-ddd and added a new second law at § 399-ddd. Consequently, there are now two § 399-ddd provisions of the New York General Business Law. *See* N.Y. GEN. BUS. LAW § 399-ddd (previously numbered §399-dd) (McKinney 2013); N.Y. GEN. BUS. LAW § 399-ddd (McKinney 2013).

20. *See* N.Y. GEN. BUS. LAW § 399-ddd(2)(a)-(f) (previously numbered §399-dd) (McKinney 2013); *see also* Press Release, *supra* note 19.

social security numbers in the first place.[21]

The amendments prohibit employers, excluding state and local government employers, from requiring an individual to disclose his or her social security number "for any purpose in connection with any activity," or "to refuse any service, privilege or right to an individual wholly or partly because such individual refuses to disclose or furnish such number."[22] However, the amendments contain several enumerated exceptions. For example, the law does not apply where: the individual consents to the acquisition; the number is expressly required by a federal, state, or local law or regulation; the number is to be used for internal verification or fraud investigation; or the number is requested for employment purposes.[23]

The amendments also prohibit employers from hiring an inmate for any position "that involves obtaining access to, collecting or processing [social security numbers] of other individuals."[24] For purposes of the law, an "inmate" is defined as any person confined to a correctional facility or local correctional facility as those terms are defined under New York's Correction Law.[25]

B. New York Makes Reforms to the Unemployment Insurance Law

On March 29, 2013, Governor Cuomo signed into law a number of key reforms to New York's Unemployment Insurance Law.[26] With the state's Unemployment Insurance Trust Fund ("Trust Fund") insolvent by nearly $3.5 billion, the new reforms are intended to increase revenue for the Trust Fund while purportedly saving money for employers.[27]

After October 1, 2013, employers who respond to NYDOL inquiries in an untimely or insufficient manner will not be relieved of charges to their unemployment insurance account, even if an

21. *See* N.Y. GEN. BUS. LAW § 399-ddd(2) (McKinney 2013); *see also* Press Release, *supra* note 19. Under the law, an SSN is defined as "the number issued by the federal social security administration, and any number derived from that number, such as the last four digits," but it does not include "any number that has been encrypted." *See id*. at 1; N.Y. GEN. BUS. LAW § 399-ddd (1) (previously numbered § 399-dd) (McKinney 2013).

22. N.Y. GEN. BUS. LAW § 399-ddd(2).

23. *See id.* § 399-ddd(3)(a)-(m) (for the full list of exemptions from law).

24. *Id.* at § 399-ddd(2)(g) (previously numbered § 399-dd).

25. *Id.* at § 399-ddd(1)(b) (previously numbered § 399-dd).

26. N.Y.S. 2607D, 236th Sess. (2013) (enacted).

27. Press Release, N.Y. State Governor Andrew M. Cuomo, Governor Cuomo Details $1.2 Billion in Savings Resulting from Major Reforms to Workers Compensation and Unemployment Insurance Included in Recently Enacted State Budget (April 8, 2013), *available at* http://www.governor.ny.gov/press/04082013-major-reforms-to-workers-comp-and-unemployment-insurance.

overpayment is made to a claimant.[28] Instead, any recovered overpayments will be placed into the general Trust Fund.[29] Also beginning October 1, claimants will be subject to a new penalty (15% penalty or $100 fine) for misstating information relating to their benefits.[30]

Several other changes went into effect on January 1, 2014. First, the wage base increased from $8,500 to $10,300 for 2014, and this base will continue to increase each year to a maximum of $13,000 in 2026.[31] After 2026, the wage base will be calculated at sixteen percent of New York's average annual wage at that time.[32] Other changes included eliminating the six lowest contribution rates for employers[33] and requiring certain claimants (those who exhaust benefits, who are disqualified for misconduct or for voluntarily resigning without good cause, or who decline a job offer) to earn ten times their benefit rate before being able to requalify for benefits.[34] Claimants who are not "actively seeking work" will also be ineligible for benefits.[35] Additionally, individuals receiving severance pay within thirty days after the employment relationship ends in an amount greater than the maximum benefit rate will not be eligible to collect unemployment insurance benefits until the severance pay is exhausted.[36] Unemployment benefits will also be reduced for those claimants who are collecting pension benefits from an employer where the employer contributed to the pension.[37]

Finally, effective October 6, 2014, the maximum weekly benefit will increase from $405 to $420 and will increase each year until 2026.[38] After 2026, the maximum benefit rate will be calculated at fifty

28. *See* N.Y.S. 2607D, 236th Sess. (2013) (enacted); N.Y. LAB. LAW § 597(d) (McKinney 2013). There is an exception, however, for failure to respond for NYSDOL errors, as well as federal and state declared disaster emergencies. *Id.*

29. *Id.*

30. N.Y. LAB. LAW § 594(4) (McKinney 2013).

31. *Id.* § 518.

32. *Id*.

33. N.Y. STATE DEP'T OF LABOR, FACT SHEET: UNEMPLOYMENT INSURANCE REFORM FOR EMPLOYERS (2013) [hereinafter FACT SHEET], *available at* http://labor.ny.gov/formsdocs/ui/P822.pdf. *See* N.Y. LAB. LAW § 581(2)(a) (McKinney 2013).

34. N.Y. LAB. LAW § 593(1)-(3). Previously, claimants only had to earn five times their benefit rate to re-qualify. N.Y.S. 2607D, 236th Sess. (2013) (enacted).

35. N.Y. LAB. LAW § 591(2).

36. *Id.* § 591(6); *see also* FACT SHEET, *supra note* 33.

37. N.Y. LAB. LAW § 591(6), 600 *see also* FACT SHEET, *supra note* 33.

38. N.Y. LAB. LAW § 590 (5)(a).

percent of New York State's average weekly wage.[39] The minimum weekly benefit will also rise from $64 to $100.[40]

C. New Child Performer Regulations Go into Effect

On February 19, 2013, the NYDOL adopted new "child performer" regulations.[41] The regulations took effect on April 1, 2013.[42]

These regulations place special obligations on entities employing child performers who reside or work in New York State, as well as the parents and guardians of those children.[43] Exceptions exist for certain live performances (other than motion picture films), as well as certain child performances in radio or television programs.[44]

Among other changes, the new regulations impose additional Child Performer Permit requirements, order that a responsible person be designated to monitor the safety of children under the age of sixteen, require employers to provide a nurse for infants, and create new trust account, education, safety instruction, and recordkeeping obligations.[45] The regulations also prohibit employers from employing children under fifteen-days-old and impose certain meal and break requirements on employers.[46] Finally, the regulations institute limitations on work hours for child performers based on the child's age and type of performance.[47]

D. Second Department Finds Employer Violating IRCA Still Entitled to Protection Under the Workers' Compensation Law from Claims of Employees and Third Parties

In *N.Y. Hospital Medical Center of Queens v. Microtech Contracting Corp.*, the Second Department held that employers who hire undocumented immigrants in violation of the federal Immigration Reform and Control Act of 1986 ("IRCA") are still protected under New York's Workers' Compensation Law ("WCL").[48] Section 11 of

39. *Id.*

40. *Id.*

41. *Child Performer Regulations*, N.Y. STATE DEP'T OF LABOR, http://labor.ny.gov/legal/child-performer-regulations.shtm (last visited March 30, 2014).

42. *Id*.

43. N.Y. COMP. CODES R. & REGS. tit. 12, §§ 186-1.2, 186-3.1(a)(b), 186-4.1(a)(b)(c) (2013).

44. *Id.* § 186-1.3(a)(1)-(4).

45. *Id.* §§ 186-3.1, 186-3.2, 186-3.5, 186-3.6(a), 186-4.6, 186-4.7, 186-7.2.

46. *Id.* §§ 186-6.1, 186-6.2. For example, employers must provide meal periods and at least ten minutes of rest for every four hours worked. *Id*. §§ 186-6.3, 186-6.4(a).

47. *Id.* §§ 186-1.3, 186-6.1, 186-6.2.

48. 98 A.D.3d 1096, 1101, 951 N.Y.S.2d 546, 551 (2d Dep't 2012).

the WCL generally bars personal injury claims against employers by their employees and precludes third-party claims against employers for contribution and indemnification except where an employee is "gravely injured" or the employer contracted to provide indemnification.[49]

The defendant in *N.Y. Hospital Medical Center of Queens*, Microtech Contracting Corp. ("Microtech"), allegedly hired two undocumented workers to perform work on the property of the plaintiff, the New York Hospital Medical Center of Queens ("New York Hospital").[50] The undocumented employees were injured while performing the work and Microtech provided them workers' compensation benefits.[51] Subsequently, the undocumented employees sued New York Hospital for damages relating to their injuries, which in turn caused New York Hospital to commence an action against Microtech seeking contribution and indemnification.[52] Microtech moved to dismiss the action on the ground that New York Hospital's claims were barred by WCL Section 11.[53] In opposition, New York Hospital argued that Microtech's violation of the IRCA should cause it to lose the protection of the WCL.[54] Microtech's motion to dismiss was granted at the supreme court level, and New York Hospital appealed to the Second Department.[55]

Noting that no case had yet addressed the issue, the Second Department found that "the IRCA does not preempt the applicable provisions of the Workers' Compensation Law and that the violations of the IRCA alleged here [did] not abrogate the protections provided to [Microtech] by Workers' Compensation Law § 11 from third-party claims for contribution and indemnification."[56] The court reasoned that "[t]he IRCA does not contain an explicit statement that Congress intended to preempt state laws such as New York's Workers' Compensation Law" and, "[t]o the contrary, the legislative history of IRCA shows that the Act was not intended 'to undermine or diminish in any way labor protections in existing law.'"[57] Accordingly, the Second

49. *See* N.Y. WORKERS' COMP. LAW § 11 (McKinney 2013).

50. *N.Y. Hosp. Med. Ctr. of Queens v. Microtech Contr. Corp.*, 98 A.D.3d 1096, 1096, 951 N.Y.S.2d 546, 548 (2d Dep't 2012).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id*. at 1098, 951 N.Y.S.2d at 549.

55. *N.Y. Hosp. Med. Ctr. of Queens*, 98 A.D.3d at 1096, 951 N.Y.S.2d at 548.

56. *Id*. at 1101, 951 N.Y.S.2d. at 551.

57. *Id*. at 1099, 951 N.Y.S.2d at 550 (quoting Balbuena v. IDR Realty LLC, 6 N.Y.3d 338, 359, 845 N.E.2d 1246, 1257, 812 N.Y.S.2d 416, 427 (2006)).

Department affirmed the lower court's dismissal.[58]

III. DEVELOPMENTS IMPACTING PUBLIC SECTOR EMPLOYMENT IN NEW YORK

A. New York Court of Appeals Mostly Upholds the Validity of the 2008 Wicks Law Amendments

The Wicks Law, dating back to 1912, requires public entities seeking bids on construction contracts to offer four separate contracts (general construction, plumbing, electrical, and HVAC) as opposed to one general contract that would allow a general contractor to subcontract out the plumbing, electrical, and HVAC work.[59] The law has long been controversial, and until 2008, it applied everywhere in New York State to contracts exceeding $50,000.[60]

In 2008, amendments to the Wicks Law raised this uniform $50,000 threshold to a three-tiered monetary threshold.[61] The amendments provide a $3 million threshold for the five counties in New York City, a $1.5 million threshold for Nassau, Suffolk, and Westchester Counties, and $500,000 in the other fifty-four counties.[62] The amendments also created Labor Law Section 222, which provides an exemption from the Wicks Law requirements when the project is covered by a qualifying Project Labor Agreement ("PLA") and the PLA requires that each contractor and subcontractor participate in apprenticeship training programs approved by the NYDOL.[63]

In *Empire State Chapter of Associated Builders & Contractors, Inc. v. Smith*, the plaintiffs, including Empire State Chapter of Associated Builders and Contractors, challenged the constitutionality of both the three-tiered threshold and various aspects of the apprenticeship requirements.[64] The Court of Appeals upheld the three-tiered threshold

58. *Id*. at 1101, 951 N.Y.S.2d at 551-52.

59. Empire State Chapter of Associated Builders & Contractors, Inc. v. Smith, 21 N.Y.3d 309, 313, 992 N.E.2d 1067, 1069, 970 N.Y.S.2d 724, 726 (2013).

60. *Id*. at 314, 992 N.E.2d at 1069, 970 N.Y.S.2d at 726.

61. Act of April 23, 2008, ch. 57, 2008 McKinney's Sess. Laws of N.Y. Part MM, §§ 1, 2-6, 14 (codified at N.Y. GEN. MUN. LAW § 101(1), (5) (McKinney 2014)).

62. *Id*.

63. N.Y. LAB. LAW § 222(1) (McKinney 2014) (defining a PLA as "a pre-hire collective bargaining agreement between a contractor and a bona fide building and construction trade labor organization establishing the labor organization as the collective bargaining representative for all persons who will perform work on a public project, and which provides that only contractors and subcontractors who sign a pre-negotiated agreement with the labor organization can perform project work").

64. 21 N.Y.3d at 314, 992 N.E.2d at 1069, 970 N.Y.S.2d at 726.

and rejected the plaintiff's argument that the 2008 amendments violated the Home Rule Section in Title IX and Section 2 of the New York State Constitution by unjustifiably favoring the eight counties given higher thresholds (i.e., by loosening Wicks Law restrictions to a greater extent for them than the other counties).[65]

The plaintiffs were slightly more successful on the constitutional challenges to the apprenticeship training requirements. The Court of Appeals refused to dismiss the plaintiffs' claims, as related to three of the out-of-state plaintiffs in this matter, finding that the language requiring apprentice training programs as approved by the NYDOL may potentially have the effect of excluding out-of-state contractors from bidding on certain New York contracts in violation of the Privileges and Immunities Clause and the Dormant Commerce Clause of the Federal Constitution.[66]

The decision also provided some relief to construction employers in New York by ruling that the apprenticeship training requirements imposed on contractors are limited only to those projects proceeding under PLAs.[67] Based on the unclear and broad language in Section 222, there had been some confusion among contractors as to whether the apprenticeship requirements applied to "any contract" exceeding the Wicks Law thresholds.[68]

B. New York Court of Appeals Distinguishes "Critical Evaluation" from "Formal Reprimand" for Public Employees Entitled to Due Process Rights

Generally, public employees must be provided the opportunity to a hearing before being issued a "formal reprimand."[69] However, the same due process protections do not apply where public employers issue "critical evaluations" aimed at identifying a minor breach of policy and encouraging an employer's compliance with the policy in the future.[70] In *D'Angelo v. Scopetta*, the Court of Appeals highlighted the distinction between a formal reprimand and critical evaluation.[71]

65. *Id*. at 319, 992 N.E.2d at 1073, 970 N.Y.S.2d at 730.

66. *Id*. at 321-22, 992 N.E.2d at 1074, 970 N.Y.S.2d at 731.

67. *Id*. at 320, 992 N.E.2d at 1073-74, 970 N.Y.S.2d at 730-31.

68. *Id*. at 321-22, 992 N.E.2d at 1074, 970 N.Y.S.2d at 732.

69. Holt v. Bd. of Educ. of Webutuck Cent. Sch. Dist., 52 N.Y.2d 625, 633, 422 N.E.2d 499, 503, 439 N.Y.S.2d 839, 843 (1981) (distinguishing between a "formal reprimand" and a "critical evaluation").

70. D'Angelo v. Scopetta, 19 N.Y.3d 663, 668, 978 N.E.2d 1241, 1244, 954 N.Y.S.2d 772, 775 (2012).

71. *Id*. at 667, 978 N.E.2d at 1243, 954 N.Y.S.2d at 774.

In *D'Angelo*, a firefighter was accused of yelling a racial epithet at another employee, and the employee filed a complaint with the fire department's Equal Employment Opportunity ("EEO") office in response.[72] After a two-year internal investigation, the department found that the firefighter had used the epithet, and it issued a final report summarizing its findings and recommendations. [73] This report was reviewed and approved by the Commissioner of the Fire Department.[74]

Consistent with this recommendation, the department's Assistant Commissioner sent the offending firefighter a letter stating that he had "exercised unprofessional conduct and made an offensive racial statement."[75] The letter further advised the firefighter to sign an attached Advisory Memorandum and notice that he would receive further EEO training at a future date.[76] The letter was placed in the firefighter's permanent EEO file, and the firefighter objected to the placement of the letter in his file without the opportunity for a hearing.[77]

In finding the letter to be a "formal reprimand," the Court of Appeals held that the determination that the firefighter directed a racial slur at another employee could not be considered a "minor breach" of the EEO policy but serious misconduct that could negatively impact the firefighter's eligibility for future promotion.[78] Additionally, contrary to an earlier Court of Appeals decision finding a letter issued and reviewed only by the employee's direct supervisor to be a "critical evaluation," the letter in *D'Angelo* was sent to the firefighter after a two-year formal investigation with approval from both the Assistant Commissioner and Commissioner of the Fire Department.[79] In light of these facts, the Court of Appeals found that the letter was a formal reprimand and could not be placed in the employee's personnel file without a hearing.[80]

C. Revisions to New York's Interest Arbitration Law

On June 24, 2013, Governor Andrew Cuomo signed legislation extending compulsory interest arbitration to resolve bargaining disputes

72. *Id*. at 666, 978 N.E.2d at 1242, 954 N.Y.S.2d at 773.

73. *Id*.

74. *Id*.

75. *D'Angelo*, 19 N.Y.3d at 666, 978 N.E.2d at 1243, 954 N.Y.S.2d at 774.

76. *Id.*

77. *Id.* at 666-67, 978 N.E.2d at 1243, 954 N.Y.S.2d at 774.

78. *Id.* at 669, 978 N.E.2d at 1244-45, 954 N.Y.S.2d at 776-77 (quoting *Holt*, 52 N.Y.2d at 633, 422 N.E.2d at 503, 439 N.Y.S.2d at 843).

79. *Id.* at 668-69, 978 N.E.2d at 1244, 954 N.Y.S.2d at 775 (quoting *Holt*, 52 N.Y.2d at 633, 422 N.E.2d at 503, 439 N.Y.S.2d at 843).

80. *D'Angelo*, 19 N.Y.3d at 670, 978 N.E.2d at 1245, 954 N.Y.S.2d at 776.

between municipalities and police officer and firefighter bargaining units for three more years, until July 1, 2016.[81] The existing compulsory arbitration procedures were set to expire on July 1, 2013.[82]

In an attempt to provide some relief to cash-strapped municipalities, the legislation amended the binding arbitration procedure to provide that in the case of a "fiscally eligible municipality", the "ability to pay" must be the leading factor in an arbitrator's award.[83] A local government is fiscally eligible if one of the following tests is met: (1) the local government's average full value property tax rate is above the seventy-fifth percentile for all municipalities in the state as averaged over five years; or (2) the local government's five-year average general fund balance equals less than five percent of its budget, as certified by the State Comptroller.[84]

For any such local government entering binding interest arbitration, the arbitration panel must give seventy percent of its weight and consideration to the local government's "ability to pay."[85] Arbitrators also must factor in the constraints and limitations imposed by the State's Property Tax Cap in issuing an award.[86]

To further assist municipalities, the legislation created a permanent Financial Restructuring Board for Local Governments ("Restructuring Board"), which is intended to "provide a meaningful, substantive avenue for fiscally eligible municipalities to reform and restructure and provide public services in a cost-effective manner."[87] The Restructuring Board, at the request of a "fiscally eligible municipality," is empowered to seek information; review government operations, finances, management practices, and the economic base; and make recommendations on reforming and restructuring the municipality's operations.[88] The Restructuring Board may make loans and issue grants to assist a municipality in implementing those recommendations.[89] The Restructuring Board will also be available as an alternative and voluntary process for unions and municipalities to resolve impasses in

81. 2013 N.Y. Sess. Laws News A-112 (legislative memorandum); N.Y. CIV. SERV. LAW § 209 (McKinney 2014) (showing amendment effective June 24, 2013).

82. 2013 N.Y. Sess. Laws News A-112 (legislative memorandum).

83. N.Y. CIV. SERV. LAW § 209(6)(e) (McKinney 2014).

84. *Id.* § 209(6)(c), (d).

85. *Id.* § 209(6)(e).

86. *Id.*

87. 2013 N.Y. Sess. Laws News A-111 (legislative memorandum).

88. *Id.* at A-112.

89. *Id.*

collective negotiations.[90]

IV. NEW YORK CITY DEVELOPMENTS

A. New York City Council Passes the Unemployment Discrimination Act

On March 13, 2013, overriding Mayor Michael Bloomberg's veto, the New York City Council passed a law amending the New York City Human Rights Law ("NYCHRL") to prohibit employers from discriminating against job applicants based on their employment status.[91] Effective as of June 13, 2013, employers with four or more employees are prohibited from basing an employment decision on an applicant's unemployment status, or publishing in print, or in any other medium, a job advertisement that provides that: (1) being currently employed is a requirement or qualification for the job; or (2) that an employer will not consider individuals for employment because they are unemployed.[92]

However, there are numerous exceptions to the law. Employers are not prohibited from considering an applicant's unemployment if there is a "substantially job-related reason for doing so" or from inquiring into the circumstances surrounding an applicant's separation from prior employment.[93] Similarly, employers are not prohibited from considering or advertising for any substantially job-related qualification, including a current valid professional or occupational license, a certificate, registration, permit, minimum level of education, minimum level of training, or minimum level of experience requirement.[94] Finally, employers are not prohibited from determining that only applicants who are currently employed by the employer will be considered for employment or from giving priority to those individuals.[95]

Individuals who believe they have been discriminated against have a private right of action.[96] In addition, failure to comply with the law may result in criminal or financial penalties from the New York City Commission on Human Rights.[97]

90. *Id.*
91. N.Y.C., N.Y. Local Law No. 14 (Mar. 13, 2013).
92. N.Y.C., N.Y. ADMIN. CODE § 8-107(21) (2013).
93. *Id.* § 8-107(21)(b)(1).
94. *Id.* § 8-107(21)(b)(2)-(3).
95. *Id.* § 8-107(21)(b)(4)(a).
96. *Id.* § 8-107(21)(c)(2), (e).
97. N.Y.C., N.Y. ADMIN. CODE § 8-107(21).

B. New York City Council Passes the Earned Sick Time Act

On June 26, 2013, again overriding Mayor Michael Bloomberg's veto, the New York City Council passed the Earned Sick Time Act, amending the New York Administrative Code to require certain private sector employers to offer paid sick leave.[98] The effective date of the law was specified as April 1, 2014.[99]

The Sick Time Act provides that an eligible employee will earn at least one hour of sick leave for every thirty hours worked, up to a maximum of forty hours of paid sick leave per calendar year.[100] Eligible employees include full-time and part-time employees, but the Sick Time Act excluded independent contractors, work study students, public sector employees, and certain hourly professional employees.[101] Employers are not required to permit employees to use accrued sick leave until 120 calendar days after the employee begins work.[102] However, employers may provide employees with a faster accrual of sick leave than what is required by the law and may permit employees to use sick leave within their first 120 calendar days of employment.[103]

Accrued sick leave may be used for absences due to: (1) the employee's own health condition; (2) the employee's need to care for a spouse, domestic partner, child, parent, or the child or parent of a spouse or domestic partner; or (3) the closure of the employee's place of business due to a public health emergency or the employee's need to care for a child whose school or child care provider has been closed due to a public health emergency.[104] An employer may require documentation that sick leave was used for one of these purposes only if the absence is for more than three consecutive workdays.[105] Employers are also prohibited from retaliating against employees for their use of sick leave or for filing a complaint alleging a violation of the Sick Time Act.[106]

98. N.Y.C., N.Y. Local Law No. 46 (June 26, 2013) (codified at N.Y.C., N.Y. ADMIN. CODE § 20-911 (2014)).

99. Although amendments were made that significantly expanded the provisions of the Earned Sick Time Act, those amendments were made well after the *Survey* year, and therefore, the law as it was originally enacted on June 26, 2013, is described below. *See* N.Y.C., N.Y. Bill Int. 0001-2014 (Enacted March 20, 2014).

100. N.Y.C., N.Y. ADMIN. CODE § 20-913(b).

101. N.Y.C., N.Y. ADMIN. CODE § 20-912(f) (2013); N.Y.C. ADMIN. CODE § 20-913(f).

102. N.Y.C., N.Y. ADMIN. CODE § 20-913(d)(1).

103. *Id.* § 20-922(a).

104. *Id.* § 20-914(a).

105. *Id.* § 20-914(c).

106. *Id.* § 20-918.

The law was intended to be phased in over a two-year period. Effective April 1, 2014, private sector employers in New York City with at least twenty employees would have been required to provide five paid sick days per year to their employees.[107] Effective October 1, 2015, private sector employers in New York City with at least fifteen employees would have been required to provide five paid sick days per year to their employees.[108] However, the law did provide that these implementation dates could be postponed if economic indicators, based on a financial index maintained by the Federal Reserve Bank of New York, did not meet certain conditions.[109]

C. Second Circuit Clarifies that NYCHRL Claims Must Be Analyzed Separately from Federal and State Discrimination Claims

In *Mihalik v. Credit Agricole Cheuvreux North America*, the Second Circuit clarified that courts must analyze NYCHRL claims separate and independent from discrimination claims under federal or state law, and it specifically set forth considerations for district courts in analyzing such claims.[110] As part of these guidelines, the court clarified that "the federal severe or pervasive standard of liability no longer applies to NYCHRL claims [except that] the severity or pervasiveness of conduct" may be relevant to damages.[111] Additionally, "the totality of the circumstances must be considered" in evaluating a claim, and "even a single comment may be actionable in the proper context."[112]

The court further held that to establish a gender discrimination claim under the NYCHRL, a plaintiff need only show that he or she has been treated "less well than other employees" because of his or her gender and that such treatment was "neither petty nor trivial."[113] Such "differential treatment [is] actionable even if it does not result in an employee's discharge."[114]

107. N.Y.C., N.Y. ADMIN. CODE § 20-913(a)(3), (b) (citing , N.Y.C., N.Y. Local Law No. 46, § 7(1)(a) (June 26, 2013)).

108. *Id.* § 20-913(a)(1), (b) (citing N.Y.C., N.Y. Local Law No. 46, § 7(1)(b)).

109. N.Y.C., N.Y. Local Law No. 46, § 7 (1)-(4).

110. 715 F.3d 102, 112-13 (2d Cir. 2013).

111. *Id.* at 113 *(citations omitted).*

112. *Id.*

113. *Id.* (citing Williams v. N.Y.C. Housing Auth., 61 A.D.3d 62, 78, 872 N.Y.S.2d 27, 39 (1st Dep't 2009)).

114. *Id.* at 114.

V. DEVELOPMENTS UNDER TITLE VII AND OTHER FEDERAL DISCRIMINATION STATUTES

A. U.S. Supreme Court Delineates the Definition and Scope of a "Supervisor" for Purposes of the Title VII Faragher-Ellerth *Defense*

In *Vance v. Ball State University*, the U.S. Supreme Court addressed the appropriate definition and scope of a "supervisor" under Title VII's *Faragher-Ellerth* defense.[115] Determining whether an alleged harasser is a supervisor is critical in all harassment cases because different standards will apply depending on the status of the perpetrator.

Under Title VII, an employer can be held liable for harassment perpetrated by a non-supervisory employee "only if it was negligent in controlling working conditions."[116] In contrast, if harassment is perpetrated by a "supervisor," and the harassment results in a tangible adverse employment action, the employer is held strictly liable.[117] However, when the harassment is perpetrated by a supervisor and there is no tangible adverse employment action, the employer may avoid liability if it establishes "that (1) it exercised reasonable care to prevent and correct any harassing behavior, and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided."[118]

In a five-to-four opinion, the U.S. Supreme Court adopted a narrow definition of supervisor, holding that:

> an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.*, to effect a "significant change in employment status, such as hiring firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[119]

The Court clarified that "[t]he ability to direct another employee's tasks is simply not sufficient" to establish an individual as a supervisor for purposes of Title VII liability.[120] According to the Court, what makes a person a supervisor is the ability to function as an agent of the employer and "to make economic decisions affecting other employees

115. 133 S. Ct. 2434, 2439 (2013).

116. *Id.*

117. *Id.*

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

119. *Id.* at 2443 (quoting *Ellerth*, 524 U.S. at 761).

120. *Vance*, 133 S. Ct. at 2448.

under his or her control."[121]

In adopting the above definition of supervisor, the majority explicitly rejected the definition of "supervisor" set forth by the Equal Employment Opportunity Commission ("EEOC") in its Enforcement Guidance, which states that "in order to be classified as a supervisor, [the individual] must wield authority 'of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment.'"[122] The Court rejected the EEOC's definition as "a study in ambiguity" and declared the "tangible employment action" standard to be more workable and easily applied.[123]

B. Second Circuit Finds Actionable Same-Sex Harassment Between Two Heterosexual Males

In *Barrows v. Seneca Foods Corp*., the Second Circuit held that a heterosexual male may bring a sexual harassment claim for unwanted groping and suggestive remarks made by another heterosexual male.[124] In *Barrows*, the employee alleged that one of his former male supervisors grabbed his genitals on one occasion and hit the employee in the same place on other occasions, in addition to calling him names like "faggot" and making suggestive remarks about oral sex.[125] The employee alleged that this supervisor treated some other male employees in a similar fashion, but that he never engaged in this type of conduct with women.[126]

Despite the supervisor's conduct, the district court found that the employee had failed to make a claim of gender discrimination because the evidence showed that the employee and the supervisor were both straight males, and there was no evidence that the supervisor believed the employee was homosexual.[127]

The Second Circuit reversed the districts court's decision, holding that there is no categorical bar on same-sex harassment claims.[128] The court reasoned that a jury could find that "direct comparative evidence show[ed] that the [former boss] treated women better than men and that,

121. *Id.* (citing *Ellerth*, 524 U.S. at 762).

122. *Id.* at 2449 (citing *Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors*, EEOC (June 18, 1999), http://www.eeoc.gov/policy/docs/harassment.html).

123. *Id.* at 2444, 2449, 2454.

124. 512 F. App'x 115, 116 (2d Cir. 2013).

125. *Id.*

126. *Id*. at 117-118.

127. *Id*. at 117; *see* Barrows v. Seneca Foods, Case No. 09-CV-6554 CJS, 2012 U.S. Dist. LEXIS 10992, at *22-24 (W.D.N.Y. Jan. 30, 2012).

128. *Barrows*, 512 F. App'x at 117.

therefore, men were 'exposed to [a] disadvantageous term[] or condition[] of employment to which [women] were not.'"[129] The Second Circuit held that this was true regardless of the alleged sexual orientation of those involved, and found that "a reasonable jury could also consider the fact that some of [the supervisor's] vulgar comments were sex-specific and that he frequently touched male-specific (and sex-related) body parts."[130]

C. Second Circuit Confirms an Employer May Be Liable for Harassment by a Non-Employee if the Employer Was Negligent

In *Summa v. Hofstra University*, the Second Circuit ruled that employers can be held liable for the actions of non-employees under Title VII.[131] In doing so, the Second Circuit joined the majority of other appellate courts in adopting the EEOC's rules for imputing liability to the employer for harassment by non-employees.[132] These rules are based on the same standards for non-supervisory co-workers, with the qualification that "'the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees'" will be considered.[133]

Specifically, the Second Circuit stated that an employer will only be held liable if it is found negligent, and "the plaintiff must demonstrate that the employer 'failed to provide a reasonable avenue for complaint or that it knew, or in the exercise of reasonable care should have known, about the harassment yet failed to take appropriate remedial action.'"[134] In determining the "appropriateness" of the employer's response, courts will look to "whether the response was 'immediate or timely and appropriate in light of the circumstances, particularly the level of control and legal responsibility [the employer] has with respect to the [employee's] behavior.'"[135]

In *Summa*, a former graduate student and football team manager brought a claim of sexual harassment after she became the target of an insulting Facebook page and lewd behavior from members of the football team on a bus ride returning from a game.[136] The lower court dismissed the former student's claim, concluding that the school and its

129. *Id.* (citing Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80-81 (1998)).
130. *Id.* at 118.
131. 708 F.3d 115, 124 (2d Cir. 2013).
132. *Id*.
133. *Id*. (citing 29 C.F.R. § 1604.11(e) (2014)).
134. *Id.* (citing Duch v. Jakubek, 588 F.3d 757, 762 (2d Cir. 2009)).
135. *Id.* (citing Crist v. Focus Homes, Inc., 122 F.3d 1107, 1111 (8th Cir. 1997)).
136. *Summa*, 708 F.3d at 124.

personnel could not be held liable for the student players' alleged harassment since the University took the necessary "remedial action."[137]

Applying the standard set forth above, the Second Circuit affirmed, finding that the University could not be held liable because: (1) the University responded quickly to the incidents of harassment; (2) the football player who engaged in particularly egregious conduct was kicked off the team; and (3) the University had the entire athletic staff undergo sexual harassment training.[138]

D. Survey Released on Discrimination and Retaliation Claims in the Northern and Western Districts of New York

A recent employment discrimination study analyzing cases from the Western and Northern Districts of New York found that from 2007-2011, the most commonly litigated claims were race-based claims, with disability claims placing second.[139] However, the study noted a recent shift in employment discrimination claims, finding disability and generally classified employment discrimination claims (which include retaliation, religion and national origin claims, among others) were on the rise, while claims based on sex, age and race were declining.[140]

The study also noted a small increase in cases disposed of before trial by substantive motion and a continued decline in the overall number of cases going to trial.[141] For those rare employment discrimination cases making it to trial, the study found that defendants prevailed in a majority of cases—fifty-seven percent of the time in jury trials and eighty-seven-and-one-half percent in bench trials.[142]

The study also found: the average jury award was slightly under $295,000 and attorneys' fees awards averaged out at $114,804; the length of jury trials from filing to verdict significantly increased from 2007-2011 to about four years (compared to 2.21 years from 1997-2000); and the length of bench trials increased to 6.6 years during the same period (compared to just under two years from the 1997-2001 period).[143]

137. *Id.* at 125.

138. *Id*.

139. BOND, SCHOENECK & KING, PLLC, 2012 STUDY OF EMPLOYMENT DISCRIMINATION LITIGATION IN THE NORTHERN AND WESTERN DISTRICTS OF NEW YORK 11 (2013), *available at* http://www.bsk.com/site/files/2012_study_of_employment_discrimination_litigation.pdf.

140. *Id*. at 16.

141. *Id*.

142. *Id*. at 5-7.

143. *Id*. at 9, 15 (given the relatively small number of bench trials, however, we note the possibility that one or two outlier cases could skew these numbers).

E. The EEOC Releases Its Strategic Enforcement Plan

From a study of past discrimination to a look into the future, on December 17, 2012, the EEOC approved its Strategic Enforcement Plan ("Strategic Plan") for Fiscal Years 2013-2016.[144] The Strategic Plan's stated purpose is to "focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace."[145] For employers, it provides useful guidance on where the EEOC is likely to focus its investigatory attention and resources.

The Strategic Plan identifies six national priorities: (1) eliminating barriers in recruitment and hiring by taking a look at hiring or recruiting practices that have the effect of channeling or steering individuals into jobs due to their status in a particular group, restrictive application practices, and the use of pre-employment screening tools; (2) protecting immigrant, migrant, and other vulnerable workers; (3) addressing emerging and developing issues such as the revisions under the Americans with Disability Amendments Act, lesbian, gay, bisexual and transgender discrimination issues, and pregnancy discrimination; (4) enforcing equal pay laws; (5) investigating retaliatory actions by employers and the failure to retain records required by EEOC regulations and settlement agreements; and (6) preventing harassment through systemic enforcement and targeted education and outreach.[146]

VI. NATIONAL LABOR RELATIONS BOARD DEVELOPMENTS

A. The Board Issues Its First Decisions Addressing Social Media Policies and Discipline for Social Media Activity

After three social media reports issued by the National Labor Relations Board's ("NLRB" or the "Board") Acting General Counsel analyzing the lawfulness of various provisions in social media policies and the lawfulness of imposing discipline for employees' social media activity,[147] on September 7, 2012, the Board issued its first social media

144. EEOC, STRATEGIC ENFORCEMENT PLAN FY 2013-2016 (2012), *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm.

145. *Id.* at 1.

146. *Id.*

147. *See generally* Memorandum from the Office of the Gen. Counsel Representative Div. of Operations-Mgmt., OM 11-74, Report of the Acting Gen. Counsel Concerning Social Media Cases (Aug. 18, 2011); Memorandum from the Office of the Gen. Counsel Representative Div. of Operations-Mgmt., OM 12-31, Report of the Acting Gen. Counsel Concerning Social Media Cases (Jan. 24, 2012); Memorandum from the Office of the Gen.

decision in *Costco Wholesale Corp*.[148] In *Costco Wholesale Corp.*, the Board analyzed the employer's technology policy, and this decision, and other decisions issued by the Board during the *Survey* year, highlight the difficulties employers face in drafting lawful social media polices. Additionally, the Board's initial decisions regarding discipline for an employee's social media activity indicate that the Board will apply established Board law to an employee's social media activity, and social media will therefore be entitled to the same or similar protections as in-person conversations.

1. Decisions Involving Social Media Policies

By way of background, Section 7 of the National Labor Relations Act ("NLRA" or the "Act") enables employees to organize and join unions and to participate "in other concerted activities for the purpose of collective bargaining or *other mutual aid or protection*."[149] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of their" guaranteed Section 7 rights.[150] The right to engage in concerted activities for "mutual aid or protection" has been broadly interpreted to protect employees seeking "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employer-employee relationship."[151] The conditions which employees may seek to improve are expansive, including "wages, benefits, working hours, the physical environment, dress codes, assignments, responsibilities, and the like."[152] Accordingly, where a company policy or rule explicitly restricts Section 7 rights, or employees would reasonably construe the language to prohibit Section 7 activity, the work rule will violate Section 8(a)(1).[153]

Applying this framework in *Costco Wholesale Corp.*, the Board analyzed the company's technology policy and found a particular provision unlawfully overbroad because employees would reasonably construe the rule as prohibiting Section 7 activity.[154] The provision warned that employees who make:

Counsel Representative Div. of Operations-Mgmt., OM 12-59, Report of the Acting Gen. Counsel Concerning Social Media Cases (May 30, 2012).

148. 358 N.L.R.B. No. 106, 2012-2013 NLRB Dec. (CCH) ¶ 15,602 (Sept. 7, 2012).

149. 29 U.S.C. § 157 (2014) (emphasis added).

150. 29 U.S.C. § 158(a)(1) (2014).

151. Eastex, Inc. v. N.L.R.B., 437 U.S. 556, 565 (1978).

152. New River Indus., Inc. v. N.L.R.B., 945 F.2d 1290, 1294 (4th Cir. 1991).

153. *See* Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646 (2004).

154. *Id*.

> statements posted electronically (such as [to] online message boards or discussion groups) that damage the company, defame any individual or damage any person's reputation . . . may be subject to discipline, up to and including termination of employment.[155]

In *Karl Knauz Motors, Inc.*, the Board also found the following "courtesy rule" unlawfully overbroad:

> Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.[156]

The Board found that the employer car dealership's "courtesy" rule violated the NLRA because employees could "reasonably construe its broad prohibition against 'disrespectful' conduct and 'language which injures the image or reputation of the Dealership' as encompassing Section 7 activity."[157]

The Board has also found the following provisions unlawful:

> (i) "You may not make disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates . . . .";[158]
>
> (ii) "you must . . . obtain . . . written authorization . . . before engaging in public communications regarding EchoStar . . . ";[159] and
>
> (iii) "[e]mployees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record."[160]

A policy banning "negative electronic discussions during 'Company Time'" was also declared overbroad because it failed to convey that such discussions may occur during breaks and other non-working hours at the company's facility.[161] The Board did find, however, that an employer may prohibit the use of social media on company resources and/or during "working time" as long it is clear to employees that they may use their own resources during non-working

155. *Id*.
156. 358 N.L.R.B. No. 164, 2012-2013 NLRB Dec. (CCH) ¶ 15,620 (Sept. 28, 2012).
157. *Id.*
158. Echostar Techs., LLC, 2012 NLRB Lexis 627, at *35 (Sept. 20, 2012).
159. *Id.* at *51, 58-60, 89.
160. DirecTV U.S. DirectTV Holdings, LLC, 359 N.L.R.B. No. 54, 2012-2013 Dec. (CCH) ¶ 15,671 (N.L.R.B. Jan. 25, 2013).
161. Dish Network Corp., 359 N.L.R.B. No. 108, 2012-2013 Dec. (CCH) ¶ 15,695 (N.L.R.B. Apr. 30, 2013).

time to engage in social media activity.[162]

2. Disciplining Employees for Social Media Activity

The Board also issued its first decisions addressing employee discipline for social media activity during the *Survey* year. The Board's initial decisions indicate that the Board will evaluate discipline for social media activity consistent with disciplinary decisions for conduct arising outside the social media context.[163] Such decisions first analyze whether the employee(s) engaged in "protected" and "concerted" activity under the NLRA.[164] If yes, then the Board analyzes whether the employee(s) lost the protection of the Act by engaging in (1) "opprobrious" conduct under the standard set forth in *Atlantic Steel*, and/or (2) "disparaging or disloyal" conduct sufficient to lose the protection of the Act.[165]

Applying this framework in its first social media discipline decision, the Board upheld the termination of a car salesman for posting photographs and commentary relating to an incident at the car dealership when a customer's thirteen-year-old sat in the driver's seat of the vehicle and ended up driving the vehicle into a shallow pond.[166] The photo included the caption "[t]his is your car: [t]his is your car on drugs."[167] The Board found that the postings were not protected or concerted because the postings were made as "a lark without any discussion with any other employee of the [dealership], and [they] had no connection to . . . the employees' terms and conditions of employment."[168] Because the Board found the salesman had lawfully been terminated for his vehicle-in-the pond postings, it refused to reach the question of whether additional postings the employee had made relating to the employer's serving of hot dogs at a luxury car event (where concerns about the food were previously raised with management, and the food and drink served could potentially impact the employee's commissions) constituted protected and concerted

162. Echostar Techs., LLC, 2012 NLRB Lexis 627, at *43, 89 (Sept. 20, 2012).

163. *See generally.*, Design Tech. Group, LLC, 359 N.L.R.B. No. 96, 2012-2013 Dec. (CCH) ¶ 15,687 (N.L.R.B. Apr. 19, 2013); Karl Knauz Motors, 358 N.L.R.B. No. 164, 2012-2013 Dec. (CCH) ¶ 15,620 (N.L.R.B. Sept. 28, 2012); Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37, 2012-2013 Dec. (CCH) ¶ 15, 656 (N.L.R.B. Dec. 14, 2012).

164. *Id.*

165. *Id.*; *see also* Atl. Steel Co., 245 N.L.R.B. 814, 816 (1979); *see also* N.L.R.B. v. Local Union No. 1229, 346 U.S. 464, 472 (1953).

166. Karl Knauz Motors, 358 N.L.R.B. No. 164, 2012-2013 Dec. (CCH) ¶ 15,620 (N.L.R.B. Sept. 28, 2012).

167. *Id.*

168. *Id.*

activity.[169]

In *Design Technology Group LLC*, the Board confirmed what was a common theme in the Acting General Counsel's memoranda: if an employee makes a complaint on social media that in any way relates to his or her working conditions, and other co-workers respond, those complaints will generally be protected and concerted, and an employer is likely to violate the NLRA by disciplining employees for their posts.[170] In *Design Technology Group LLC*, employees had made in-person complaints to their manager that the stores closed later than other stores in the area and employees felt unsafe leaving at night.[171] In addition to making complaints in person, employees also made complaints on a Facebook thread, including a post stating:

> [T]omorrow I'm bringing a California Worker's Rights book to work. My mom works for a law firm that specializes in labor law and BOY will you be surprised by all the crap that's going on that's in violation 8[sic] see you tomorrow![172]

The Facebook thread also included statements that the Board found to be unprotected "venting" that were unrelated to working conditions (such as "Bettie Page would roll over in her grave"), however, the Board ultimately concluded that the posts were part of a collective effort to change store hours based on safety concerns and thus related to terms and conditions of employment.[173] It also found that the posts were not so opprobrious or disloyal so as to lose the protection of the NLRA.[174] The Board, therefore, found that the employer committed an unfair labor practice by terminating the employees who had posted on the thread and ordered that the employees be reinstated with back pay.[175]

These cases indicate that discipline for social media activity will continue to be a major enforcement target for the Board and employers must therefore be careful in monitoring and disciplining employees for such activity.

169. *Id.*

170. 359 N.L.R.B. No. 96, 2012-2013 Dec. (CCH) ¶ 15,687 (N.L.R.B. Apr. 19, 2013).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. Design Tech. Groups, LLC, 359 N.L.R.B. No. 96, 2012-2013 Dec. (CCH) ¶ 15,687 (N.L.R.B. Apr. 19, 2013).

B. The Board Strikes Down an Employer's Confidentiality Rule for Internal Investigations

On July 30, 2012, the Board issued a controversial decision in *Banner Health System*, finding an employer's policy of asking employees not to discuss ongoing internal investigations violated the NLRA.[176] Specifically, the Board found that such an instruction "viewed in context, had a reasonable tendency to coerce employees, and so constituted an unlawful restraint of Section 7 rights."[177] An Administrative Law Judge ("ALJ") had previously found that the employer's practice was lawful given its legitimate business justification of maintaining an investigation's integrity.[178] The NLRB, however, reversed the decision, finding that the employer's "generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights." [179]

The NLRB advised that an employer must consider a number of individualized factors before requiring confidentiality, such as whether: (1) there are witnesses in need of protection; (2) evidence is in danger of being destroyed; (3) testimony is in danger of being fabricated; or (4) there is a need to prevent a cover-up.[180] According to the Board, the hospital's blanket approach of requiring confidentiality in every investigation clearly failed to meet this fact-specific standard.[181]

Relying on the factors set forth in the *Banner Health* decision, the NLRB's Office of General Counsel ("OGC") issued an advice memorandum finding an employer's blanket policy precluding employees from "disclosing information about ongoing investigations into employee misconduct" to be unlawful.[182] While the application of *Banner Health* in the memorandum is straightforward and expected, the memorandum is particularly useful for employers because the OGC states that the employer could have lawfully advised its employees that:

> [The Employer] may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our

176. 358 N.L.R.B. No. 93, 2012-2013 Dec. (CCH) ¶15,598 (N.L.R.B. July 30, 2012).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* (citing Hyundai Am. Shipping Agency, 357 N.L.RB No. 80, 2010-2011 Dec. (CCH) ¶15,482 (N.L.R.B. Aug. 26, 2011)).

181. Banner Health Sys., 358 N.L.R.B. No. 93, 2012-2013 Dec. (CCH) ¶ 15,598 (N.L.R.B. July 30, 2012).

182. N.L.R.B., OFFICE OF THE GENERAL COUNSEL, CASE NO. 30-CA-089350, ADVICE MEMORANDUM RE: VERSO PAPER 1 (Jan. 29, 2013), *available at* http://www.nlrb.gov/cases-decisions/advice-memos.

> role in it in strict confidence. If [the Employer] reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.[183]

Although the OGC's advice memorandum is not binding precedent, it provides useful guidance on what the Board is likely to consider a lawful confidentiality rule.

C. Two Circuit Courts Find the Board's Notice-Posting Rule to Be Invalid

As reported in last year's *Survey*, on August 30, 2011, the NLRB issued a final rule requiring private sector employers to post a notice advising employees of their right to join a union and of their other rights under the NLRA.[184] The rule was met with a number of legal challenges.[185] On May 7, 2013, the U.S. Court of Appeals for the D.C. Circuit held that the posting rule was invalid because the enforcement mechanisms imposed by the rule were unlawful.[186] Subsequently, on June 14, 2013, the U.S. Court of Appeals for the Fourth Circuit also struck down the rule on the grounds that the NLRB had exceeded its rulemaking authority.[187] Thus, private employers are under no obligation to post such notices unless the Board successfully appeals these two decisions or engages in future rulemaking.[188]

D. NLRB Overturns Fifty Years of Precedent Relating to the Survival of Dues-Checkoff Provisions After Contract Expiration

On December 12, 2012, the NLRB overturned fifty years of precedent by finding that employers were obligated to honor dues-checkoff provisions (a provision requiring the employer to deduct and remit union dues from an employee's paycheck) after the parties'

183. *Id.* at 3 n.7.

184. Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 168 (Aug. 30, 2011).

185. *See* Kerry W. Langan & Katherine Ritts Schafer, *Labor and Employment Law, 2011-2012 Survey of New York Law*, 63 SYRACUSE L. REV. 829, 850-51 (2013).

186. Nat'l Ass'n of Mfrs. v. N.L.R.B., 717 F.3d 947, 950 (D.C. Cir. 2013).

187. Chamber of Commerce of the U.S. v. N.L.R.B., 721 F.3d 152, 154 (4th Cir. 2013).

188. Although it was predicted that the Board would seek U.S. Supreme Court review of the two Court of Appeals decisions, the NLRB announced on January 6, 2014 (well after the *Survey* year) that it would not be seeking review. *See* N.L.R.B., Office of Public Affairs, The NLRB's Notice Posting Rule (January 6, 2014) *available at* http://www.nlrb.gov/news-outreach/news-story/nlrbs-notice-posting-rule.

collective bargaining agreement ("CBA") had expired.[189] The decision overturns the longstanding rule in *Bethlehem Steel Co.* that an employer is not obligated to recognize a dues-checkoff provision after contract expiration.[190] By way of background, in *Bethlehem Steel Co.*, the Board reasoned that section 8(a)(3) of the NLRA, which permits employers and unions to make an "agreement" to require union membership as a condition of employment, means that parties cannot enforce a union security provision after the CBA containing such a provision has expired.[191] The Board further reasoned that because dues-checkoff provisions are tied to and intended to implement union security provisions, an employer's obligation to continue deducting union dues from employees' pay checks also ends upon the expiration of the CBA.[192]

In *WKYC-TV, Inc.*, as is common, the employer's CBA contained both a dues-checkoff provision and a union-security clause.[193] After the contract expired, the employer refused to honor the dues-checkoff provision.[194] Relying on *Bethlehem Steel*, an ALJ found the employer acted lawfully.[195] However, on appeal, the Board explicitly overturned *Bethlehem Steel*, holding that the NLRA requires employers to honor dues-checkoff arrangements post-contract expiration.[196]

In overturning *Bethlehem Steel*, the Board explained that a dues-checkoff provision is a mandatory bargaining subject similar to wages, and there is nothing in federal labor law or policy to suggest that such provisions should be treated less favorably than other terms and conditions of employment that cannot be unilaterally changed without bargaining in good faith.[197] The Board also attacked what it viewed as *Bethlehem Steel's* "flawed" reasoning "that union security agreements and dues-checkoff arrangements are so similar or interdependent that they must be treated alike . . . ."[198] The Board explained that dues-

189. WKYC-TV, Inc., 359 N.L.R.B. No. 30, 2012-2013 Dec. (CCH) ¶ 15,653 (N.L.R.B. Dec. 12, 2012).

190. 136 N.L.R.B. No. 1500, 1502, 1962 Dec. (CCH) ¶ 11,163 (N.L.R.B. 1962), *remanded on other grounds sub nom.*, Marine & Shipbuilding Workers v. N.L.R.B., 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964).

191. *Id.*

192. *Id.*

193. WKYC-TV, Inc., 359 N.L.R.B. No. 30, 2012-2013 Dec. (CCH) ¶ 15,653 (N.L.R.B. Dec. 12, 2012).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. WKYC-TV, Inc., 359 N.L.R.B. No. 30, 2012-2013 Dec. (CCH) ¶ 15,653 (N.L.R.B. Dec. 12, 2012).

checkoff and union security arrangements "can, and often do, exist independently of one another."[199]

E. NLRB Overturns Longstanding Precedent and Finds "Witness Statements" Received During Investigations No Longer Protected from Disclosure

For nearly thirty-five years, employers in pre-arbitration discovery with a union have not been required to disclose "witness statements" obtained during internal investigations.[200] Since 1978, the Board had consistently applied a blanket exemption from disclosure for witness statements obtained during internal investigations of employee misconduct, reasoning that a blanket exemption is necessary to avoid coercion and intimidation, and to encourage cooperation in internal investigations.[201]

However, in *Piedmont Gardens*, the Board explicitly rejected this blanket-exemption rule, finding its logic "flawed."[202] In its place, the Board held that the production of witness statements should be subject to the same standard as other union information requests and that any attempts to withhold disclosure must be analyzed using the test developed by the U.S. Supreme Court in *Detroit Edison Co. v. NLRB*.[203] Under this test, where requested witness statements may contain relevant information, an employer may refuse to produce them only if it can show that a legitimate and substantial confidentiality interest outweighs the union's need for the information.[204] To establish a valid confidentiality defense, the employer also must raise its concerns to the union in a "timely manner" and offer an accommodation regarding the information requested before refusing to disclose the statement.[205]

F. The Validity of Hundreds of NLRB Decisions Remains in Question

As the above sections indicate, the aggressively pro-union Board has made significant changes to longstanding and well-established Board law. However, the validity of a number of these decisions is in question after a January 25, 2013, decision by the U.S. Court of Appeals

199. *Id*.

200. Anheuser-Busch, Inc., 237 N.L.R.B. 982, 984 (1978) (quoting N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 236 (1978)).

201. *Id.*; *see e.g.*, Fleming Cos., Inc., 332 N.L.R.B. 1086, 1087 (2000).

202. Am. Baptist Homes of the West d/b/a Piedmont Gardens, 359 N.L.R.B. No. 46, 2012 NLRB LEXIS 846, at *9 (Dec. 15, 2012).

203. *Id.* (citing Detroit Edison Co. v. N.L.R.B., 440 U.S. 301 (1979)).

204. *Id.* at *10.

205. *Id.* at *19-20.

for the D.C. Circuit.[206] In *Noel Canning*, the D.C. Circuit Court of Appeals invalidated three January 4, 2012, "recess appointments" President Obama had made to fill vacancies on the Board.[207]

The court invalidated President Obama's appointments as unconstitutional, finding that the Senate was not technically in recess at the time the appointments were made.[208] On May 16, 2013, the Third Circuit Court of Appeals similarly held the recess appointments to be invalid.[209] On June 24, 2013, the U.S. Supreme Court accepted review of the D.C. Circuit Court's *Noel Canning* decision.[210]

The U.S. Supreme Court's decision could potentially invalidate hundreds of decisions issued by the NLRB that were issued without a valid quorum of at least three members. The ruling could invalidate decisions dating back to at least January 4, 2012. Depending on the scope of the ruling, there is also a potential that those NLRB decisions issued from August 27, 2011, through January 3, 2012, could be invalidated if it is found that Member Craig Becker was also an invalid recess appointee.

G. NLRB Office of the General Counsel Provides Guidance on Permissible At-Will Employment Provisions

A well-publicized ALJ decision, *American Red Cross Arizona Blood Services Region*, produced concern among employers that the NLRB may consider standard at-will employment language found in most employee handbooks and other policy documents to be unlawful under the NLRA.[211] Alleviating some of these concerns, on October 31, 2012, the OGC issued two advice memoranda reviewing and finding employers' "at-will" policies to be lawful under the NLRA.[212]

206. *See generally* Noel Canning v. N.L.R.B., 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S.Ct. 2861 (2013).

207. *Id.* at 506-07.

208. *Id.* at 506.

209. N.L.R.B. v. New Vista Nursing & Rehab., 719 F.3d 203, 244 (3d Cir. 2013).

210. N.L.R.B. v. Canning, 133 S. Ct. 2861 (2013).

211. Am. Red Cross Ariz. Blood Services Region, 2012 NLRB LEXIS 43, at *63 (2012). In *Red Cross*, the language "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way," essentially created a waiver of the employee's right to concertedly advocate for changes in that at-will status and was therefore unlawful. *Id*.

212. *See* N.L.R.B., OFFICE OF THE GENERAL COUNSEL, CASE NO. 32-CA-08799, ADVICE MEMORANDUM RE: ROCHA TRANSPORTATION (2012), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580d6f56e; *see also* N.L.R.B., OFFICE OF THE GENERAL COUNSEL, CASE NO. 28-CA-084365, ADVICE MEMORANDUM RE: SWH CORPORATION D/B/A MIMI'S CAFÉ (2012), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580d6f56d.

In *Rocha Transportation*, employment at the company was expressly classified as "at-will" and managers, supervisors, and employees of the company lacked "any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will."[213] The handbook gave only the company's president the power to make agreements for employment other than at-will and required that such agreements be in writing.[214] Similarly, in *SWH Corporation*, the employee handbook provided that the relationship between the employer and an employee was "employment at will," and representatives of the company had no "authority to enter into any agreement contrary to the foregoing "employment at-will" relationship."[215]

The OGC found that the provisions in *Rocha* and *SWH Corporation* were lawful because they did not explicitly or otherwise restrict an employee's Section 7 rights and did not imply that the at-will relationship could never be changed.[216] As noted in the footnote above, the policy language in the *American Red Cross* decision suggested that the at-will relationship could never be changed, and it was primarily on this basis that the ALJ found the policy unlawful.[217]

Notably, the OGC stated in each memorandum that "the law in this area remains unsettled" and directed all regions of the NLRB to submit cases involving employer handbook provisions restricting future modification of at-will employment status to the OGC for advice.[218]

213. N.L.R.B., OFFICE OF THE GENERAL COUNSEL, CASE NO. 32-CA-08799, ADVICE MEMORANDUM RE: ROCHA TRANSPORTATION 1 (2012), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580d6f56e.

214. *Id.* at 4.

215. N.L.R.B., OFFICE OF THE GENERAL COUNSEL, CASE NO. 28-CA-084365, ADVICE MEMORANDUM RE: SWH CORPORATION D/B/A MIMI'S CAFÉ (2012), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580d6f56d.

216. *Id.* at 3; N.L.R.B., OFFICE OF THE GENERAL COUNSEL, CASE NO. 32-CA-08799, ADVICE MEMORANDUM RE: ROCHA TRANSPORTATION 3 (2012), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580d6f56e.

217. Am. Red Cross Ariz. Blood Services Region, 2012 NLRB LEXIS 43, at *71 (2012).

218. N.L.R.B., OFFICE OF THE GENERAL COUNSEL, Case No. 32-CA-08799, ADVICE MEMORANDUM RE: ROCHA TRANSPORTATION 5 (2012), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580d6f56e; N.L.R.B., OFFICE OF THE GENERAL COUNSEL, Case No. 28-CA-084365, ADVICE MEMORANDUM RE: SWH CORPORATION D/B/A MIMI'S CAFÉ 5 (2012), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580d6f56d.

VII. OTHER FEDERAL LEGISLATIVE, REGULATORY, AND JUDICIAL DEVELOPMENTS

A. The U.S. Supreme Court Issues a Landmark Ruling Striking Down Portions of the Defense of Marriage Act as Unconstitutional

On June 26, 2013, the U.S. Supreme Court issued a landmark ruling in *United States v. Windsor*, striking down Section 3 of the Defense of Marriage Act ("DOMA").[219] Section 3 defines "marriage" and "spouse" for purposes of any federal law to exclude same-sex partners.[220]

Windsor involved Edith Windsor, who was barred from taking advantage of the federal estate tax exemption for surviving spouses after her same-sex spouse passed away.[221] Windsor and her spouse had entered into a same-sex marriage in Ontario, Canada, and were residents of New York, a state that recognizes same-sex marriage.[222] Windsor brought suit against the Internal Revenue Service ("IRS"), claiming that Section 3 of DOMA violated the Fifth Amendment's equal protection clause, and therefore, the IRS improperly denied her request for a tax refund based on the federal tax exemption.[223] The district court found Section 3 unconstitutional, the Second Circuit affirmed, and the U.S. Supreme Court granted certiorari.[224]

In a 5-4 decision, the U.S. Supreme Court found that Section 3 of DOMA is "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."[225] Justice Kennedy, writing for the majority, reasoned that:

> DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State [of New York], by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in

219. 133 S. Ct. 2675, 2696 (2013).
220. *Id.* at 2683; *see* 1 U.S.C. § 7 (2012).
221. *Windsor*, 133 S.Ct. at 2682.
222. *Id.*
223. *Id*. at 2683.
224. *Id.* at 2684.
225. *Id*. at 2695.

violation of the Fifth Amendment.[226]

The U.S. Supreme Court recognized that DOMA applies to the interpretation of over 1,000 federal laws, a number of which involve the employment relationship.[227] For example, following the *Windsor* decision, a "spouse" will include a same-sex spouse (at least in those states where same-sex marriage is recognized[228]) for employee benefit plans and arrangements governed by the Internal Revenue Code, the Employee Retirement Income Security Act, social security benefits, the Family Medical and Leave Act ("FMLA"), and Consolidated Omnibus Budget Reconciliation Act ("COBRA") benefits. The same would hold true for U.S. citizens or lawful permanent residents filing immigration petitions on behalf of their same-sex spouse.[229]

B. U.S. Department of Labor Issues Final Rule to Implement Statutory Amendments to the Family Medical & Leave Act

The FMLA was amended by the National Defense Authorization Act ("NDAA") for Fiscal Year 2010 to expand the military-related leave protections.[230] The U.S. Department of Labor ("USDOL") issued a Final Rule with an effective date of March 8, 2013, implementing these amendments and clarifying changes relating to military leave, including the adoption of a new qualified exigency category and

226. *Windsor*, 133 S.Ct. at 2696. In *Windsor*, Justice Kennedy noted that Section 2 of DOMA, allowing states to refuse to recognize same-sex marriages under the laws of other states, was not challenged. *Id.* at 2682-83; *see also* 28 U.S.C. § 1738C (2012). With this section of DOMA still intact, DOMA still permits one state to disregard a same-sex marriage entered into in another state.

227. *Windsor*, 133 S.Ct. at 2683. Applauding the *Windsor* decision, President Obama issued a statement that he has "directed the Attorney General to work with other members of my Cabinet to review all relevant federal statutes to ensure this decision, including its implications for Federal benefits and obligations, is implemented swiftly and smoothly." Press Release, Office of the Press Secretary, Statement by the President on the Supreme Court Ruling on the Defense of Marriage Act (June 26, 2013), *available at* http://www.whitehouse.gov/doma-statement.

228. It is somewhat unclear how couples legally-married in a jurisdiction recognizing same-sex marriage (*e.g.,* New York), but residing in a jurisdiction that does not recognize the marriage's validity (*e.g.*, Texas) will be treated under federal law.

229. *See* Press Release, U.S. Dep't of Homeland Sec., U.S. Citizenship & Immigration Servs., Statement from Secretary of Homeland Security Janet Napolitano: Same-Sex Marriages (July 1, 2013), *available at* http://www.uscis.gov/family/same-sex-marriages.

230. The Family and Medical Leave Act, 78 Fed. Reg. 8834-01, 8834 (Feb. 6, 2013) (amending 29 C.F.R. pt. 825). It was also amended to include eligibility provisions for airline flight crew employees, however these particular amendments and regulations are not explained in detail. *Id.*

modification to military caregiver leave.[231] These changes generally expand the availability of FMLA leave to the families of service members and veterans.[232]

1. Qualifying Exigencies

Section 825.126 of Title 29 of the Code of Federal Regulations provides FMLA leave to family members of "covered military members" during "covered active duty" for "qualifying exigencies."[233] All three of these definitions were modified by the Final Rule.[234]

First, the term "covered military member" has now been expressly defined to include both the Regular Armed Forces as well as "the Reserve components of the Armed Forces [including] the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves[.]"[235]

Second, the term "covered active duty" is now defined to require deployment to a foreign country.[236] A call to active duty by a state is not covered unless under order of the President of the United States.[237]

A new qualifying category of "parental care leave" was also added. Previously, qualifying exigency leave was allowed for the following reasons: (1) short notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation[238]; and (7) post-deployment activities.[239] Qualifying exigency leave is now also available for "parental care."[240] This new category mandates that the parent require active assistance or supervision to provide daily self-care in three or more of the activities of daily living, such as: grooming and hygiene, bathing, dressing, eating, cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using

231. *Id.*
232. *Id.*
233. 29 C.F.R. § 825.126(a) (2013).
234. The Family and Medical Leave Act, 78 Fed. Reg. at 8917-18.
235. *Id.* at 8917.
236. *Id.*
237. 29 C.F.R. § 825.126(a)(4).
238. The law also increases the length of time an eligible family member may take for the qualifying exigency leave reason of rest and recuperation from five days to up to a maximum of fifteen days. *See id.* § 825.126(b)(6)(ii).
239. *Id.* § 825.126(b)(1)-(7).
240. *Id.* § 825.126(b)(8).

telephones and directories, or using a post office.[241] Leave can be taken to provide necessary care, arrange for alternative care, admit the parent to a care facility, or attend meetings with staff at a care facility.[242]

2. Leave to Care for Covered Servicemembers

Section 825.127 of Title 29 of the Code of Federal Regulations provides eligible employees with up to twenty-six work weeks per twelve month period of FMLA leave to care for "covered servicemembers" with a "serious injury or illness."[243] The definitions of "covered servicemember" and "serious injury or illness" were modified by the Final Rule.[244]

First, the term "covered servicemember" now includes "covered veterans."[245] A "covered veteran" is "an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran."[246] For an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves) and who was discharged or released under conditions other than dishonorable prior to March 8, 2013, the period between October 28, 2009, (the enactment of the NDAA) and March 8, 2013 (the effective date of the Final Rule), shall not count towards the determination of the five-year period for covered veteran status.[247]

Second, the term "serious injury or illness" was modified. Previously, the term only included injuries or illnesses incurred in the line of active duty.[248] The term is now defined to include injury or illness "that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty."[249] Moreover, for the newly eligible class of veterans, "serious injury or illness" means injury or illness that: (i) was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the

241. *Id.*
242. 29 C.F.R. § 825.126(b)(8)(i)-(iv).
243. *Id.* § 825.127(a), (e).
244. The Family and Medical Leave Act, 78 Fed. Reg. 8834-01, 8918-19 (Feb. 6, 2013) (amending 29 CFR pt. 825).
245. 29 C.F.R. § 825.127(b)(2).
246. *Id.*
247. *Id.* § 825.127(b)(2)(i).
248. The Family and Medical Leave Act, 78 Fed. Reg. at 8834.
249. 29 C.F.R. § 825.127(c)(1).

servicemember's office, grade, rank, or rating; (ii) resulted in a U.S. Department of Veterans Affairs Service-Related Disability Rating of fifty percent or greater; (iii) substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation; or (iv) caused enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.[250]

C. U.S. Citizenship and Immigration Services Issues New Form I-9 for Employment Eligibility Verification

On March 8, 2013, United States Citizenship and Immigration Services released a newly revised Form I-9.[251] The Immigration Reform and Control Act of 1986 requires employers to verify the identity and legal authorization of all individuals hired after November 6, 1986, through completion of the Form I-9.[252] Effective May 7, 2013, employers are no longer permitted to use any expired version of the Form I-9.[253]

The changes are intended to minimize errors in form completion by adding and revising a number of data fields on the form, providing improved instructions with additional guidance, and updating the form's layout.[254] The release of the new Form I-9, however, does not change the existing employment verification law.

D. Federal Bureau of Consumer Financial Protection Issues New Updated Model Forms for Use Under the Fair Credit Reporting Act

Not to be outdone, on November 14, 2012, the Federal Bureau of Consumer Financial Protection issued updated model forms for use pursuant to the Fair Credit Reporting Act ("FCRA").[255] The FCRA establishes notice and disclosure requirements for employers (or other entities) who use "consumer reports"[256] or "investigative consumer

250. *Id.* § 825.127(c)(2).

251. Introduction of the Revised Employment Eligibility Verification Form, 78 Fed. Reg. 15,030-01, 15,030 (March 8, 2013).

252. *See id*; *see also* 8 C.F.R. § 274a.2 (2013).

253. Introduction of the Revised Employment Eligibility Verification Form; Correction, 78 Fed. Reg. 21,144, 21,144 (April 9, 2013) (on April 9, 2013, the U.S. Citizenship and Immigration Services ("USCIS") published a correction notice in the Federal Register clarifying that the effective date of the newly revised Form I-9 begins on May 7, 2013).

254. *See supra* note 251.

255. Fair Credit Reporting (Regulation V); Correction, 77 Fed. Reg. 67,744, 67,744 (Nov. 14, 2012).

256. A "consumer report" is defined by the FCRA as a "written, oral, or other communication of any information by a consumer reporting agency bearing on a customer's

reports"[257] prepared by third parties in evaluating job applicants or employees.[258]

The Financial Protection Bureau issued the following updated FCRA model forms: Summary of Consumer Identity Theft Rights; Summary of Consumer Rights; Notice of Furnisher; Responsibilities; and Notice of User.[259]

credit worthiness, credit standing, credit capacity, general reputation, personal characteristics, or mode of living, which is used for . . . employment purposes." 15 U.S.C. § 1681a(d)(1)(B) (2012).

257. An "investigative consumer report" is a specific type of consumer report, defined as "a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items or information." *Id.* § 1681a(e).

258. *See* 15 U.S.C. § 1681 et. seq.

259. Fair Credit Reporting (Regulation V); Correction, 77 Fed. Reg. at App'x I, K, M, N.