

LABOR & EMPLOYMENT LAW

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INTRODUCTION

This was a very active year at both the state and national levels in the field of labor and employment law. At the state level, the general minimum hourly wage was increased to \$9.00 on December 31, 2015. Governor Cuomo has announced his support for a phased-in increase in the minimum wage to \$15.00. There were also minimum wage increases adopted from the wage board recommendation for workers in the fast food industry and for tipped employees in the hospitality industry.

The Wage Theft and Prevention Act (WTPA) was amended to eliminate the annual wage notice requirement for employers, to increase penalties for non-compliant employers, to enhance the investigatory authority of the labor commissioner, and to make it easier to establish liability on the part of successors and other related entities, as well as individual members of limited liability corporations. Governor Cuomo announced the commencement of a statewide initiative to eradicate labor, safety and health violations in the nail salon industry, and established a multi-agency task force to coordinate public education and enforcement efforts. Both New York State and New York City adopted measures to protect unpaid interns from discrimination. And the New York State Division of Human Rights reported that it eliminated its backlog of aged cases for the first time in decades.

This year's *Survey* includes a large and representative (albeit non-exhaustive) sample of federal and state court discrimination cases, including three issued by the Supreme Court. In the aggregate, these decisions reflect the expansion of protected classifications and the application of existing standards to new protections for these classifications. The decisions also demonstrate that employment discrimination law remains unsettled and continues to evolve. Thus, in

Margerum v. City of Buffalo, the Court of Appeals wrestled with the type of “reverse discrimination” issue that emerged when Title VII, now more than fifty years old, was in its infancy. The procedural history of that case alone is perhaps a perfect metaphor for what continues to divide Americans well beyond the workplace.

At the federal level, the Supreme Court decisions drawing the most attention upheld the Affordable Care Act (ACA) and established constitutional protections for same-sex couples, which have been written about extensively elsewhere, and about which familiarity is assumed in their summary treatment below. The long-term impact of both decisions on employee benefit plans generally (with respect to same-sex couples), and for employer health care decisions in particular (under the ACA) remains to be seen. The Court also addressed a series of decisions concerning the Fair Labor Standards Act’s (FLSA) overtime exemption for professional employees; the application of the Administrative Procedure Act (APA) to the interpretations of the U.S. Department of Labor (USDOL or “Department”); and issues arising under Title VII, the Americans with Disabilities Act (ADA) and the Pregnancy Discrimination Act (PDA). The continuing obligation of employers to provide lifetime health insurance to retirees under an expired collective bargaining agreement was also the subject of an important decision issued by the Court during the *Survey* year.

At the administrative level, the USDOL’s Wage and Hour Division issued an interpretation broadly interpreting the definition of employee under the FLSA. The Department’s Office of Federal Contract Compliance Programs (OFCCP) issued new guidance to contractors on sexual orientation issues. A final regulation amending the definition of “spouse” under the Family Medical Leave Act (FMLA) to include same-sex couples was also issued by the Department.

There was an extraordinary number of decisions issued by the National Labor Relations Board (NLRB or “Board”), and the *Survey* focuses on those impacting the rights of all workers, both union and non-union, to communicate about work on social media or by email or other electronic means. The *Survey* also reports on new guidance addressing the distinction between lawfully and unlawfully broad handbook rules.

There was continued focus during the *Survey* year on misclassification and whistleblower issues. Both issues are treated separately in standalone sections.

Finally, the Supreme Court granted a petition for certiorari in a case challenging mandatory agency or service fees in the public sector on First Amendment grounds. That challenge was ultimately rejected by

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a 4-4 vote which followed the death of Justice Antonin Scalia.

I. EMPLOYEE MISCLASSIFICATION***A. Misclassification Overview and the New York State Joint Enforcement Task Force***

Governor Cuomo has continued the interagency Joint Enforcement Task Force on Employee Misclassification (“Task Force”), which was established by executive order in 2007.¹ The Task Force is charged with coordinating efforts to reduce the incidence of employee misclassification in New York State.² The Task Force’s principal focus is directed at (1) the misclassification of employees as independent contractors; and (2) the non-reporting of “off the book” payments to employees. Such misclassification, as the Task Force recently reported,

hurts the government which is deprived of substantial revenues due to nonpayment of taxes and decreased legitimate business activity; hurts law abiding businesses which must compete with employers who engage in this illegal cost-cutting practice; and hurts employees by denying them the protection of various employment and labor laws by reducing compliance with employment and job safety standards.³

In 2014, the Task Force “identified nearly 26,000 instances of employee misclassification; discovered nearly \$316 million in unreported wages; and assessed nearly \$8.8 million in unemployment insurance contributions.”⁴

B. Veto of Challenge to the Commercial Goods Transportation Act

The New York State Commercial Goods Transportation Industry Fair Play Act (CGTA)⁵ was enacted in response to various findings, such as the finding in one study that 82% of port truck drivers in the

1. N.Y. COMP. CODES R. & REGS. tit. 9A, § 6.17(1) (2011); *see also* GOV. ANDREW CUOMO, NO. 2: REVIEW, CONTINUATION AND EXPIRATION OF PRIOR EXECUTIVE ORDER, <http://www.governor.ny.gov/news/no-2-review-continuation-and-expiration-prior-executive-orders>.

2. JOINT ENF’T TASK FORCE ON EMP. MISCLASSIFICATION, DEP’T OF LABOR, ANNUAL REPORT OF THE JOINT ENFORCEMENT TASK FORCE ON EMPLOYEE MISCLASSIFICATION (2015), <https://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2015.pdf>. The members of the Task Force are the Commissioner of Labor (Chair), the Attorney General, the Commissioner of Taxation and Finance, the Chair of the Workers’ Compensation Board, the Workers’ Compensation Fraud Inspector General, and the Comptroller of the City of New York. *Id.*

3. *Id.* at 2.

4. *Id.*

5. N.Y. LABOR LAW § 862 (McKinney 2014).

state were classified as independent contractors.⁶ The CGTA applies to drivers engaged in the transport of commercial goods.⁷ It incorporates a “presumption of employment” that is not found in the common law.⁸ The CGTA also incorporates the so-called “ABC test,” in lieu of the common law test traditionally used to resolve misclassification disputes under New York law.⁹ The “ABC test,” presumes that a driver is an employee unless the alleged employer can demonstrate each of the following:

- (1) That the driver is not directed or controlled by the presumed employer;
- (2) The worker performs services that are not part of the ordinary operations of the presumed employer; and
- (3) That the worker has an independent business.¹⁰

The CGTA enumerates eleven factors to be considered to determine whether the worker does or does not maintain a bona fide business independent from the presumed employer.¹¹

Governor Cuomo vetoed a bill that would have amended the CGTA to make it easier for newspaper publishers to treat delivery workers as independent contractors, excluding them from coverage under the state unemployment, minimum wage, and workers’ compensation laws.¹² The bill seems to have been prompted by a series of unemployment decisions involving the Gannett newspaper chain, which found that claimed independent contractors were, in fact, employees.¹³ Supporters of the bill contended that the amendments

6. JOINT ENFORCEMENT TASK FORCE, *supra* note 2, at 9.

7. *Id.*

8. *Id.*

9. *Id.*

10. *See, e.g.*, In re Ramirez, 127 A.D.3d 1295, 1296, 6 N.Y.S.3d 748, 749 (3d Dep’t 2015) (citing In re LaValley, 120 A.D.3d 1498, 1499, 992 N.Y.S.2d 378, 380 (3d Dep’t 2014); Yoga Vida NYC, Inc. v. Comm’r of Labor, 119 A.D.3d 1314, 1314, 989 N.Y.S.2d 710, 711 (3d Dep’t 2014)).

11. *See* N.Y. LABOR LAW § 862-b (McKinney 2014).

12. *See* N.Y. Assemb. 07753, 201st Sess. (2015).

13. *See, e.g.*, In re Race, 128 A.D.3d 1130, 1130–31, 6 N.Y.S.3d 504, 504–05 (3d Dep’t 2015) (citing In re Travis, 127 A.D.3d 1349, 1349, 5 N.Y.S.3d 623, 624 (3d Dep’t 2015); In re Gager, 127 A.D.3d 1348, 1348–49, 4 N.Y.S.3d 784, 785 (3d Dep’t 2015); In re Hunter, 125 A.D.3d 1166, 1167–68, 3 N.Y.S.3d 195, 196–97 (3d Dep’t 2015); In re Armison, 122 A.D.3d 1101, 1102–03, 995 N.Y.S.2d 856, 858 (3d Dep’t 2014); In re Travis, 127 A.D.3d at 1349, 5 N.Y.S.3d at 624 (citing In re Hunter, 125 A.D.3d at 1167–68, 3 N.Y.S.3d at 196–97; In re Isaacs, 125 A.D.3d 1077, 1079, 3 N.Y.S.3d 776, 778 (3d Dep’t 2015); In re Gager, 127 A.D.3d at 1348–1349, 4 N.Y.S.3d at 784–85); In re Isaacs, 125 A.D.3d at 1078, 3 N.Y.S.3d at 777 (citing In re Concourse Ophthalmology Assoc., 60 N.Y.2d 734, 736, 456 N.E.2d 1201 1202, 469 N.Y.S.2d 78, 79 (1983); In re Empire State

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would conform to pertinent state and federal regulations, including newspaper industry guidelines established by the New York State Department of Labor (NYDOL) in 2000. Bill proponents also claimed that the proposed amendments would conform to longstanding industry practice, and that the failure to adopt the bill would endanger the very survival of the newspaper industry.¹⁴

The proposed amendments were introduced by leadership members from both parties, and then passed summarily in both legislative chambers, without hearing or floor debate, with overwhelming bipartisan support.¹⁵ It would come as no surprise under these circumstances if the proposed amendments were reintroduced in the 2016 legislative session.

C. State Misclassification Cases

In *In re Ramirez*, the Third Department Appellate Division affirmed the determination of the Unemployment Insurance Appeal Board (“Appeal Board”) that a graphic designer was an employee and not an independent contractor.¹⁶ The court found substantial evidence in the record to support the determination, including that the graphic designer: (1) was paid on an hourly basis every two weeks; (2) performed most of his work on the employer’s premises; (3) was provided with a computer and related equipment that were required to perform his duties; (4) was supervised by the employer and his work product could be reviewed and directed to be changed; and (5) was precluded from including client projects in his own personal portfolio.¹⁷

A different result was reached by the Third Department in *In re Jennings*.¹⁸ The court reversed the Appeal Board’s determination that a driver transporting misplaced airport luggage to and from the airport was an employee.¹⁹ The court relied on evidence that the driver: (1) paid his own expenses; (2) negotiated his own rate of pay; (3) was eligible

Towing & Recovery Ass’n, Inc., 15 N.Y.3d 433, 437, 938 N.E.2d 984, 985, 912 N.Y.S.2d 551, 552 (2010)); *In re Armison*, 122 A.D.3d at 1102–03, 995 N.Y.S.2d at 858 (citing *In re O’Connor*, 67 A.D.3d 1302, 1303, 890 N.Y.S.2d 663, 664–65 (3d Dep’t 2009); *In re Aubrey*, 8 A.D.3d 803, 804–05, 779 N.Y.S.2d 595, 596 (3d Dep’t 2004)); *In re Lewis*, 121 A.D.3d 1488, 1488, 994 N.Y.S.2d 469, 470 (3d Dep’t 2014)).

14. See N.Y.Assemb. 07753, 201st Sess. (2015).

15. *Id.*

16. 127 A.D.3d 1295, 1296–97, 6 N.Y.S.3d 748, 749–50 (3d Dep’t 2015).

17. *Id.*

18. 125 A.D.3d 1152, 1152–53, 3 N.Y.S.3d 209, 210 (3d Dep’t 2015) (quoting *McCollum v. Fire Island Union Free Sch. Dist.*, 118 A.D.3d 1203, 1203, 987 N.Y.S.2d 708, 709 (3d Dep’t 2014)).

19. *Id.* at 1152, 3 N.Y.S.3d at 210.

for a portion of commissions earned by the company; (4) was permitted to hire assistants; and (5) he could accept and reject assignments offered to him by the alleged employer.²⁰

In *Schwenger v. NYU School of Medicine*,²¹ the Third Department affirmed a determination made by the Workers' Compensation Board that a postdoctoral fellow working at a university hospital was an employee.²² The postdoctoral fellow conducted laboratory research that was funded by a grant from the National Institute of Health (NIH).²³ He applied for workers' compensation after an incident in the lab which he claimed caused him to become exposed to a certain virus.²⁴

The university hospital contended that state workers' compensation law was preempted by federal law because it was funded by the NIH.²⁵ The Third Department rejected this contention, observing that there was "neither an explicit nor an implicit indication in any federal statute or regulation that Congress intended to preempt state workers' compensation law."²⁶ The court turned to the misclassification issue and found substantial evidence in the record to support the agency's determination, including evidence that the research fellow: (1) was supervised by a professor; (2) was provided with university equipment; (3) was required to work a set number of hours in the lab each week; and (4) that he could be disciplined by his supervising professor.²⁷

20. *Id.* at 1153, 3 N.Y.S.3d at 210–11 (citing *In re Holleran*, 98 A.D.3d 757, 759, 950 N.Y.S.2d 205, 206–07 (3d Dep't 2012); *In re Lewis*, 121 A.D.3d 1488, 1488–89, 994 N.Y.S.2d 469, 471 (3d Dep't 2014); *In re Khan*, 66 A.D.3d 1098, 1099, 886 N.Y.S.2d 776, 778 (3d Dep't 2009)).

21. 126 A.D.3d 1056, 1056, 3 N.Y.S.3d 465, 465 (3d Dep't 2015).

22. *Id.* at 1056, 1059, 3 N.Y.S.3d at 467, 469.

23. *Id.* at 1056–57, 3 N.Y.S.3d 467.

24. *Id.* at 1057, 3 N.Y.S.3d at 467 (citing N.Y. WORKERS' COMP. LAW § 29 (McKinney 2015)).

25. *Id.* at 1057, 3 N.Y.S.3d at 468.

26. *Schwenger*, 126 A.D.3d at 1058, 3 N.Y.S.3d at 468.

27. *Id.* at 1058–59, 3 N.Y.S.3d at 469 (citing *Jara v. SMJ Envtl., Inc.*, 55 A.D.3d 1157, 1158, 866 N.Y.S.2d 404, 406 (3d Dep't 2008); *Fisher v. K.J. Transp.*, 27 A.D.3d 934, 935, 811 N.Y.S.2d 476, 477 (3d Dep't 2006); *LaCelle v. N.Y. Conference of Seventh Day Adventists*, 235 A.D.2d 694, 694–95, 652 N.Y.S.2d 352, 353–54 (3d Dep't 1997)). Employment relationships were also found to exist in the following unemployment misclassification cases during the *Survey* year: *In re Lobban*, 131 A.D.3d 1294, 1294–95, 16 N.Y.S.3d 626, 627–28 (3rd Dep't 2015) (quoting *In re Ruano*, 118 A.D.3d 1088, 1088, 987 N.Y.S.2d 491, 492 (3d Dep't 2014)) (security guard and referral service); *In re Stecher Aviation Servs., Inc.*, 131 A.D.3d 1289, 1290, 15 N.Y.S.3d 516, 517–18 (3d Dep't 2015) (quoting *In re McAlevey*, 126 A.D.3d 1219, 1219–20, 5 N.Y.S.3d 609, 611 (3d Dep't 2015)) (aircraft crew members referral service); *In re Matter of Aussicker*, 128 A.D.3d 1264, 1264–66, 9 N.Y.S.3d 730, 730–31 (3d Dep't 2015) (citing *Yoga Vida NYC, Inc. v. Comm'r of Labor*, 119 A.D.3d at 1314, 989 N.Y.S.2d at 711; *In re Cohen*, 117 A.D.3d 1112, 1113, 985 N.Y.S.2d 190, 192 (3d Dep't 2014)) (customer service representatives and

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*D. Federal Misclassification Developments**1. State Misclassification Grants*

On September 14, 2014, the USDOL announced that it had awarded misclassification grants in the amount of \$10.2 million to nineteen states, including a \$500,000 award to New York.²⁸ The grants were awarded “to increase the ability of state [Unemployment Insurance] tax programs to identify instances where employers improperly classify employees as independent contractors or fail to report the wages paid to workers at all.”²⁹ The USDOL reported that this was the first time that it had awarded state grants specifically aimed at employee misclassification.³⁰

2. Misclassification Under the National Labor Relations Act

A conflict emerged during the *Survey* year between the NLRB and the federal courts concerning the proper test used in misclassification cases. The conflict is reflected in two decisions with different results involving FedEx drivers. In *FedEx Home Delivery*, the NLRB ruled that a group of FedEx drivers were employees under the National Labor Relations Act (NLRA).³¹ In an earlier decision by the United States Circuit Court of Appeals for the District of Columbia, a different group of FedEx drivers were held to be independent contractors under the NLRA.³²

The NLRB was critical of the DC Circuit’s failure to give appropriate consideration to whether the drivers had a genuine opportunity to operate a business independently from the alleged employer.³³ The Board found that the court’s “expansive approach

airport parking booking agency); *In re Singhal*, 128 A.D.3d 1308, 1308, 9 N.Y.S.3d 748, 748–49 (3d Dep’t 2015) (quoting *In re Armison*, 122 A.D.3d at 1102, 995 N.Y.S.2d at 858) (contract attorney and law firm).

28. Press Release, Dept. of Labor, \$10.2m Awarded to Fund Worker Misclassification Detection, Enforcement Activities in 19 State Unemployment Insurance Programs (Sept. 14, 2014), <http://www.dol.gov/newsroom/releases/eta/eta20141708>.

29. *Id.*

30. *Id.* In September 2015, the USDOL announced that the grant program would be continued for a second year, and that forty-three states, Puerto Rico, and the District of Columbia would be awarded more than \$39 million, with New York scheduled to receive \$1 million. Press Release, Dept. of Labor, More than \$39 Million in Grants Awarded to Improve Performance, Integrity of State Unemployment Insurance Programs and Reduce Worker Misclassification (Sept. 22, 2015), <http://www.dol.gov/opa/media/press/eta/eta20151888.htm>.

31. 361 N.L.R.B. No. 55 (2014).

32. *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 494 (D.C. Cir. 2009).

33. *FedEx Home Delivery*, 361 N.L.R.B. No. 55 (Sept. 30, 2014).

departs from the mainstream of Board precedent, lacks clear support in traditional common-law principles, and could dramatically broaden the independent-contractor exclusion under the [NLRA].”³⁴ In contrast to the DC Circuit, the NLRB stressed the necessity of analyzing “whether the evidence tends to show that the putative [independent] contractor is, in fact, *rendering services as part of an independent business*.”³⁵

As a practical matter, the DC Circuit’s interpretation will remain the law of the land, given that the DC Circuit is vested with nationwide jurisdiction to review NLRB orders.³⁶ In any event, at least until new Board members are appointed, the respective positions of the Board and the DC Circuit are unlikely to change.

3. Misclassification Under the FLSA—Administrative Interpretation 2015–1

On July 15, 2015, the Wage and Hour Division of the USDOL issued Administrative Interpretation 2015–1 (“Interpretation”) to address misclassification under the FLSA’s broad “suffer or permit” language to define employment.³⁷ The Interpretation reflects the position of the USDOL that “most workers are employees under the FLSA’s broad definition.”³⁸

The Interpretation also discusses the material distinctions between the “economic realities” test used in FLSA cases, and the more restrictive “control” test developed under the common law and used to resolve misclassification issues under the New York Labor Law (NYLL).³⁹ The Interpretation provides:

The FLSA’s definition of employ as “to suffer or permit to work” and the later-developed “economic realities” test provide a broader scope of employment than the common law control test. Indeed, although the common law control test was the prevalent test for determining whether an employment relationship existed at the time that the FLSA was enacted, Congress rejected the common law control test in drafting the FLSA.⁴⁰

34. *Id.*

35. *Id.*

36. 29 U.S.C. § 160(f) (2015) (A party may seek “review of [a final NLRB order] in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia.”).

37. DAVID WEIL, DEP’T. OF LABOR, ADM’R’S INTERPRETATION NO. 2015–1 (2015).

38. *Id.*

39. *Id.*

40. *Id.*

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4. “Black Car” Drivers and the Tests for Misclassification Under the FLSA and the New York Labor Law

The economic reality and common law control tests were both applied by the district court in *Saleem v. Corp. Transportation Group, Ltd.*⁴¹ In *Saleem*, a putative class of “black car” limousine drivers commenced an action for wage and hour violations under the FLSA and the NYLL.⁴² The district court analyzed the claims as required under both tests and concluded that they were independent contractors under both state and federal wage and hour laws.⁴³

The court applied both the economic realities test and the totality of the circumstances test and held that the drivers were independent contractors under the NLRA.⁴⁴ The court found evidence that: (1) the drivers were subjected to a minimum degree of supervision, (2) there were genuine opportunities for drivers to earn profits or sustain losses, (3) the job required “a significant degree of independent initiative,” and (4) the relationship between the drivers and the companies they served lacked the permanence of an ordinary employment relationship.⁴⁵

The court also held that the drivers were independent contractors under the NYLL.⁴⁶ The district court applied the common law control test and found that (1) drivers worked at their own convenience, (2) they could obtain work from other companies, (3) they received no fringe benefits, (4) they did not appear on the companies’ payroll records, and (5) drivers were not required to work a minimum number of hours or to provide service on a fixed schedule.⁴⁷

II. WAGE AND HOUR DEVELOPMENTS

A. New York State Developments

1. General Minimum Wage

The general minimum hourly wage was increased to \$9.00 on December 31, 2015.⁴⁸ The increase was the third and final annual incremental increase on a schedule that raised the minimum wage from \$7.15 to \$8.00 as of December 31, 2013, then to \$8.75 as of December

41. 52 F. Supp. 3d 526, 537–43 (S.D.N.Y. 2014).

42. *Id.* at 528.

43. *Id.* at 545.

44. *Id.* at 539–43.

45. *Id.* at 537–42.

46. *Saleem*, 52 F. Supp. 3d at 545.

47. *Id.* at 544–45.

48. N.Y. LAB. LAW § 652(1) (McKinney 2015).

31, 2014, and then to its current \$9.00 rate.⁴⁹

On March 9, 2015, Governor Cuomo announced his support for an increase in the minimum hourly wage to \$10.50.⁵⁰ The Governor subsequently announced his support for a phased-in increase of the minimum hourly wage to \$15.00.⁵¹

2. Minimum Wage for Tipped Employees in the Hospitality Industry

On July 24, 2014, Governor Cuomo directed that a wage board be convened to consider whether there should be an increase in the minimum wage for tipped employees in the hospitality industry.⁵² The wage board recommended that the rate be increased from \$7.25 to \$7.50.⁵³ The recommendations were adopted by the acting labor commissioner on February 24, 2015.⁵⁴ The increase went into effect on December 31, 2015.⁵⁵

3. Minimum Wage for Fast Food Workers

On May 7, 2015, Governor Cuomo directed his acting labor commissioner to form a wage board to consider the minimum wage for workers in the fast food industry.⁵⁶ On July 22, 2015, the Commissioner issued an order adopting the recommendation of the Fast Food Wage Board for an incremental increase in the minimum wage for employees

49. *Id.*

50. Press Release, Governor Andrew M. Cuomo, Governor Cuomo Details Impact of Minimum Wage Increase on New York Workers and the Economy (Mar. 9, 2015), <https://www.governor.ny.gov/news/governor-cuomo-details-impact-minimum-wage-increase-new-york-workers-and-economy>.

51. Press Release, Governor Andrew M. Cuomo, Rush Transcript: Governor Cuomo Announces Push to Raise New York's Minimum Wage to \$15 An Hour (Sept. 15, 2015), <http://www.governor.ny.gov/news/rush-transcript-governor-cuomo-announces-push-raise-new-yorks-minimum-wage-15-hour>.

52. Press Release, Governor Andrew M. Cuomo, Governor Cuomo Directs State Labor Commissioner to Convene Wage Board (July 24, 2014), <http://www.governor.ny.gov/news/governor-cuomo-directs-state-labor-commissioner-convene-wage-board>.

53. *Id.*

54. *Id.*

55. Mario J. Musolino, Acting Comm'r of Labor, Order on the Report and Recommendations of the 2014 Hospitality Wage Board (Feb. 24, 2015), https://labor.ny.gov/workerprotection/laborstandards/pdfs/wage_board_order.pdf.

56. Press Release, Governor Andrew M. Cuomo, Governor Cuomo Instructs State Labor Department to Convene Wage Board to Investigate and Make Recommendations on Raising Minimum Wage For Fast Food Workers (May 7, 2015), <http://www.governor.ny.gov/news/governor-cuomo-instructs-state-labor-department-convene-wage-board-investigate-and-make>.

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in the fast food industry to \$15.00.⁵⁷ In New York City, the minimum wage for fast food workers will increase to \$15.00 by the end of 2018.⁵⁸ The minimum wage for fast food workers outside of New York City will be increased to \$15.00 by the end of 2021.⁵⁹ Fast food establishments are covered if they are part of a chain that has at least thirty similar fast food establishments nationwide.⁶⁰

4. Amendments to the Wage Theft Prevention Act

On December 29, 2014, Governor Cuomo signed a bill amending the WTPA.⁶¹ The amendment eliminated the annual wage notice requirement imposed on state employers.⁶² Such notices must still be provided to newly hired employees.⁶³ The amendments also raise monetary penalties and daily fines for noncompliant employers and willful and repeat offenders.⁶⁴ The enforcement authority of the labor commissioner is expanded in several respects and is directed to conduct investigations in most cases to cover a six-year period.⁶⁵ Finally, the amendment adds provisions for imposing liability on successor and other related entities, and on individual members of limited liability corporations.⁶⁶

5. NYDOL Regulations on Wage Payments by Debit Card

On May 27, 2015, NYDOL issued proposed regulations that would restrict an employer's ability to pay wages with debit cards.⁶⁷ The regulations "outline the responsibilities of businesses that use debit cards to pay workers and prohibit employers from profiting from or passing along costs to the employee."⁶⁸ Absent advance consent from an employee, the regulations prohibit employers from using debit cards to

57. Mario J. Musolino, Acting Comm'r of Labor, Order on the Report and Recommendations of the 2015 Hospitality Wage Board (Sept. 10, 2015), <https://labor.ny.gov/workerprotection/laborstandards/pdfs/FastFood-Wage-Order.pdf>.

58. *Id.*

59. *Id.*

60. *Id.*

61. N.Y. Assemb. 8106, 236th Leg. Sess. (2013).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. N.Y. Assemb. 8106, 236th Leg. Sess. (2013).

67. 37 N.Y. Reg. 16–18 (May 27, 2015).

68. Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces New Proposed Rules Concerning Businesses That Pay Workers with Debit Cards (May 27, 2015), <https://www.governor.ny.gov/news/governor-cuomo-announces-new-proposed-rules-concerning-businesses-pay-workers-debit-cards>.

pay wages.⁶⁹ Employers are required under the proposed regulations to maintain records confirming advance consent for a period of six years.⁷⁰ In addition, employers must provide their employees with information about nearby locations where the debit card can be used to withdraw cash at no cost to the employee.⁷¹ Employers must also provide employees with access to a network of ATM machines at which they can make unlimited withdrawals from the debit card at no cost to the employee.⁷²

B. Federal Wage and Hour Developments

1. United States Supreme Court Decisions

The Supreme Court issued two important wage and hour decisions during this *Survey* year. First, in *Integrity Staffing Solutions v. Busk*, the Supreme Court held that an employer was not required to pay employees for the time they spent completing pre- and post-shift security checks.⁷³ The Court's decision was made based on its determination that mandatory security checks were not "integral and indispensable" components of the employees' principal job duties.⁷⁴

In *Perez v. Mortgage Bankers Ass'n*, the Supreme Court was asked to address whether the USDOL could reverse its own interpretation of the overtime exemption for administrative employees as applied to mortgage loan officers without complying with notice and comment requirements under the APA.⁷⁵ The opinion was challenged on the ground that it was issued unilaterally and without compliance with notice and comment provisions of the APA.⁷⁶ The Court held that the APA expressly excluded agency interpretations that do not have the force and effect of law from such requirements.⁷⁷

2. Second Circuit Wage and Hour Decisions

a. Arbitration Agreements and Collective Action

The Second Circuit Court of Appeals issued two key decisions

69. 37 N.Y. Reg. 16 (May 27, 2015).

70. *Id.*

71. *Id.* at 17.

72. *Id.*

73. 135 S. Ct. 513, 518 (2014).

74. *Id.*

75. 135 S. Ct. 1199, 1203 (2015).

76. *Id.* at 1203, 1208.

77. *Id.* at 1208.

addressing the enforceability of mandatory arbitration agreements that restrict or prohibit class and collective actions for wage and hour violations. In *Lloyd v. J.P. Morgan Chase & Co.*⁷⁸ and *Cohen v. UBS Financial Services, Inc.*,⁷⁹ the court ruled that current and former employees were precluded by their employment agreements from pursuing class and collective actions, and could only pursue their claims individually at arbitration. The Second Circuit found in both cases that the incorporation of the rules of the Financial Industry Regulatory Authority (FINRA) in the employment agreements, in particular the FINRA rule barring collective actions, was binding on the parties and precluded such actions accordingly.⁸⁰

b. FLSA “Professional Exemption”

In *Pippins v. KPMG L.L.P.*,⁸¹ the Second Circuit ruled that entry-level accountants known as audit associates were not entitled to overtime under the FLSA because they were “professional” employees within the meaning of the statute.⁸² The FLSA’s professional exemption applies to a worker whose primary duties require “advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.”⁸³

The plaintiffs asserted that, as entry-level accountants, their duties did not require “specialized academic training or involve the consistent exercise of advanced knowledge or professional judgment.”⁸⁴ The Second Circuit disagreed with the plaintiffs on this point, explaining that its “review has demonstrated that Audit Associates, while early in their careers, are precisely the types of professionals the regulations seek to exempt from the FLSA—well-compensated professionals at a top national accountancy practice, performing key accountancy tasks.”⁸⁵ The court concluded:

78. 791 F.3d 265, 269 (2d Cir. 2015).

79. 799 F.3d 174, 180 (2d Cir. 2015).

80. *Lloyd*, 791 F.3d at 271; *Cohen*, 799 F.3d at 180.

81. 759 F.3d 235, 235 (2d Cir. 2014).

82. *Id.* at 238, 249. DOL regulations, which can be found at 29 C.F.R. § 541.301 (2015), include a three-part test to determine whether an employee is covered by the professional exemption. As summarized by the court, “the work must be (1) ‘predominantly intellectual in character, and . . . requir[e] the consistent exercise of discretion and judgment’ . . . (2) in a ‘field of learning,’ which includes accounting . . . and (3) of a type where ‘specialized academic training is a standard prerequisite for entrance into the profession.’” *Pippins*, 759 F.3d at 238 (citing 29 C.F.R. § 541.301(a)-(d)).

83. *Id.* at 238 (citing 29 C.F.R. § 541.301(a)).

84. *Id.* at 239.

85. *Id.* at 252.

Audit Associates are learned professionals who perform work requiring advanced knowledge requiring the consistent exercise of discretion and judgment, and who have customarily received this advanced knowledge through a prolonged course of specialized intellectual instruction. They are thus learned professionals, and exempt from overtime requirements.⁸⁶

c. FLSA and Unpaid Interns

In a pair of companion decisions issued at the close of the *Survey* year, the Second Circuit decided whether unpaid interns are considered employees under the FLSA. In *Glatt v. Fox Searchlight Pictures, Inc.*, the Second Circuit vacated and remanded a district court decision that granted conditional certification of a nationwide putative class of unpaid interns claiming employee status under both FLSA and NYLL.⁸⁷ The Second Circuit found that the district court erred by failing to establish whether the intern or alleged employer was the “primary beneficiary” of the relationship.⁸⁸ The court listed a “non-exhaustive set of considerations” that should be considered in identifying the “primary beneficiary,” including the extent to which:

- (1) “[T]he intern and the employer clearly understand that there is no expectation of compensation;”
- (2) The internship provides training that is similar to the type of training one would receive at an academic institution;
- (3) The internship is integrated into the intern’s formal education program, including whether or not academic credit is available to the intern;
- (4) “[T]he internship accommodates the intern’s academic commitments by corresponding to the academic calendar;”
- (5) “[T]he internship’s duration is limited to the period in which the internship provides the intern with beneficial learning;”
- (6) “[T]he intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern;” and
- (7) “[T]he intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.”⁸⁹

The Second Circuit emphasized the inherently individualized

86. *Id.*

87. 791 F.3d 376, 388 (2d Cir. 2015).

88. *Id.* at 383.

89. *Id.* at 384.

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nature of the primary beneficiary test.⁹⁰ As such, it found the district court's conditional certification of the nationwide class to be inconsistent with the individualized identification of the primary beneficiaries required by the decision.⁹¹

Wang v. Hearst Corp. was issued by the Second Circuit on the same day that it issued *Glatt* and, in fact, the court conducted a single, simultaneous argument for both cases.⁹² In *Wang*, the court remanded the case to the district court so that it could make the primary beneficiary determination using the factors announced in *Glatt*.⁹³ It then affirmed that portion of the district court's decision denying class certification to the nationwide putative class and, as in *Glatt*, explained that collective action would not be consistent with the individualized nature of the primary beneficiary test.⁹⁴

3. Increase in Salary Test for "White Collar" Overtime Exemptions

For the first time since 2004, the USDOL issued regulations pertaining to the "salary level test" used to determine whether an employee is exempt from overtime requirements under the professional, administrative, or executive exemptions.⁹⁵ Salaried employees earning more than a minimum established by regulation may not, regardless of job duties, qualify for the exemptions.⁹⁶ On June 30, 2015, the USDOL announced the issuance of the new regulations, which increased the minimum salary from the weekly amount of \$455 (or \$23,660 annualized) to the weekly amount of \$970 (or \$50,400 annualized).⁹⁷ The regulations also increased the minimum annual amount needed to qualify for the FLSA's overtime exemption for "highly compensated employees."⁹⁸ The regulations do not alter the "duties" tests for any of the overtime exemptions.⁹⁹

90. *Id.* at 386.

91. *Id.* at 388.

92. 617 F. App'x 35, 36 (2d Cir. 2015).

93. *Id.* at 37.

94. *Id.* at 37–38; *Glatt*, 791 F.3d at 388.

95. *Id.*

96. DEP'T OF LABOR, FACT SHEET: PROPOSED RULEMAKING TO UPDATE THE REGULATIONS DEFINING AND DELIMITING THE EXEMPTIONS FOR "WHITE COLLAR" EMPLOYEES (2016), <http://www.dol.gov/whd/overtime/nprm2015/factsheet.htm>; 29 C.F.R. Part 451 (2015).

97. DEPARTMENT OF LABOR, *supra* note 96.

98. *Id.*

99. *Id.*

III. EMPLOYMENT DISCRIMINATION DEVELOPMENTS

A. New York State

1. Case Processing at the New York State Division of Human Rights

On November 10, 2014, New York State Division of Human Rights (“Division”) Commissioner Helen Diane Foster announced that the Division had, for the first time in decades, eliminated its backlog of “aged cases.”¹⁰⁰ The Division reported that they had eliminated a backlog of 2188 aged cases since the spring of 2012.¹⁰¹ The timing of the Division’s case processing has statutory significance under the New York Human Rights Law (NYSHRL), which states, *inter alia*, that investigations of individual complaints shall be completed within 180 days, and that a public hearing be conducted to resolve probable cause determinations within 465 days of filing of the complaint.¹⁰²

2. Protection for Interns Under the New York State Human Rights Law

On July 22, 2014, Governor Cuomo signed a bill to amend the NYSHRL to add protection against discrimination for unpaid interns.¹⁰³ Interns are defined to include any individual performing work for an employer for training purposes, provided that:

- (a) No commitment has been made to hire the individual after training is completed;
- (b) There is an agreement between the parties that the intern will not be paid; and
- (c) The work performed:
 - (i) improves the individual’s employment prospects;
 - (ii) offers a beneficial personal experience to the individual;
 - (iii) does not displace regular workers; and

100. Press Release, N.Y. Division of Human Rights, New York State Division of Human Rights Eliminates Decades-Long Backlog of Aged Cases (November 10, 2014), <http://www.dhr.ny.gov/sites/default/files/pdf/nysdhr-release-11-10-2014.pdf>.

101. *Id.*

102. *See id.*; *see also* N.Y. EXEC. LAW § 297(2) (McKinney 2013).

103. N.Y. EXEC. LAW § 296-c (McKinney 2016); *see* Robert F. Manfredi, *New York Amends Human Rights Law to Protect Unpaid Interns*, N.Y. LAB. & EMP. L. REP. (July 23, 2014), <http://www.nylaborandemploymentlawreport.com/2014/07/articles/employment-discrimination/new-york-amends-human-rights-law-to-protect-unpaid-interns/>.

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(iv) is closely supervised by the employer's existing staff.¹⁰⁴

The protection afforded to interns under the NYSHRL is similar in scope to the protections under New York City law.

3. State Court Developments

a. New York Court of Appeals

In *Margerum v. City of Buffalo*, the Court of Appeals addressed a challenge from a group of Caucasian firefighters, who claimed that the city had intentionally discriminated against them on account of race in connection with promotional opportunities.¹⁰⁵ The dispute centered on the early removal of the white firefighters from the promotional eligibility list before the time legally required for such removal had expired.¹⁰⁶ The trial court granted partial summary judgment to most of the plaintiffs on the issue of liability.¹⁰⁷

Two issues were addressed by the Court of Appeals. First, the city contended that the judgment should be dismissed because the plaintiffs did not comply with the ninety day notice of claim requirements under General Municipal Law section 50-e (1), which states that “[i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation”¹⁰⁸ That provision, the Court explained, was inapplicable to discrimination claims under the NYSHRL:

Human rights claims are not tort actions under section 50-e and are not personal injury, wrongful death, or damage to personal property claims under 50-i. Nor do we perceive any reason to encumber the filing of discrimination claims. Accordingly, we conclude that there is no notice of claim requirement here.¹⁰⁹

The city also argued that summary judgment should not have been awarded on the issue of liability because in doing so, the court failed to consider the material issue of whether the city acted in good faith in making the challenged decisions.¹¹⁰ The city pointed out that at the time of the challenged conduct there was a pending federal court action

104. N.Y. EXEC. LAW § 296-c.

105. 24 N.Y.3d 721, 728, 28 N.E.3d 515, 517, 5 N.Y.S.3d 336, 338 (2015).

106. *Id.*

107. *Id.*

108. *Id.* at 730, 28 N.E.3d at 518, 5 N.Y.S.3d at 339; N.Y. GEN. MUN. LAW § 50-e (McKinney 2013).

109. *Margerum*, 24 N.Y.3d at 730, 28 N.E.3d at 519, 5 N.Y.S.3d at 340.

110. *Id.* at 728, 28 N.E.3d at 517, 5 N.Y.S.3d at 338.

alleging that the promotional process had a discriminatory impact on non-white firefighters.¹¹¹

The Court relied upon the test established by the U.S. Supreme Court in *Ricci v. DeStefano* to evaluate the liability decision below.¹¹² Under *Ricci*, when an employer defends against a charge of intentional discrimination “for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.”¹¹³ The Court of Appeals found that consideration of the city’s motivation for its challenged conduct was a matter of credibility that should not have been determined in the context of a summary judgment motion.¹¹⁴ Accordingly, the case was remanded to the trial court for further consideration of the issue of the city’s state of mind.¹¹⁵

b. Appellate Division Decisions

i. Discrimination Based on Protected Status of Spouse

The Second Department, in a case of first impression, addressed whether an employee could assert a discrimination claim under the NYSHRL based on the protected class status of the employee’s spouse.¹¹⁶ In *Chiara v. Town of New Castle*, a non-Jewish employee of the town claimed that he worked in a hostile environment and was ultimately terminated because his wife was Jewish.¹¹⁷ The trial court granted summary judgment in favor of the town based on its finding that there were legitimate business reasons for the termination, and because his assertion relating to his wife was unsupported by anything beyond conjecture.¹¹⁸ The town contended on appeal that the employee could not make out a prima facie case of discrimination because the protected status of his Jewish spouse did not make him, constructively or otherwise, a member of the Jewish faith.¹¹⁹ The Second Department found otherwise, relying in large measure on Title VII case law holding

111. *Id.*

112. *Id.* at 730–31, 28 N.E.3d at 519, 5 N.Y.S.3d at 340 (citing *Ricci v. DeStefano*, 557 U.S. 557 (2009)).

113. *Ricci*, 557 U.S. at 585.

114. *Margerum*, 24 N.Y.3d at 732, 28 N.E.3d at 520, 5 N.Y.S.3d at 341.

115. *Id.*

116. *Chiara v. Town of New Castle*, 126 A.D.3d 111, 113, 2 N.Y.S.3d 132, 134 (2d Dep’t 2015).

117. *Id.* at 113–14, 2 N.Y.S.3d at 135.

118. *Id.* at 118–19, 2 N.Y.S.3d at 138–39.

119. *Id.* at 120, 2 N.Y.S.3d at 139–40.

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that an employer could violate Title VII by discriminating against an employee based on his or her association with one or members of a protected class.¹²⁰

ii. Discrimination Based on Gender

There were a number of appellate division decisions during the *Survey* year which addressed the respective evidentiary standards for discrimination claims under state and city law. The standards of proof under the NYSHRL and the New York City Human Rights Law (NYCHRR). are not always identical, as illustrated by the First Department's decision in *Gonzalez v. EVG, Inc.*¹²¹ There the court held that the employer was entitled to summary judgment on a hostile environment claim under the state law, but not under the law applicable to her identical claim under the NYCHRR.¹²² The state claim was dismissed under the more difficult standard that looks to whether the alleged discriminatory conduct was "severe and pervasive."¹²³ Under state law, the court found that the hostile work environment claim should be dismissed because the discriminatory conduct was not "severe and pervasive," as required under the state law.¹²⁴ On the other hand, the court held that the same claim based on the same facts could proceed under the NYCHRR, and noted that the city law's more lenient standard did not detract from the gravity of the plaintiff's claim:

Indeed, [c]onsidering the totality of the circumstances, this is not a truly insubstantial case. Defendants' alleged constant use of language degrading women, telling of sexually explicit jokes, and overt viewing of pornography in the workplace can be characterized as having subjected plaintiff to differential treatment. Accordingly, the broad remedial purposes of the City HRL would be countermanded by dismissal of the claim.¹²⁵

In *Overbeck v. Alpha Animal Health*, the Second Department reversed the trial court's dismissal of the plaintiff's state law claims for sex discrimination and retaliation.¹²⁶ Plaintiff was a female veterinary technician who had been terminated by her former employer.¹²⁷ Her complaint alleged that the individual owner of the business, who was

120. *Id.* at 122, 2 N.Y.S.3d at 141.

121. 123 A.D.3d 486, 487, 999 N.Y.S.2d 16, 17 (1st Dep't 2014).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* (citations and internal quotation marks omitted).

126. 124 A.D.3d 852, 852, 2 N.Y.S.3d 541, 542 (2d Dep't 2015).

127. *Id.*

included among the defendants in the complaint, “used his position of power to engage her in humiliating, bizarre, and intolerable forms of sexual discrimination, which included sexual intercourse and perverted behavior, jokes, and contact.”¹²⁸ The complaint also alleged that the plaintiff was terminated “when she eventually rebuffed the sexual advances.”¹²⁹ Summary judgment was awarded in favor of the defendants after the trial court determined that the sexual advances were not unwelcome.¹³⁰ The Second Department found the issue of whether the sexual advances were unwelcome—which plaintiff denied in her deposition—presented disputed issues of fact precluding an award of summary judgment in favor of the defendants.¹³¹ The Second Department observed that the trial court

appear[ed]to have focused on the voluntariness of the plaintiff’s participation in the claimed sexual episodes. However, “the fact that sex-related conduct was ‘voluntary,’ in the sense that the [plaintiff] was not forced to participate against her will, is not a defense,” and the “correct inquiry is whether [the plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome.”¹³²

In *Nelson v. Vigorito*, the Second Department affirmed the trial court’s denial of the employer’s motion for summary judgment on the plaintiff’s state law hostile work environment and constructive discharge claims.¹³³ The court found that, with respect to the hostile work environment claim, the employer-defendants “failed to establish, prima facie, that the underlying alleged conduct, which allegedly continued over the entire time the plaintiff was employed [by the employer], did not rise to the level of a hostile work environment.”¹³⁴

In *La Marca-Pagano v. Dr. Steven Phillips, P.C.*, the Second Department affirmed the trial court’s dismissal of a terminated plaintiff’s hostile work environment claim under state law.¹³⁵ The court found that the employer “demonstrated that the allegedly discriminatory remarks and conduct attributed to the defendant were isolated incidents that were not so severe or pervasive as to permeate the workplace and alter the conditions of the plaintiff’s employment.”¹³⁶ The court

128. *Id.*

129. *Id.*

130. *Id.* at 853, 2 N.Y.S.3d at 543.

131. *Overbeck*, 124 A.D.3d at 854, 2 N.Y.S.3d at 544.

132. *Id.* (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986)).

133. 121 A.D.3d 872, 874, 994 N.Y.S.2d 649, 651 (2d Dep’t 2014).

134. *Id.* at 873, 994 N.Y.S.2d at 651 (citations omitted).

135. 129 A.D.3d 918, 919, 12 N.Y.3d 192, 194 (2d Dep’t 2015).

136. *Id.* at 920, 12 N.Y.S.3d at 194–95.

disagreed with the trial court's dismissal of plaintiff's remaining state law claim for retaliatory discharge.¹³⁷ The court noted that the plaintiff was terminated the day after her employer received a letter from the plaintiff's attorney, and concluded that "[t]he close temporal proximity between the plaintiff's protected activity and the adverse employment action is sufficient to demonstrate the necessary causal nexus."¹³⁸

In *Jones v. New York State Division of Human Rights*, the plaintiff was a terminated employee who commenced an Article 78 proceeding to annul the decision of the New York State Division of Human Rights to dismiss her complaint alleging that she was sexually harassed and subjected to a hostile work environment.¹³⁹ The Fourth Department, in affirming the agency's dismissal of the plaintiff's petition, explained:

[T]he testimony at the hearing on the complaint established that the restaurant's employees used a cellular telephone that was also allegedly used by the restaurant owner to send numerous text messages of a sexual nature to petitioner. The restaurant manager testified that petitioner knew of and demonstrated a "spoof texting" application. Petitioner's expert, who extracted the text messages from petitioner's cellular telephone, did not verify the extracted messages against the records of the involved cellular telephone carriers. The administrative law judge (ALJ) who presided at the hearing was not "bound by the strict rules of evidence prevailing in courts of law or equity," and we will not disturb the ALJ's decision to credit the testimony of certain witnesses for the restaurant over that of petitioner and her expert.¹⁴⁰

iii. Discrimination Based on Disability

There were a number of appellate division decisions addressing disability discrimination under state law, with most of them focused on the duty imposed on employers to attempt to make reasonable accommodations for disabled employees. In *County of Erie v. State Division of Human Rights*, the county sought to annul a determination by the State Division of Human Rights (SDHR) that it had failed to reasonably accommodate an employee with mobility issues by providing her with a desktop printer.¹⁴¹ The county had reviewed the employee's workspace and its proximity to a common printer and

137. *Id.* at 921, 12 N.Y.S.3d at 195.

138. *Id.*

139. 122 A.D.3d 1387, 1387, 997 N.Y.S.2d 878, 878 (2d Dep't 2014).

140. *Id.* at 1388, 997 N.Y.S.2d at 879 (quoting N.Y. EXEC. LAW § 297(4)(a) (McKinney 2013)).

141. 121 A.D.3d 1564, 1564–65, 993 N.Y.S.2d 849, 850 (4th Dep't 2014).

determined the request for a desktop printer was not a necessary accommodation.¹⁴² The Fourth Department upheld the state division's decision, emphasizing in doing so that it had limited authority to review the factual determinations of the agency, and recognizing that there appeared to be conflicting evidence in the record.¹⁴³

In *Coles v. New York State Division of Human Rights*, the Fourth Department upheld the SDHR determination that the Erie County Sheriff's Office was not required to provide light-duty accommodation to a deputy sheriff with epilepsy.¹⁴⁴ The deputy sheriff worked as an "inmate escort" and had requested light work as an accommodation.¹⁴⁵ She claimed that she was denied the requested accommodation in violation of both the Americans with Disabilities Act and the NYSHRL.¹⁴⁶ The SDHR determined that there was no duty to provide her with the requested accommodation because of the long-term prognosis for her disability and the lack of the type of light-duty work that she requested.¹⁴⁷ The Fourth Department upheld the determination after finding "no basis to disturb the SDHR's determination that petitioner's disability was of a permanent nature and that ECSO had no permanent light-duty police assignments available."¹⁴⁸

In *Cohen v. State*, the plaintiff was employed as a corrections officer by the New York State Department of Corrections (DOC).¹⁴⁹ She became disabled and unable to work after sustaining a work-related injury to her hand.¹⁵⁰ Upon her receipt of a proposed termination notice, the plaintiff sought to return to work prior to the termination date in the notice.¹⁵¹ The DOC then sent a second notice denying the reinstatement request based on plaintiff's failure to demonstrate that she was medically fit to return to work, and because plaintiff had failed to provide a certain date by which she could return to her full duties.¹⁵² Plaintiff responded with a letter informing the DOC that she was to undergo hand surgery.¹⁵³ She was subsequently terminated and shortly

142. *Id.*

143. *Id.* at 1565–66, 993 N.Y.S.2d at 851.

144. 122 A.D.3d 1256, 1257, 999 N.Y.S.2d 280, 283 (4th Dep't 2014).

145. *Id.* at 1257, 999 N.Y.S.2d at 282.

146. *Id.* at 1258, 999 N.Y.S.2d at 283.

147. *Id.* at 1257, 999 N.Y.S.2d at 282–83.

148. *Id.* at 1256, 999 N.Y.S.2d at 283..

149. 129 A.D.3d 897, 898, 10 N.Y.S.3d 628, 629 (2d Dep't 2015).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

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thereafter commenced an action alleging that she filed a complaint for damages under the Executive Law based on disability discrimination and retaliation.¹⁵⁴

The trial court granted the DOC's motion for summary judgment to dismiss the disability claim.¹⁵⁵ The court based its decision on its finding of legitimate and non-discriminatory reasons for the plaintiff's termination, and because there was no evidence that plaintiff ever requested accommodation.¹⁵⁶ On appeal, the Second Department found that the DOC should have treated the correspondence from the plaintiff as an accommodation request.¹⁵⁷ As such, the DOC had a duty to engage in a good faith interactive process with the plaintiff regarding the requested accommodation, and its failure to do so precluded an award of summary judgment on the disability claim.¹⁵⁸

The Second Department came to a different conclusion in *Leon v. State University of New York*, on the issue of whether the plaintiff in that case had made an appropriate request for accommodation.¹⁵⁹ The plaintiff was a former State University of New York (SUNY) employee who had requested that he be given a modified work schedule at Kings County Hospital, which is a SUNY "affiliate," but is neither owned nor operated by SUNY.¹⁶⁰ The Second Department found that the plaintiff failed to present any evidence that SUNY unlawfully failed to consider any request for accommodation, and thus could not establish a prima facie case of disability discrimination.¹⁶¹

In *Caban v. New York Methodist Hospital*, the plaintiff brought a claim against his employer for disability discrimination under the NYCHRR. The plaintiff worked as a hospital security guard.¹⁶² He requested a fourteen-month leave upon learning that he required treatment for cancer, and thereafter received full medical clearance and returned to work.¹⁶³ Approximately two years later, the plaintiff was terminated for excessive and patterned absences.¹⁶⁴

The plaintiff's union representative grieved his termination and

154. *Cohen*, 129 A.D.3d at 898, 10 N.Y.S.3d at 628–29.

155. *Id.* at 898, 10 N.Y.S.3d at 629.

156. *Id.* at 898–99, 10 N.Y.S.3d at 629.

157. *Id.* at 899, 10 N.Y.S.3d at 629.

158. *Id.* at 899, 10 N.Y.S.3d at 630.

159. 120 A.D.3d 771, 772, 991 N.Y.S.2d 359, 360 (2d Dep't 2014).

160. *Id.* at 771–72, 991 N.Y.S.2d at 360.

161. *Id.*

162. 119 A.D.3d 717, 717, 989 N.Y.S.2d 313, 313 (2d Dep't 2014).

163. *Id.*

164. *Id.*

ultimately submitted the case to an arbitrator, who found just cause for the termination.¹⁶⁵ Thereafter, plaintiff commenced an action based on disability discrimination under the NYCHRR.¹⁶⁶ The court below dismissed the complaint based on its determination that the arbitration award had a collateral estoppel effect (because the plaintiff's treatment history was raised with and considered by the arbitrator).¹⁶⁷

On appeal, the Second Department affirmed the dismissal of the disability claim, but not because of the collateral estoppel effect of the arbitration award.¹⁶⁸ In affirming the lower court, the Second Department held that there were legitimate, non-discriminatory reasons for plaintiff's termination, and that the hospital had presented evidence that plaintiff had a disability requiring accommodation at the time of his termination.¹⁶⁹

iv. Discrimination Based on Sexual Orientation

In *Miranda v. ESA Hudson Valley, Inc.*, the Third Department affirmed the trial court's award of summary judgment and dismissal of a complaint brought by a paramedic claiming that he was terminated by his employer on account of sexual orientation.¹⁷⁰ The paramedic's personnel records reflected that he had been required to attend training after he was accused of inappropriately touching a coworker, that shortly thereafter a female coworker complained about his "abrasive" behavior, and that in a third incident he was found to have violated patient privacy rights.¹⁷¹ Ultimately, the paramedic was terminated for failing to properly secure controlled substances and to maintain accurate records relating to the inventory and use of controlled substances.¹⁷² Both the court below and the Third Department found that such evidence presented by the employer satisfied its burden of demonstrating that it had legitimate, non-discriminatory reasons for the termination decision.¹⁷³ Both courts also rejected the paramedic's contention that he was on the employer's "hit list" and that the controlled substances investigation was asserted as pretext for

165. *Id.*

166. *Id.*

167. *Caban*, 119 A.D.3d at 718, 989 N.Y.S. at 313.

168. *Id.*

169. *Id.* at 718, 989 N.Y.S. at 314.

170. 124 A.D.3d 1158, 1160, 2 N.Y.S.3d 668, 671 (3d Dep't 2015).

171. *Id.* at 1159, 2 N.Y.S. at 670.

172. *Id.* at 1159–60, 2 N.Y.S. at 670–71.

173. *Id.* at 1161, 2 N.Y.S. at 672.

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discrimination.¹⁷⁴ The Third Department credited the employer's argument that it could have fired the plaintiff, had it wished to discriminate against him, when the first complaint for inappropriate touching was made against him.¹⁷⁵

v. Discrimination Based on Criminal Conviction

In *Costco Wholesale Corp. v. New York State Division of Human Rights*, the Third Department affirmed the trial court's decisions annulling SDHR's determination that the plaintiff, who applied for a position electronically on the company's website, was discriminated against based on his record of criminal convictions.¹⁷⁶ The Third Department found that there was no evidence to support the plaintiff's claim and, in fact, the evidence established that the employer did not exclude applicants from consideration based on responses to questions about prior criminal convictions.¹⁷⁷

c. Local Developments

On May 6, 2016, New York City Mayor Bill de Blasio signed a bill that amended the NYCHRR to prohibit employers from looking into or relying on an employment applicant's credit history in making hiring decisions.¹⁷⁸ In addition, on June 29, 2015, Mayor de Blasio signed the Fair Chance Act, which places substantial limitations on an employer's ability to make hiring decisions based on an applicant's criminal background.¹⁷⁹

Additionally, Erie County added equal pay protection for employees working for Erie County contractors. On November 6, 2014, Erie County Executive Mark C. Polencarz signed an executive order that requires contractors working for the county to certify their

174. *Id.* at 1162, 2 N.Y.S. at 672–73.

175. *Miranda*, 124 A.D.3d at 1162, 2 N.Y.S. at 673.

176. 129 A.D.3d 410, 411, 10 N.Y.S. 228, 229 (3d Dep't 2015).

177. *Id.* at 411, 10 N.Y.S. at 229.

178. Press Release, Office of the Mayor, Mayor de Blasio Signs Legislation to Prohibit Employers from Using Credit Checks to Screen Applicants (May 6, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/293-15/mayor-de-blasio-signs-legislation-prohibit-employers-using-credit-checks-screen#/0>.

179. Bill de Blasio, Mayor of N.Y.C., *Criminal Record?: You Can Work with That*, N.Y.C. COMMISSION ON HUM. RTS. (Nov. 16, 2015), http://www.nyc.gov/html/cchr/downloads/pdf/FairChance_Employer.pdf; Press Release, Office of the Mayor, Mayor de Blasio Signs "Fair Chance Act" (June 29, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/456-15/mayor-de-blasio-signs-fair-chance-act-#/0>.

compliance with state and federal equal pay requirements for women.¹⁸⁰

B. Discrimination Under Federal Law

1. Supreme Court Decisions

a. Judicial Review of EEOC Conciliation

Title VII requires the EEOC to encourage informal settlement before proceeding with judicial enforcement of a determination that an unlawful employment practice has occurred.¹⁸¹ In *Mach Mining, L.L.C. v. EEOC*, the Supreme Court held that EEOC conciliation efforts are subject to judicial review.¹⁸² In that case, the EEOC advised the employer of its determination upon investigation that the employer had engaged in unlawful sex discrimination.¹⁸³ The same letter included an invitation to the employer to participate in conciliation with the agency.¹⁸⁴ That letter was followed approximately one year later by a second letter to the employer stating that conciliation had not been successful.¹⁸⁵ Thereafter, the EEOC commenced a lawsuit against the employers.¹⁸⁶ The district court granted the employer's motion to dismiss the complaint based on the EEOC's failure to participate in conciliation as required by the statute.¹⁸⁷ The Seventh Circuit reversed the district court, holding that, with respect to Title VII's conciliation requirements, the EEOC was only required to plead that conciliation was attempted without success.¹⁸⁸

The Supreme Court held that Title VII's pre-litigation conciliation provision was more than a mere pleading requirement, and that

180. Press Release, Erie County Executive Mark C. Poloncarz, Poloncarz Signs Executive Order Requiring Equal Pay Certification and Compliance (Nov. 11, 2014), <http://www2.erie.gov/exec/index.php?q=11614-poloncarz-signs-executive-order-requiring-equal-pay-certification-and-compliance>.

181. Title VII requires the EEOC to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion," 42 U.S.C. § 2000e-5(b) (2012), and further states that the EEOC may file a lawsuit if it "has been unable to secure from the respondent conciliation agreement acceptable to the Commission." 42 U.S.C. § 2000e-5(f)(1) (2012). *See also* *Mach Mining, L.L.C. v. Equal Emp't Opportunity Comm'n*, 135 S. Ct. 1645, 1651 (2015) ("Title VII, as the Government acknowledges, imposes a duty on the EEOC to attempt conciliation of a discrimination charge prior to filing a lawsuit.").

182. 135 S. Ct. at 1649.

183. *Id.* at 1650.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Mach Mining*, 135 S. Ct. at 1650.

188. *Id.* at 1650–51.

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conciliation was subject to judicial review.¹⁸⁹ The Supreme Court referred both to the mandatory language in the conciliation provision, and the ordinary presumption favoring judicial review of agency action.¹⁹⁰ The Court also noted that the courts routinely conduct judicial review of other pre-litigation matters, such as with respect to certain questions of timeliness.¹⁹¹

The Supreme Court also stated that the scope of judicial review of conciliation efforts should be narrow in light of the “abundant discretion” the law gives the EEOC “to decide the kind and extent of discussions appropriate in a given case.”¹⁹² Finally, the Court cautioned that judicial review “may not impinge on that latitude and on the Commission’s concomitant responsibility to eliminate unlawful workplace discrimination.”¹⁹³

b. Pregnancy

The Supreme Court established a special standard for reviewing claims arising under the PDA.¹⁹⁴ In *Young v. United Parcel Service*, the plaintiff was a driver who claimed that the employer refused her pregnancy-related, light-duty accommodation request in violation of the PDA.¹⁹⁵ The employer countered that its refusal was legitimate and non-discriminatory, based on language in the collective bargaining agreement providing for light-duty work under specific and limited circumstances that did not include pregnancy-related issues.¹⁹⁶ The district court granted the employer’s motion for summary judgment and that decision was affirmed on appeal to the Fourth Circuit.¹⁹⁷

The Supreme Court vacated the decision and remanded the case to the Fourth Circuit for consideration of the record under a new standard for evaluating PDA claims of intentional discrimination.¹⁹⁸ Under the new standard, if an employer cites a neutral policy to explain its refusal of a pregnancy-related obligation, the plaintiff can establish intentional discrimination with evidence that the policy imposes a “significant burden” on pregnant workers, and that the value of the policy is

189. *Id.* at 1649.

190. *Id.* at 1651.

191. *Id.*

192. *Mach Mining*, 135 S. Ct. at 1656.

193. *Id.*

194. *Young v. United Parcel Serv.*, 135 S. Ct. 1338, 1344 (2015).

195. *Id.*

196. *Id.* at 1344–45.

197. *Id.* at 1347.

198. *Id.* at 1356.

outweighed by the scope of any such burden.¹⁹⁹

c. Religious Accommodation

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the Supreme Court addressed the scope of protection for employees who seek religious accommodation from neutral workplace policies.²⁰⁰ The employer was a clothing retailer with a dress code that prohibited employees from wearing caps.²⁰¹ The employer made a decision not to hire the plaintiff because of the scarf she wore.²⁰² The plaintiff wore the scarf on account of her Muslim faith.²⁰³

The employer sought dismissal of the complaint because it did not at any time have actual knowledge that the plaintiff wore the headscarf for religious reasons.²⁰⁴ The Supreme Court held that a plaintiff claiming religious discrimination is not required to plead or prove that the employer had “actual knowledge” of a plaintiff’s religion.²⁰⁵ Rather, Justice Scalia, writing for an eight-to-one majority, explained that it is the defendant’s motivation, rather than the defendant’s “actual knowledge,” that governs:

Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor A request for accommodation, or the employer’s certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability.²⁰⁶

2. Second Circuit Decisions

a. Race Discrimination

In *Turley v. ISG Lackawanna, Inc.*, the Second Circuit confronted a number of issues on appeal from a judgment issued in favor of an African American plaintiff for hostile work environment discrimination under Title VII and the NYSHRL, and for the intentional infliction of emotional distress under New York common law.²⁰⁷ The plaintiff

199. *Id.* at 1364 (Scalia, J., dissenting).

200. 135 S. Ct. 2028, 2031 (2015).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 2032.

205. *Abercrombie & Fitch*, 135 S. Ct. at 2033.

206. *Id.* at 2033.

207. 774 F.3d 140, 146 (2d Cir. 2014).

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prevailed on his claim after a three-week jury trial, and was awarded \$1.32 million in compensatory damages and slightly more than \$24 million in punitive damages.²⁰⁸

The defendants made a post-trial motion for either: (1) judgment notwithstanding the verdict, (2) a new trial, or (3) or for remittitur of damages.²⁰⁹ The district court found the punitive damages to be excessive and proposed that the award be reduced to \$5 million by remittitur.²¹⁰ Remittitur gives the plaintiff the option of either accepting the reduction or proceeding with a new trial. The plaintiff agreed to the proposed reduction and the district court amended the judgment accordingly.²¹¹

The defendants raised a series of issues on appeal: (1) alleged prejudice caused by erroneous jury instructions and verdict form; (2) the liability of the corporate parent of plaintiff's employer under the "single employer" theory; (3) the sufficiency of the evidence to support the intentional infliction of emotional distress portion of the judgment; and (4) the amounts awarded as both compensatory and punitive damages to the plaintiff.²¹²

Notably, the factual issues underlying a pattern of what the Second Circuit characterized as "extreme racial harassment" were not disputed by any of the defendants on appeal.²¹³ As described by the court:

The plaintiff, a longtime steelworker at a plant in Lackawanna, New York, endured an extraordinary and steadily intensifying drumbeat of racial insults, intimidation, and degradation over a period of more than three years. The demeaning behavior of the plaintiff's tormentors included insults, slurs, evocations of the Ku Klux Klan, statements comparing black men to apes, death threats, and the placement of a noose dangling from the plaintiff's automobile. Supervisors' meager investigations and nearly total lack of action failed to stop the escalating abuse; instead, managers often appeared to condone or even

208. *Id.* at 146–47.

209. *Id.* at 152; Remittitur is:

the process by which a court compels a plaintiff to choose between the reduction of an excessive verdict and a new trial. If the plaintiff rejects the specified reduction in the amount of damages, the court must grant a new a trial to avoid depriving the plaintiff of the Seventh Amendment right to a jury trial; the court does not have the option of entering judgment for the reduced amount without the plaintiff's consent.

Id. at 167–68 (*quoting* MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 59.13[2][g][iii][A] (3d ed. 2013)).

210. *Id.* at 152.

211. *Turley*, 774 F.3d at 152.

212. *Id.*

213. *Id.* at 146, 152.

participate in the harassment. The experience left the plaintiff psychologically scarred and deflated²¹⁴

The Second Circuit found that the jury instructions and verdict form did not prejudice the jury based on an overly broad interpretation of the liability of an employer for the acts of its non-supervisory staff.²¹⁵ The court found the defendants' contention was based on a selective reading of the challenged instruction, and found that the totality of the instruction appropriately set forth the applicable standard, i.e., that the jury should consider the totality of circumstances in evaluating whether in a given case an employer should be held liable for the acts of non-supervisory workers.²¹⁶

The court next considered whether the jury correctly determined that the corporate parent of the plaintiff's "direct" employer was liable based on its "single employer" relationship with the direct employer.²¹⁷ The court found sufficient evidence in the record to support the jury's determination that the corporation shared a "single employer" relationship with its subsidiary, such that it was jointly and severally liable for the unlawful discrimination.²¹⁸ The court also found sufficient evidence in the record to support the jury's decision to hold the plaintiff's employer and the employer's chief of security liable under the plaintiff's claim for intentional infliction of emotional distress (IIED).²¹⁹

The defendants claimed that they had not committed any of the alleged acts of harassment and that they should not be held liable for IIED based merely on acts of omission, i.e., in this case their failure to adequately respond to the plaintiff's harassment complaints.²²⁰ The Second Circuit disagreed with the defendants, although it acknowledged that in the ordinary course the failure to act, standing alone, would be insufficient to establish a claim for IIED.²²¹ The court explained:

But, under New York law, an IIED claim does not turn on a distinction between action and omission. The ultimate question remains whether the conduct proven at trial, in light of all the

214. *Id.* at 146.

215. *Id.* at 154.

216. *Turley*, 774 F.3d at 153–55.

217. *Id.* at 156–57.

218. *Id.* at 157.

219. *Id.* at 161.

220. *Id.* at 160.

221. *Turley*, 774 F.3d at 160–61.

circumstances, was “utterly intolerable in a civilized community.”²²²

Finally, the court affirmed the jury’s award of compensatory damages but remanded the case with instructions that the court issue a remittitur with a reduced punitive damage award, or to conduct a new trial in the event that the plaintiff did not agree with the reduction.²²³ The court found that the four-to-one ratio of punitive to compensatory damages raised constitutional due process concerns, and that it was in any event required under the common law to ensure that the award of punitive damages was “fair, reasonable, predictable, and proportionate.”²²⁴ The court stated that the maximum ratio between punitive and compensatory damages should not exceed two-to-one, and vacated and remanded the judgment with instructions that the district court propose, by remittitur, an award of punitive damages consistent with the court’s proportionality findings.²²⁵

In *Tolbert v. Smith*, the plaintiff was an African American, former teacher who sued his school district and former supervising principal after he was denied tenure.²²⁶ The plaintiff asserted claims based on common law defamation, race discrimination, and hostile work environment under Title VII and the NYSHRL.²²⁷ On appeal, the Second Circuit reversed the district award of summary judgment as to the claim based on denial of tenure but affirmed the court with respect to the hostile environment claim.²²⁸

The Second Circuit found that the district court erred in its determination that the alleged racially offensive remarks the plaintiff claimed were made were “stray” and “too attenuated” to support such an inference of intentional discrimination.²²⁹ The court noted that the alleged remarks occurred within one year of each other and one remark allegedly occurred three months before the tenure decision.²³⁰ The court also stated that, in addition to the remarks, an inference of discrimination could be made from allegations that the principal took a

222. *Id.* at 161 (quoting *Gray v. Schenectady City Sch. Dist.*, 86 A.D.3d 771, 773, 927 N.Y.S.2d 442, 445 (3d Dep’t 2011)). The court also noted that the defendant employer was liable for the acts of its employees performed in the scope of employment.

223. *Id.* at 168.

224. *Turley*, 774 F.3d at 168 (quoting *Payne v. Jones*, 711 F.3d 85, 93 (S.D.N.Y. 2013)).

225. *Id.* at 164, 167.

226. 790 F.3d 427, 430–433 (2d Cir. 2015).

227. *Id.* at 433.

228. *Id.* at 438–439.

229. *Id.* at 437.

230. *Id.*

series of steps that interfered with the normal course of the tenure decision-making process.²³¹

On the other hand, the court found that the same allegations that were sufficient to state a claim for discrimination were too tenuous and remote to support a hostile work environment claim.²³² In particular, the court found that the plaintiff “failed to identify sufficient material facts showing that his work environment was objectively hostile and abusive.”²³³

b. Gender Discrimination

In *Moll v. Telesector Resources Group, Inc.*, the Second Circuit reversed the district court’s dismissal of the plaintiff’s state and federal sex-based hostile work environment claims.²³⁴ The district court ruled that the plaintiff could not rely on non-sex related allegations as the basis for a sex-based hostile work environment claim.²³⁵ The district court also found that the plaintiff’s sex-based allegations all occurred outside of the applicable limitations periods for both statutes and, accordingly, could not be used to state a timely claim.²³⁶

The Second Circuit found that the district court should have considered the complaint in its totality, including non-sex based allegations included in the complaint. Explaining its ruling, the court explained that “[s]ex-based hostile work environment claims may be supported by facially sex-neutral incidents and ‘sexually offensive’ acts may be facially sex-neutral.”²³⁷

The defendant accused of discrimination in *Fowlkes v. Ironworkers Local 40* was the plaintiff’s union representative.²³⁸ The plaintiff was a self-identified male who had been born a biological female.²³⁹ The plaintiff claimed that the union discriminated against him on account of sex in connection with job referrals made through the union’s hiring hall.²⁴⁰ Plaintiff filed his complaint pro se with the district court, which

231. *Tolbert*, 790 F.3d at 438 (quoting *Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984)).

232. *Id.* at 439 (quoting *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997)).

233. *Id.*

234. 760 F.3d 198, 200 (2d Cir. 2014).

235. *Id.*

236. *Id.* at 203.

237. *Id.* at 200 (citing *Alfano v. Costello*, 294 F.3d 365, 375 (2d Cir. 2002)).

238. 790 F.3d 378, 381 (2d Cir. 2015).

239. *Id.* at 380.

240. *Id.* at 381.

dismissed the complaint after it determined that it was based on Title VII and that the plaintiff had failed to exhaust the pre-litigation administrative process.²⁴¹

The Second Circuit reversed the district court for two reasons. First, it noted that the Title VII exhaustion requirement was not jurisdictional and was subject to waiver.²⁴² As such, and particularly given the plaintiff's pro se status, the Second Circuit held that the district court erred in failing to consider whether the plaintiff could have avoided dismissal by pleading the equitable defense that exhaustion would have been futile, or the equitable defense that more recent events were reasonably related to a previous charge that the plaintiff had filed with the EEOC.²⁴³

Second, the Second Circuit found that the complaint could be read to state a claim against the union for breach of the duty of fair representation under section 301 of the NLRA, as amended.²⁴⁴ A union breaches the duty of fair representation when it fails to represent its members "without hostility or discrimination," and with "complete good faith and honesty, and to avoid arbitrary conduct."²⁴⁵ In the amended complaint, the court ruled that the plaintiff stated a claim for the breach of the duty of fair representation by alleging that the plaintiff refused to refer him to jobs because of his gender and in retaliation for a previous complaint of discrimination filed by the plaintiff.²⁴⁶ Such allegations, if proven, would demonstrate that the union's "conduct was at the very least arbitrary, if not discriminatory or indicative of bad faith."²⁴⁷

c. Disability Discrimination

In *Noll v. International Business Machine Corp.*, the Second Circuit affirmed the district court's dismissal of a "refusal to accommodate" claim under the ADA and the NYSHRL.²⁴⁸ The plaintiff was a deaf employee who alleged that the employer refused his reasonable accommodation request for captioned video or transcripts to be made available as soon as video or audio files were uploaded to the

241. *Id.*

242. *Id.* at 385.

243. *Fowlkes*, 790 F.3d at 386 (quoting *Skubel v. Fuoroli*, 113 F.3d 330, 334 (2d Cir. 1997)).

244. *Id.* at 387.

245. *Id.* (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)).

246. *Id.* at 388.

247. *Id.*

248. 787 F.3d 89, 98 (2d Cir. 2015).

employer's intranet system.²⁴⁹ The employer denied the request because it believed that it was already providing reasonable accommodation to the plaintiff by providing him with transcripts and/or live or remote sign language interpreters, immediately upon request.²⁵⁰ The Second Circuit found that the plaintiff was currently provided a reasonable accommodation and that, under such circumstances, the employer was under no obligation to consider an alternative accommodation request.²⁵¹ At most, the court found that plaintiff did not always receive transcripts on a timely basis.²⁵² Nevertheless, the court was persuaded by the undisputed facts that sign interpreters were always available to the plaintiff on either a remote or on-site basis, that interpreters were included among the reasonable accommodations referenced in USDOL regulations, and that they did not disadvantage the plaintiff during live meetings.²⁵³

3. Additional Federal Developments

a. Executive Order on Sexual Orientation and Gender Identity

On July 21, 2014, President Obama signed an executive order prohibiting discrimination by federal contractors based on sexual orientation and gender identity.²⁵⁴

b. Guidelines on LGBT Protections for Federal Workers

On June 3, 2015, four federal agencies jointly issued a guide entitled *Addressing Sexual Orientation and Gender Identity Discrimination in Civilian Employment*.²⁵⁵

c. Updated Guidelines on PDA Claims

On June 25, 2015, the EEOC issued a guide entitled *Enforcement*

249. *Id.* at 93.

250. *Id.*

251. *Id.* at 96.

252. *Id.* at 95.

253. *Noll*, 787 F.3d at 95–96; *see also* 29 C.F.R. § 1630.2(o) (2015).

254. Exec. Order No. 13,672, 3 C.F.R. § 100.1 (2015).

255. OFFICE OF PERS. MGMT., EQUAL EMP'T OPPORTUNITY COMM'N, OFFICE OF SPECIAL COUNSEL & MERIT SYS. PROT. BD., ADDRESSING SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN FEDERAL CIVILIAN EMPLOYMENT: A GUIDE TO EMPLOYMENT RIGHTS, PROTECTIONS, AND RESPONSIBILITIES (rev. June 2015), <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/addressing-sexual-orientation-and-gender-identity-discrimination-in-federal-civilian-employment.pdf>.

Guidance on Pregnancy Discrimination and Related Issues.²⁵⁶ The guidelines updated an earlier version that had been issued before the Supreme Court issued its decision in *Young v. United Postal Service*, establishing a new test for evaluating claims of intentional discrimination under the Pregnancy Discrimination Act.²⁵⁷

IV. PUBLIC SECTOR DEVELOPMENTS

Public sector labor organizations were presented with what many considered to be an existential threat in *Friedrichs v. California Teachers Association*.²⁵⁸

In *Friedrichs*, a group of teachers challenged their obligation to pay a mandatory service fee paid to their union representative, in lieu of paying dues as a member of the union.²⁵⁹

In the Supreme Court's landmark 1977 decision, *Abood v. Detroit Board of Education*, a distinction was made between union expenditures for collective bargaining and those expenditures made for political purposes.²⁶⁰ The Supreme Court held that mandatory fees used to support collective bargaining matters "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."²⁶¹

Thereafter, the Supreme Court appeared to express reservations about its holding in *Abood*. In *Knox v. SEIU Local 1000*, Justice Alito, writing for the majority, observed that the imposition of mandatory fees on non-members "creat[ed] a risk that the fees nonmembers pay will be used to further political and ideological ends with which they do not agree."²⁶² Similar concerns were expressed in the Supreme Court's more recent decision in *Harris v. Quinn*, where the Court, having found that the home care workers at issue were not full-fledged public employees, was not required to consider the constitutionality of mandatory fee requirements for non-members.²⁶³

256. U.S. Equal Emp. Opportunity Comm'n, EEOC Notice No. 915.003, EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (June 25, 2015), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

257. *Id.*

258. 135 S. Ct. 1083 (2016).

259. No. 13-676, 2013 WL 9825479, at *1 (C.D. Cal. Dec. 5, 2013), *aff'd*, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *aff'd by an equally divided court*, 135 S. Ct. 1083 (2016).

260. 431 U.S. 209, 227-31 (1977).

261. *Id.* at 222.

262. 132 S. Ct. 2277, 2283 (2012).

263. 134 S. Ct. 2618, 2639 (2014).

Justice Scalia passed away before the vote on *Friedrich* had been taken by the Court, and the challenge was defeated by a vote of 4-4.²⁶⁴ There is a high probability that the issue will come before the Supreme Court in the very near future. If that happens, and if the Court were to hold that mandatory service fees violate the First Amendment, it would have an extraordinary nationwide impact on labor-management relations in the public sector. As a matter of simple economics, and all things otherwise equal, a non-union worker would prefer to be represented at no cost than at some cost.

V. WHISTLEBLOWER CLAIMS

A. New York State

New York Labor Law section 740 protects employees from retaliation for: (a) disclosing or threatening to disclose to a supervisor or public body information concerning a legal violation “present[ing] a substantial and specific danger to the public health or safety, or which constitutes health care fraud;” (b) providing information to or testifying before a public investigatory body that is investigating the employer; or (c) objecting to or refusing to participate in a violation of law.²⁶⁵

The Appellate Division, First Department, issued an important decision at the close of the *Survey* year addressing whether an employee asserting a whistleblower claim under Labor Law section 740 is barred from asserting additional claims based on the same facts and circumstances. In *Seung Won Lee v. Woori Bank*, the First Department held that such retaliatory claims do not bar the assertion of such additional claims.²⁶⁶

The plaintiffs in *Woori Bank* worked in the New York office of a bank based in Seoul, South Korea. The plaintiffs alleged that they were subjected to frequent sexual comments and advances by senior staff.²⁶⁷ They further alleged that after complaining to senior management in New York without success, the plaintiffs complained to senior management in Korea.²⁶⁸ Thereafter, the plaintiffs claimed they were transferred to unwanted positions in retaliation for their complaints.²⁶⁹

Plaintiffs filed a state court complaint for retaliation under Labor

264. 136 S. Ct. 1083 (2016).

265. N.Y. LAB. LAW § 740 (McKinney 2006).

266. 131 A.D.3d 273, 274, 14 N.Y.S.3d 359, 359 (1st Dep’t 2015).

267. *Id.* at 274, 14 N.Y.S.3d at 359–60.

268. *Id.* at 274–75, 14 N.Y.S.3d at 360.

269. *Id.* at 275, 14 N.Y.S.3d at 360.

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Law section 740 and the NYCHRR and for, inter alia, negligent hiring and hostile work environment violations under the NYSHRL.²⁷⁰ The employer moved to dismiss the negligent hiring and hostile work environment claim based on Labor Law section 740(7), which states:

Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract, *except that the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law.*²⁷¹

The First Department held that Labor Law section 740(7) was not intended to preclude independent claims for relief, but rather was intended to prevent duplicate recovery for whistleblowing.²⁷² The claims challenged by the employer, the court explained, would not create the potential for duplicate recovery, “[t]hese claims [for hostile work environment and negligence] concern injury sustained as a result of the reported misconduct, not simply the statutorily protected loss of employment as a consequence of complaining to management about such misconduct.”²⁷³

B. Federal Whistleblower Developments

1. FLSA Retaliation Claims

In *Greathouse v. JHS Security, Inc.*, the Second Circuit held that an employee could state an anti-retaliation claim under the FLSA based on alleged conduct that occurred after the employee made an oral complaint to a supervisor about not being paid over a period of several months.²⁷⁴ The employer argued that such in-house oral complaints were not protected by section 215(a)(3)’s protection of employees who “file any complaint” related to an FLSA violation.²⁷⁵ The employer based its position on existing Second Circuit precedent holding that section 215(a)(3) only protected “formal” complaints filed with a

270. *Id.*

271. *Woori Bank*, 131 A.D.3d at 275–76, 14 N.Y.S.3d at 360; N.Y. LAB. LAW § 740(7) (McKinney 2006) (emphasis added).

272. *Woori Bank*, 131 A.D.3d at 278, 14 N.Y.S.3d at 362.

273. *Id.*

274. 784 F.3d 105, 107 (2d Cir. 2015).

275. *Id.* at 111–12.

government agency.²⁷⁶

The Second Circuit overruled its earlier decision and held that the FLSA's anti-retaliation protection applied to the plaintiff's intra-company oral complaint.²⁷⁷ The court held that reversal of its earlier decision was supported by the intervening decision of the Supreme Court in *Kasten v. Saint-Gobain Performance Plastics Corp.*²⁷⁸ Although *Kasten* did not address whether such oral complaints were only protected if made to a government agency, the Second Circuit held that intra-employer complaints were also protected under the statute.²⁷⁹ The court found its decision to be consistent with the broad remedial purposes of the FLSA, prior interpretations of federal administrative agencies, and with the decisions of other federal circuits.²⁸⁰ The court concluded that section 215(a)(3) "prohibits retaliation against employees who orally complain to their employers, so long as their complaint is 'sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection.'"²⁸¹

2. Whistleblower Claims Under Sarbanes-Oxley

The Sarbanes-Oxley Act of 2002 was enacted "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation[.]"²⁸² The statute provides whistleblower protection for employers "when they take lawful acts to disclose information or otherwise assist . . . in detecting and stopping actions which they reasonably believe to be fraudulent."²⁸³ Section 1514A of Sarbanes-Oxley prohibits public companies from retaliating against an employee who provides or assists in providing information "regarding any conduct which the employee reasonably believes constitutes [mail fraud, wire fraud, bank fraud, or securities fraud.]"²⁸⁴

In *Nielsen v. AECOM Technology Corp.*, the Second Circuit established the test for evaluating the sufficiency of claims brought

276. *Id.* at 106; *See Lambert v. Genesee Hosp.*, 10 F.3d 46, 55–56 (2d Cir. 1993).

277. *Greathouse*, 784 F.3d at 107.

278. *Id.* at 107 (citing *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 15 (2011)).

279. *Greathouse*, 784 F.3d at 115.

280. *Id.* at 107.

281. *Id.* at 117 (quoting *Kasten*, 563 U.S. at 14).

282. *Lawson v. FMR L.L.C.*, 134 S. Ct. 1158, 1161 (2014).

283. 107 CONG. REC. S7418–21 (daily ed. July 26, 2002) (statement of Sen. Leahy).

284. 18 U.S.C. § 1514A(a)(1) (2012).

under section 1514A.²⁸⁵ The plaintiff claimed that he was discharged after he expressed concern that one of his subordinates was approving fire safety engineering plans with reports that falsely indicated that the subordinate had conducted an actual review of each plan.²⁸⁶ The district court dismissed the complaint for failure to state a claim because it found that the information that the plaintiff provided was not “definitively and specifically” encompassed by the list of fraudulent conduct found in section 1514A, i.e., mail, wire, bank, or securities fraud.²⁸⁷

The Second Circuit affirmed the district court’s dismissal of the claim based on the plaintiff’s failure to support his claim with anything other than conclusory allegations.²⁸⁸ In doing so, however, the Second Circuit found the district court’s narrow construction of section 1514A was incorrect, and that the proper inquiry was whether the employee supplied information or otherwise assisted in an investigation which he reasonably believed to constitute a violation of section 1514A.²⁸⁹

3. Whistleblower Protection Under Dodd-Frank

Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) protects employees from retaliation for, inter alia, providing information or testifying or otherwise cooperating with the Securities Exchange Commission.²⁹⁰ In *Liu Meng-Lin v. Siemens AG*, the Second Circuit held that it did not have extraterritorial jurisdiction over section 922 retaliation claims.²⁹¹

The plaintiff in *Liu* was a Taiwanese citizen and resident in the employ of a Chinese company that was a wholly-owned subsidiary of a German company.²⁹² The plaintiff commenced an action in the Southern District of New York for retaliation under Dodd-Frank, claiming he was terminated in retaliation for providing information to his superiors about what plaintiff believed were improper payments to Chinese and North Korean officials.²⁹³

The Second Circuit affirmed the district court’s dismissal of the complaint because it did not have extraterritorial jurisdiction over

285. 762 F.3d 214, 221 (2d Cir. 2014).

286. *Id.* at 217.

287. *Id.* at 219.

288. *Id.* at 222.

289. *Id.* at 221.

290. 15 U.S.C. § 78u-6(h)(1)(a) (2012).

291. *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 183 (2d Cir. 2014).

292. *Id.* at 177.

293. *Id.* at 177, 179.

Dodd-Frank anti-retaliation claims.²⁹⁴ In the case at hand, each of the defendants was overseas, and each of the acts the plaintiff complained about also occurred overseas. The Second Circuit also noted that its decision was consistent with the general presumption against extraterritorial jurisdiction, particularly because the court found nothing in the language of the statute or the legislative history that could be used to overcome this presumption.²⁹⁵

VI. ADDITIONAL LABOR AND EMPLOYMENT DEVELOPMENTS

A. *New York State*

1. *Nail Salon Initiative*

On May 11, 2015, Governor Cuomo announced the formation of a multi-agency task force that would coordinate efforts to prevent unlawful practices and safety hazards for workers and consumers in the nail salon industry.²⁹⁶ New York State has licensing authority over the nail salon industry. On May 18, 2015, the Governor announced a series of legislative, regulatory, and administrative initiatives in connection with the nail salon initiative.²⁹⁷ Among other things, the task force will coordinate enforcement of state labor and health laws and provide education to employees and the general public about worker rights and safety issues.²⁹⁸ In his announcement, Governor Cuomo stated:

We will not stand idly by as workers are deprived of their hard-earned wages and robbed of their most basic rights. This Task Force will crack down on these kinds of abuses in the nail salon industry, enforce all of New York's health and safety regulations, and help ensure that no one—regardless of their citizenship status or what language they speak—is illegally victimized by their employer.²⁹⁹

B. *Additional Federal Developments*

1. *Employee Benefits*

The Supreme Court's decisions in *King v. Burwell* and *Obergefell*

294. *Id.* at 183.

295. *Id.* at 182.

296. Liu Meng-Lin, 763 F.3d at 182.

297. Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Multi-Agency Enforcement Task Force to Tackle Abuse in the Nail Salon Industry (May 11, 2015), <https://www.governor.ny.gov/news/governor-cuomo-announces-multi-agency-enforcement-task-force-tackle-abuse-nail-salon-industry>.

298. *Id.*

299. *Id.*

v. Hodges directly affect virtually every employer in New York State. The holding in *King* upholding the Affordable Care Act ensures that virtually every workplace healthcare plan, collectively bargained and otherwise, must be drafted and administered based on ACA requirements.³⁰⁰ The Court's decision in *Hodges* establishing nationwide constitutional protection for same-sex couples will impact every retirement, health, and other benefit plan that currently provides spousal benefits or is considering such benefits in the future.³⁰¹

The Supreme Court decided another employee benefits case during this *Survey* year which received far less attention than *King* and *Hodges* have, but which could nevertheless have consequences for thousands of American workers at or near retirement. In *M & G Polymers USA, L.L.C. v. Tackett*, the Court addressed whether employees had a vested right to retirement benefits that were included in the terms of a collective bargaining agreement that has expired.³⁰²

The case appealed from arose in the Sixth Circuit Court of Appeals.³⁰³ The Sixth Circuit, alone among the other circuits, applied a standard providing that, absent language in the expired agreement to the contrary, contract language promising lifetime benefits should be presumed to survive the expiration of the collective bargaining agreement.³⁰⁴ In *M & G Polymers*, the Sixth Circuit inferred a lifetime promise to retirees for health benefits from a clause in an expired contract providing that certain retirees "will receive a full Company contribution toward the cost of [health care] benefits."³⁰⁵

The Supreme Court reversed the Sixth Circuit and rejected its standard in favor of that observed by other circuits.³⁰⁶ Under this standard, traditional contract principles are controlling, including those relating to continuing obligations upon contract expiration.³⁰⁷ Under this standard, the specific language of the collective bargaining agreement and evidence relating to the parties' intent must be considered, and the vesting of such benefits should not be presumed.³⁰⁸

2. National Labor Relations Board and Rules Restricting

300. See *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015).

301. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601, 2607–08 (2015).

302. *M & G Polymers USA, L.L.C. v. Tackett*, 135 S. Ct. 926, 930 (2015).

303. *Id.*

304. *Id.* at 932.

305. *Id.* at 931–32.

306. *Id.* at 937.

307. *M & G Polymers*, 135 S. Ct. at 937.

308. *Id.* at 935.

*Employee Speech in the Internet Age*³⁰⁹

Section 7 of the NLRA protects the right of both union and non-union employees to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection”³¹⁰ The right to engage in such concerted activities applies with equal force to unionized and non-unionized employees, and to employees supporting or opposing or simply neutral in a pending union organizing drive.

The increased, or potentially increased, role for the NLRB in the non-union setting is reflected in decisions and interpretations issued during this *Survey* year distinguishing lawful work rules and unlawfully restrictive rules in the age of e-mail and social media.

The NLRB issued a key decision during this *Survey* year that established a presumptive right of employees to use the employer’s e-mail system to communicate with other employees about work-related issues. The presumption only applies to employees who are already provided with such access for work purposes. In *Purple Communications*, the NLRB overruled its 2007 decision in *Register Guard*, where it held that an employer could prohibit the use of e-mail for protected activity during non-working time so long as the prohibition was applied in a non-discriminatory fashion.³¹¹ In overruling *Register Guard*, the Board effectively recognized that the office water cooler had been replaced by electronic communications.³¹²

In *Triple Play Sports Bar & Grille*, the NLRB, in a decision affirmed by the Second Circuit, ruled that that an employer violated its employees’ section 7 rights when the employees were fired during non-working hours for alleged defamatory conduct directed at the employer on Facebook.³¹³ One of the employees used an expletive on Facebook in

309. The NLRB decided *Browning-Ferris Industries of California, Inc.*, after the closing of this *Survey* year, but it is acknowledged here because of the controversy it has ignited over the “joint employer” doctrine. 362 N.L.R.B. No. 186 (2015). Under the joint employer doctrine two separately owned employers can be found to share a relationship that makes them both employers of the same group of employees for the purposes of the NLRA. Briefly stated, the NLRB held in *Browning-Ferris* that a “joint employer” relationship is established by: (1) applying common law principles to determine whether the companies are both employers of the same employees; and (2) establishing that the employers “share or codetermine those matters governing the essential terms and conditions of employment.” *Id.* at 19.

310. 29 U.S.C. § 157 (2012).

311. *Guard Publ’g Co. (Register-Guard)*, 315 N.L.R.B. 1110 (2007), *enforced in relevant part and remanded sub nom. Guard Publishing v. NLRB*, 571 F.3d 5 (D.C. Cir. 2009), *overruled in relevant part by Purple Commc’ns, Inc.*, 361 N.L.R.B. 126 (2014).

312. *Purple Commc’ns, Inc.*, 361 N.L.R.B. 126, 7–8 (2014).

313. *Three D, L.L.C. (Triple Play)*, 361 N.L.R.B. 31, 1 (2014).

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describing the employer and the second employee was fired for using the “like” option for a comment in a conversation complaining that the company had made mistakes in connection with tax withholdings.³¹⁴

The NLRB found that the employees were engaged in protected work-related communication among fellow employees that was neither “defamatory” nor “disloyal.”³¹⁵ The NLRB distinguished this case from the landmark decision in *Jefferson Standard*, where it found defamatory comments about an employer directed to the public were not protected by the Act:

The comments at issue here are qualitatively different from the disparaging communications that lost protection in the *Jefferson Standard* case. First, the Facebook discussion here clearly disclosed the existence of an ongoing labor dispute concerning the [Employer’s] tax-withholding practices. Second, the evidence does not establish that the discussion in general, or [the terminated employees’] participation in particular, was directed to the general public. The comments at issue were posted on an individual’s personal page rather than, for example, a company page providing information about its products or services. Although the record does not establish the privacy settings of [the Facebook page at issue], we find that such discussions are clearly more comparable to a conversation that could potentially be overheard by a patron or other third party than the communications at issue in *Jefferson Standard*, which were clearly directed at the public.³¹⁶

The NLRB also found that the employer maintained an unlawful handbook policy entitled Internet/Blogging, which provided:

The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or

314. *Id.*

315. *Id.* at 3.

316. *Id.* at 6 (citing *Jefferson Standard*, 94 N.L.R.B. 1507, 1513 n.21 (1951), *aff’d sub nom.* NLRB v. Local Union No. 1229, Int’l Bhd. of Elec. Workers, 346 U.S. 464 (1953)).

effect.³¹⁷

The NLRB found the rule to be unlawful because “it would reasonably tend to chill employees in the exercise of their section 7 rights.”³¹⁸ The NLRB’s ruling was made based on application of the three-part test established in *Lutheran Village*.³¹⁹ Under this test, a rule will be found to violate section 7 rights if any of the three test components is established:

- (1) employees would reasonably construe the language to prohibit section 7 activity;
- (2) the rule was promulgated in response to union activity; or
- (3) the rule has been applied to restrict the exercise of section 7 rights.³²⁰

The NLRB reviewed the policy and found that the employer’s rule was unlawfully overbroad.³²¹ In particular, the NLRB found that the restriction against “inappropriate comments” was insufficiently precise, and could reasonably be interpreted by employees as restricting speech protected under section 7.³²²

The NLRB’s decision in *Triple Play* highlights the lack of an unambiguous bright line for distinguishing between lawful work rules and those that are unlawfully broad. In an effort to provide greater clarity, the NLRB’s General Counsel issued a guidance memorandum during this *Survey* year for analyzing work rules. General Counsel Richard F. Griffin, Jr. reported that he had held “conversations with both labor- and management-side practitioners, who ha[d] asked for guidance regarding handbook rules that are deemed acceptable under [the chilling prong] of the Board’s test.”³²³

3. Definition of Spouse Under the Family and Medical Leave Act

The Supreme Court’s decision in *Obergefell v. Hodges*, establishing that same-sex couples are protected by the due process and equal protection clauses of the Fourteenth Amendment, was preceded

317. *Id.* at 8.

318. *Triple Play*, 361 N.L.R.B. at 8.

319. Martin Luther Mem’l Home, Inc. (*Lutheran Village*), 343 N.L.R.B.646, 647 (2014).

320. *Triple Play*, 361 N.L.R.B. at 8 (citing *Lutheran Village*, 343 N.L.R.B. at 647).

321. *Id.* at 9.

322. *Id.*

323. Memorandum from Richard F. Griffin, Jr., Gen. Counsel, Nat’l Labor Relations Bd. to All Regional Dirs., Officers-in-Charge, and Resident Officers, Memorandum GC 15-04, at 2 (Mar. 18, 2015), <https://www.nlr.gov/reports-guidance/general-counsel-memos>.

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by *United States v. Windsor* where the Court defined “spouse” to include same-sex couples for all purposes under federal law.³²⁴ On February 25, 2015, in response to *Windsor*, the USDOL issued a final rule redefining “spouse” under the Family and Medical Leave Act to include same-sex marriages.³²⁵

324. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

325. 29 C.F.R. § 825.102 (2015).