

# LABOR & EMPLOYMENT

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#### INTRODUCTION

The *Survey* year coincided with the final year of the Obama administration, and ended in the midst of a heated political campaign that now leaves the federal government firmly in the control of the Republican

Party. President Trump is joined by Republican majorities in both the House and Senate.<sup>1</sup> His selection of Justice Neil Gorsuch to fill the vacancy left by the untimely passing of the late Justice Scalia once again leaves the Supreme Court with a conservative majority. The President will also appoint at least two new members to the National Labor Relations Board (NLRB), and make dozens of appointments at the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC), and at other agencies.<sup>2</sup> If history and common sense are useful guides—and useful they are except when they are not—changes at the national level in the field of labor and employment law should be anticipated. Of course, with no political judgment intended, at the time of this writing it does seem fair to assume that President Trump will be less predictable on workplace issues than are most of his Republican colleagues.

Circumstances were very different in New York State, where Governor Cuomo's current term continues through 2018.<sup>3</sup> The *Survey* year was highlighted by legislation signed by Governor Cuomo phasing in a statewide fifteen-dollar minimum hourly wage rate, and creating a statewide program that will eventually provide workers with up to twelve weeks of paid family leave.<sup>4</sup> The governor also signed legislation adding new protections to—and strengthening existing ones in—the Human Rights Law.<sup>5</sup>

At the local level, the New York City Human Rights Law (NYCHRL) was amended to add protection against discrimination to home caregivers.<sup>6</sup> In addition, new regulations were issued relating to

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1. Mark Z. Barabak & Lisa Mascaro, *Republicans Hold the House and Senate, but Will That End the Washington Gridlock Even with President Trump?*, L.A. TIMES (Nov. 9, 2016, 12:10 AM), <http://www.latimes.com/politics/la-na-pol-election-congress-control-20161108-story.html>.

2. See John P. Furparo & Risa M. Salins, *Anticipated Changes Under President Trump: NLRB, DOL, EEOC*, N.Y.L.J. (Feb. 2, 2017), <http://www.newyorklawjournal.com/id=1202778305567/Anticipated-Changes-Under-President-Trump-NLRB-DOL-EEOC>.

3. Kenneth Lovett, *Andrew Cuomo Signals He'll Likely Seek Third Term as New York Governor in 2018*, N.Y. DAILY NEWS (Apr. 27, 2015, 11:10 AM), <http://www.nydailynews.com/news/politics/gov-cuomo-signals-seek-term-2018-article-1.2200456>.

4. *Governor Cuomo Signs \$15 Minimum Wage Plan and 12 Week Paid Family Leave Policy into Law*, N.Y. ST. GOVERNOR (Apr. 4, 2016), <https://www.governor.ny.gov/news/governor-cuomo-signs-15-minimum-wage-plan-and-12-week-paid-family-leave-policy-law>.

5. See, e.g., Cindy S. Minniti & Mark S. Goldstein, *New York State Becomes the Fourth Jurisdiction to Protect Unpaid Interns*, FORBES (July 28, 2014, 12:45 PM), <http://www.forbes.com/sites/theemploymentbeat/2014/07/28/new-york-state-becomes-the-fourth-jurisdiction-to-protect-unpaid-interns-from-employment-discrimination>.

6. *Mayor de Blasio Signs Legislation Expanding the New York City Human Rights Law to Protect Caregivers from Employment Discrimination*, NYC (Jan. 5, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/010-16/mayor-de-blasio-signs-legislation->

existing protections under the NYCHRL based on transgender identity and pregnancy-related issues.<sup>7</sup>

The mayors of the cities of Buffalo and Rochester both committed to phasing in a fifteen-dollar minimum wage for their respective employees.<sup>8</sup> They join New York City, which had previously committed to the fifteen-dollar minimum wage for its workers.<sup>9</sup>

In short, the *Survey* year was highlighted by expanded workplace protections in New York State, and an election that now leaves the federal government firmly in the control of a single party. One can only speculate whether the *Survey* year will ultimately be just another annual snapshot, or the beginning of a new era in which state and local employment protections assume a level of importance not seen since before the Great Depression and the New Deal in the 1930s.

In any event, this year's *Survey* reviews a broad range of developments in what continues to be an evolving field of labor and employment law. It is an evolution that can be observed beyond speculation about the future relationship between the state and federal governments. Indeed, the very definition of labor and employment law and what it consists of continues to evolve as well. The *Survey* once again leads with a section addressing state and federal employment misclassification developments,<sup>10</sup> and again includes a separate section on whistleblower developments,<sup>11</sup> which was first included in last year's *Survey*. Employee misclassification issues continued to receive attention at all levels of government during the *Survey* year.<sup>12</sup> Misclassification issues are likely to become even more significant if, as predicted, the workplace becomes more and more to reflect the so-called "gig economy," in which services are increasingly performed by non-

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expanding-new-york-city-human-rights-law-protect.

7. *Mayor de Blasio Announces Stronger Pregnancy Protections in the Workplace, Housing and Public Spaces*, NYC (May 6, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/436-16/mayor-de-blasio-stronger-pregnancy-protections-the-workplace-housing-public-spaces>; *NYC Commission on Human Rights Announces Strong Protections for City's Transgender and Gender Non-Conforming Communities in Housing, Employment and Public Spaces*, NYC (Dec. 21, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/961-15/nyc-commission-human-rights-strong-protections-city-s-transgender-gender>.

8. Matthew Hamilton, *Backed by Cuomo, Rochester and Buffalo Raise City Employees' Minimum Pay to \$15*, TIMES UNION: BLOG (Nov. 18, 2015, 12:09 PM), <http://blog.timesunion.com/capitol/archives/243537/watch-at-noon-gov-andrew-cuomo-visits-rochester>.

9. *See Statement from Mayor Bill de Blasio on New York Minimum Wage*, NYC (Sept. 10, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/604-15/statement-mayor-bill-de-blasio-new-york-minimum-wage>.

10. *See infra* Part I.

11. *See infra* Part V.

12. *See infra* Part I.

employee workers who, for the most part, do not receive workplace protection under state or federal law.<sup>13</sup>

The *Survey* also reports on a number of labor and employment decisions issued by the Supreme Court.<sup>14</sup> The Court issued decisions construing the Fair Labor Standards Act (FLSA), Title VII of the Civil Rights Act of 1964 (Title VII), civil rights claims under 42 U.S.C. § 1983, Employee Retirement Income Security Act (ERISA), and a brief but significant one-sentence order upholding the constitutionality of public employee agency fees.<sup>15</sup>

Finally, the *Survey* also reviews a substantial but non-exhaustive number of state and federal court decisions. The decisions that are included are meant to be a representative sample of the relevant case law.

## I. EMPLOYEE MISCLASSIFICATION

### A. *New York State Overview and Creation of Joint Task Force to Fight Worker Exploitation and Employee Misclassification*

On July 20, 2016, Governor Cuomo signed an executive order to establish the Joint Task Force on Employee Misclassification and Worker Exploitation (Task Force).<sup>16</sup> The Task Force combines multiple state agencies for the purpose of coordinating enforcement of state labor laws.<sup>17</sup> The Task Force now has jurisdiction to coordinate statewide employee misclassification efforts, and has assumed control over the state's initiative to enforce labor protections for workers in the nail salon industry (which was reported in last year's *Survey*).<sup>18</sup>

### B. *State Misclassification Cases*

Employee misclassification disputes are frequently addressed in appeals from determinations made by the New York Unemployment

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13. See Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, BUREAU LAB. STAT., <https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm> (last visited Apr. 18, 2017).

14. See *infra* Sections I.B.1, III.C.1, and VI.A.

15. See *infra* Section II.B.1, Part III, and Section VI.A.

16. 9 N.Y.C.R.R. § 8.159(1) (2016).

17. See *id.* § 8.159(3).

18. *Id.* § 8.159(2). The Task Force has assumed the jurisdiction formerly held by the Joint Enforcement Task Force on Employee Misclassification, which was addressed in last year's *Survey*. *Id.*; Bruce Levine, *2014–15 Survey of New York Law: Labor & Employment Law*, 66 SYRACUSE L. REV. 1027, 1031 (2016). The Task Force has also assumed jurisdiction of the statewide campaign to enforce state labor protections for workers in the nail salon industry. See 9 N.Y.C.R.R. § 8.159(2).

Insurance Appeal Board (Appeal Board).<sup>19</sup> The Unemployment

19. The following decisions are a representative sample of decisions in which workers were found to be employees. There were a number of decisions in which claimants in the medical industry were found to be employees, too: *Corrente v. Select Med. Corp.*, 139 A.D.3d 1283, 1285, 31 N.Y.S.3d 681, 683 (3d Dep't 2016) (first citing *Wright v. Mid Island Therapy Assocs. LLC*, 134 A.D.3d 1216, 1218, 20 N.Y.S.3d 252, 255 (3d Dep't 2015); then citing *Jean-Pierre v. Queens Perioperative Med. Assocs. PLLC*, 119 A.D.3d 1206, 1208, 989 N.Y.S.2d 195, 197 (3d Dep't 2014); and then citing *Harold v. Leonard's Transp.*, 133 A.D.3d 1069, 1071, 19 N.Y.S.3d 149, 151 (3d Dep't 2015)) (licensed speech therapist); *Armbruster v. Summit Health, Inc.*, 138 A.D.3d 1367, 1369, 31 N.Y.S.3d 616, 618 (3d Dep't 2016) (licensed practical nurse); *Ryan v. La Cruz Radiation Consultants, Inc.*, 138 A.D.3d 1324, 1326, 29 N.Y.S. 699, 701 (3d Dep't 2016) (first citing *Goddard v. Summit Health, Inc.*, 118 A.D.3d 1200, 1201–02, 987 N.Y.S.3d 520, 522 (3d Dep't 2014); then citing *Scinta v. ExamOne World Wide Inc.*, 113 A.D.3d 959, 961, 978 N.Y.S.3d 470, 472 (3d Dep't 2014); then citing *Encore Music Lessons, LLC v. Comm'r of Labor*, 128 A.D.3d 1313, 1315, 10 N.Y.S.3d 359, 361 (3d Dep't 2015); then citing *Ivy League Tutoring Connection, Inc. v. Comm'r of Labor*, 119 A.D.3d 1260, 1261 (3d Dep't 2014); and then citing *Jean-Pierre*, 119 A.D.3d at 1208, 989 N.Y.S.2d at 197) (radiation therapist); *Torres v. Crisis Care Network, Inc.*, 137 A.D.3d 1383, 1385, 26 N.Y.S.3d 808, 810 (3d Dep't 2016) (crisis counselors); *Lawlor v. ExamOne World Wide Inc.*, 130 A.D.3d 1345, 1346, 13 N.Y.S.3d 703, 705 (3d Dep't 2015) (mobile medical examiners).

The Third Department also found claimants to be employees in the following cases: *Bin Yuan v. Legal Interpreting Servs.*, 140 A.D.3d 1550, 1550, 34 N.Y.S.3d 706, 707–08 (3d Dep't 2016) (language interpreter); *Ritch v. Island Tutoring Ctr., Inc.*, 139 A.D.3d 1151, 1151–52, 31 N.Y.S.3d 305, 307 (3d Dep't 2016) (tutor); *DeVault v. Guardi*, 138 A.D.3d 1371, 1372, 29 N.Y.S.3d 702, 704 (3d Dep't 2016) (first citing *Ingle v. Mech. Sec'y, Inc.*, 129 A.D.3d 1424, 1425, 10 N.Y.S.3d 759, 761 (3d Dep't 2015); then citing *Jaeger v. Vendor Control Serv.*, 106 A.D.3d 1360, 1361, 965 N.Y.S.2d 670, 672 (3d Dep't 2013); and then citing *Ramirez v. Gottlieb Jewelry, Inc.*, 256 A.D.2d 705, 706, 681 N.Y.S.2d 137, 138 (3d Dep't 1998)) (auto mechanic); *Dwyer v. Nassau Reg'l Off-Track Corp.*, 138 A.D.3d 1369, 1370, 31 N.Y.S.3d 250, 251 (3d Dep't 2016) (security consultant); *Kristensen v. Law Offices of David C. Birdoff*, 138 A.D.3d 1318, 1319, 30 N.Y.S.3d 380, 381 (3d Dep't 2016) (paralegal); *Stewart v. Am. Inst. for Stuttering*, 137 A.D.3d 1395, 1396, 27 N.Y.S.3d 706, 708 (3d Dep't 2016) (business consultant); *Waggoner v. Preston Leasing Corp.*, 137 A.D.3d 1380, 1380, 26 N.Y.S.3d 805, 807 (3d Dep't 2016) (sales); *Zaharuk v. Guidepost Sols., LLC*, 136 A.D.3d 1138, 1139, 25 N.Y.S.3d 413, 415 (3d Dep't 2016) (claims investigator); *Eray Inc. v. Comm'r of Labor*, 136 A.D.3d 1129, 1131, 24 N.Y.S.3d 798, 800 (3d Dep't 2016) (citing *Encore Music Lessons, LLC*, 128 A.D.3d at 1315, 10 N.Y.S.3d at 361) (music instructor); *Strauss v. RMC Research Corp.*, 135 A.D.3d 1268, 1270, 23 N.Y.S.3d 736, 738 (3d Dep't 2016) (first citing *Wilner v. Primary Stages Co.*, 128 A.D.3d 1148, 1150, 8 N.Y.S.3d 491, 493 (3d Dep't 2015); and then citing *Stewart v. AML Partners, LLC*, 118 A.D.3d 1198, 1199, 987 N.Y.S.2d 706, 707 (3d Dep't 2014)); *Raynor v. Synchronicity*, 135 A.D.3d 1261, 1262, 23 N.Y.S.3d 731, 733 (3d Dep't 2016) (first citing *Human Performance, Inc. v. Comm'r of Labor*, 28 A.D.3d 971, 972, 814 N.Y.S.2d 317, 318 (3d Dep't 2006); and then citing *Fitness Plus, Inc. v. Comm'r of Labor*, 293 A.D.2d 909, 910, 241 N.Y.S.2d 300, 301 (3d Dep't 2002)); *Soo Tsui v. Language Servs. Assocs.*, 135 A.D.3d 1098, 1099, 22 N.Y.S.3d 704, 705 (3d Dep't 2016) (language interpreter); *Stecher Aviation Servs. v. Comm'r of Labor*, 131 A.D.3d 1289, 1290, 15 N.Y.S.3d 516, 518 (3d Dep't 2015) (first citing *Concourse Ophthalmology Assocs., v. Comm'r of Labor*, 60 N.Y.2d 734, 737, 456 N.E.2d 1201, 1202, 469 N.Y.S.2d 78, 79 (1983); then citing *Ivy League Tutoring Connection, Inc.*, 119 A.D.3d at 1261; then citing *Ruano v. Legal Interpreting Servs.*, 118 A.D.3d 1088, 1089, 987 N.Y.S.2d 491, 492 (3d Dep't 2014); then citing *Cobrin v. Telecom Consulting Grp. NE*, 91 A.D.3d 992, 993, 936 N.Y.S.2d 361, 363 (3d Dep't 2012); and then citing *Hoyt v. Project*

Insurance Law requires that appeals of Appeal Board determinations be filed with the Third Department of the Appellate Division.<sup>20</sup> The common law “control” test is used to resolve these disputes.<sup>21</sup> An employer-employee relationship will be found to exist “when the evidence shows that the employer exercises control over the results produced or the means used to achieve the results.”<sup>22</sup> Evidence of control over the means is ordinarily given greater weight than evidence of control over results.<sup>23</sup>

The “overall control” test is a variation of the common law control test that is used “where the details of the work performed are difficult to control because of considerations such as professional and ethical responsibilities.”<sup>24</sup> In such cases, the Court will look at whether and to

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Solvers, Inc., 256 A.D.2d 859, 860, 681 N.Y.S.2d 692, 693 (3d Dep’t 1998)) (aircraft flight crew); Gill v. Strategic Delivery Sols., LLC, 134 A.D.3d 1362, 1364, 22 N.Y.S.3d 621, 622 (3d Dep’t 2015) (first citing *Watson v. Partsfleet, Inc.*, 127 A.D.3d 1461, 1462, 7 N.Y.S.3d 676, 678 (3d Dep’t 2015)); then citing *Youngman*, 126 A.D.3d at 1226–27, 4 N.Y.S.3d at 403; and then citing *Hunter v. Gannett Co.*, 125 A.D.3d 1166, 1167–68, 3 N.Y.S.3d 195, 197 (3d Dep’t 2015)) (courier); *Thomas v. Geneva Consulting Grp.*, 134 A.D.3d 1199, 1200–01, 20 N.Y.S.3d 248, 250 (3d Dep’t 2015) (first citing *Dwightmoore v. Fanfair*, 126 A.D.3d 1221, 1222–23, 4 N.Y.S.3d 396, 398 (3d Dep’t 2015)); then citing *DeRose v. Winston Retail Sols., LLC*, 119 A.D.3d 1174, 1175, 989 N.Y.S.2d 193, 194–95 (3d Dep’t 2014); then citing *Victor v. Aubrey Organics, Inc.*, 116 A.D.3d 1327, 1328, 983 N.Y.S.2d 917, 918 (3d Dep’t 2014); and then citing *Rios v. La Prairie, Inc.*, 279 A.D.2d 681, 681–82, 719 N.Y.S.2d 718, 719 (3d Dep’t 2001)) (information technology consultant); *Voisin v. Dynamics Ops. E., Inc.*, 134 A.D.3d 1186, 1188, 20 N.Y.S.3d 243, 245 (3d Dep’t 2015) (first citing *Youngman v. RB Humphreys Inc.*, 126 A.D.3d 1225, 1226–27, 4 N.Y.S.3d 402, 403 (3d Dep’t 2015)); then citing *Kelly v. Gallo, Inc.*, 28 A.D.3d 1044, 1045, 814 N.Y.S.2d 340, 341 (3d Dep’t 2006); and then citing *Caballero v. Reynolds Transp., Inc.*, 184 A.D.2d 984, 985, 585 N.Y.S.2d 605, 605 (3d Dep’t 1992)) (courier); *Eckert v. Fox Mobile Distrib. LLC*, 133 A.D.3d 1075, 1076, 20 N.Y.S.3d 225, 226 (3d Dep’t 2015) (copyrighter); *Fatone v. Addison St. Spa, LLC*, 133 A.D.3d 1074, 1074, 20 N.Y.S.3d 223, 224 (3d Dep’t 2015) (first citing *Human Performance, Inc.*, 28 A.D.3d at 972, 814 N.Y.S.2d at 318; and then citing *Sun v. Anuthep Benja-Athon M.D., P.C.*, 27 A.D.3d 862, 863, 810 N.Y.S.2d 562, 563 (3d Dep’t 2006)) (massage therapist); *Redwoodtural v. Everest Prod. Corp.*, 133 A.D.3d 1064, 1064–66, 19 N.Y.S.3d 632, 633–34 (3d Dep’t 2015) (news reporter); *Gluck v. DaVinci 3D Corp.*, 132 A.D.3d 1045, 1046, 17 N.Y.S.3d 199, 201 (3d Dep’t 2015) (sales); *Morris v. Source Interlink Media, LLC*, 131 A.D.3d 1287, 1287, 15 N.Y.S.3d 869, 870 (3d Dep’t 2015) (sales/marketing); *Lobban v. Precinct Sec. & Invest., Inc.*, 131 A.D.3d 1294, 1294, 16 N.Y.S.3d 626, 627 (3d Dep’t 2015) (security guard).

20. N.Y. LAB. LAW § 624 (McKinney 2015).

21. See, e.g., *Empire State Towing & Recovery Ass’n v. Comm’r of Labor*, 15 N.Y.3d 433, 437, 938 N.E.2d 984, 986, 912 N.Y.S.2d 551, 553 (2010) (citing *12 Cornelia St., Inc. v. Indus. Comm’r*, 56 N.Y.2d 895, 897, 438 N.E.2d 1117, 1118, 453 N.Y.S.2d 402, 403 (1982)).

22. *Id.* (citing *12 Cornelia St., Inc.*, 56 N.Y.2d at 897, 438 N.E.2d at 1118, 453 N.Y.S.2d at 403).

23. See *id.* (first quoting *Ted Is Back Corp. v. Comm’r of Labor*, 64 N.Y.2d 725, 726, 475 N.E.2d 113, 114, 485 N.Y.S.2d 742, 743 (1984); and then quoting *Bedin v. Trussardi, Inc.*, 257 A.D.2d 809, 809, 684 N.Y.S.2d 653, 654 (3d Dep’t 1999)).

24. *Id.* at 437–38, 938 N.E.2d at 987, 912 N.Y.S.2d at 554 (first quoting *Salamanca Nursing Home, Inc.*, 68 N.Y.2d 901, 902–03, 501 N.E.2d 588, 589, 508 N.Y.S.2d 939, 940



what extent the employer exercises “control over important aspects of the services performed other than results or means.”<sup>25</sup>

The Appeal Board is entitled to considerable deference, and its decisions will be upheld on appeal if supported by substantial evidence in the administrative record and are not otherwise unlawful.<sup>26</sup> Such deference is not unlimited, and a number of Appeal Board determinations were overturned during the *Survey* year.<sup>27</sup>

Two decisions reversing Appeal Board misclassification determinations were accompanied by relatively spirited dissenting opinions over the meaning and application of the common law “control test.”<sup>28</sup> The Third Department’s decision in *Greene v. Syracuse Society For New Music, Inc.*, reflects a split among the justices over application of the corollary ongoing control test.<sup>29</sup> The claimant was a musician who from time to time was engaged to perform in concerts by a musical production company to perform in concerts.<sup>30</sup> The court majority determined that substantial evidence did not support the determination of the Appeal Board that the claimant was an employee because the production company did not exercise sufficient “overall control over important aspects of the claimant’s work.”<sup>31</sup> The majority relied on evidence that the claimant worked sporadically; was paid a fixed, flat fee

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(1986); and then quoting *Concourse Ophthalmology Assocs.*, 60 N.Y.2d at 736, 456 N.E.2d at 1202, 469 N.Y.S.2d at 79).

25. *Id.* at 437, 938 N.E.2d at 987, 912 N.Y.S.2d at 554 (quoting *Concourse Ophthalmology Assocs.*, 60 N.Y.2d at 736, 456 N.E.2d at 1202, 469 N.Y.S.2d at 79).

26. *Empire State Towing and Recovery Ass’n*, 15 N.Y.3d at 437, 938 N.E.2d at 986, 912 N.Y.S.2d at 553 (quoting *Concourse Ophthalmology Assocs.*, 60 N.Y.2d at 736, 456 N.E.2d at 1201, 469 N.Y.S.2d at 78) (first citing *King’s Brass Ceremonial v. Comm’r of Labor*, 75 A.D.3d 712, 712, 904 N.Y.S.2d 543, 544 (3d Dep’t 2010); and then citing *Rosen v. Comm’r of Labor*, 73 A.D.3d 1352, 1353, 901 N.Y.S.2d 401, 402 (3d Dep’t 2010)).

27. *See O’Shea v. Cayuga Emergency Physicians*, 140 A.D.3d 1358, 1358, 33 N.Y.S.3d 551, 552 (3d Dep’t 2016) (reversing Appeal Board determination that claimant physician was a partner and not an employee, and finding sufficient indicia of control over claimant despite existence of written partnership agreement); *Cohen v. Classic Riverdale, Inc.*, 136 A.D.3d 1179, 1179, 26 N.Y.S.3d 373, 374, 376 (3d Dep’t 2016) (reversing Appeal Board determination that fitness instructor providing services to a senior living facility was an employee because of incidental control exercised over instructor); *Wright v. Mid Island Therapy Assocs. LLC*, 134 A.D.3d 1216, 1217, 20 N.Y.S.3d 252, 254 (3d Dep’t 2015) (reversing of determination that special education instructor was an employee); *Franco v. Pyro Eng’g Inc.*, 133 A.D.3d 1066, 1066, 19 N.Y.S.3d 634, 635 (3d Dep’t 2015) (reversing Appeal Board determination finding that pyrotechnician was employee of fireworks company).

28. *Bogart v. LaValle Transportation, Inc.*, 140 A.D.3d 1217, 1221, 34 N.Y.S.3d 195, 198 (3d Dep’t 2016) (Rose, J., dissenting); *Greene v. Syracuse Soc’y For New Music, Inc.*, 139 A.D.3d 1146, 1148–49, 32 N.Y.S.3d 336, 339 (3d Dep’t 2016) (Rose, J., dissenting).

29. *Greene*, 139 A.D.3d at 1148, 32 N.Y.S.3d at 338–39 (majority opinion).

30. *Id.* at 1146, 32 N.Y.S.3d at 337.

31. *Id.* at 1148, 32 N.Y.S.3d at 338.

for each concert she performed; and was free to perform for other companies.<sup>32</sup> The majority also noted that the claimant was responsible for obtaining a substitute performer if she was unable to attend a scheduled performance, and that she was not provided with any equipment by the production company.<sup>33</sup> The majority criticized the Appeal Board for placing too much weight on “incidental” evidence that the claimant could not choose her own music and attend scheduled rehearsals.<sup>34</sup>

Justice Rose dissented from the majority opinion.<sup>35</sup> He criticized the majority’s misapplication of the “overall control” test, claiming that the majority failed to consider the matters other than the results and means of the work performed by claimant.<sup>36</sup> Justice Rose argued that the overall control test, when applied correctly to the evidence, demonstrated that the company exercised “control over important aspects” of claimant’s work.<sup>37</sup> Criticizing the majority’s dismissal of the significance of mandatory rehearsals, Justice Rose argued that such rehearsal reflected the high level of coordination required of the performers to produce a concert.<sup>38</sup> Such coordination, he contended, demonstrated the company’s exercise of “overall control” over the claimant to establish an employment relationship.<sup>39</sup>

Justice Rose, joined by Justice McCarthy, also dissented in *Bogart v. LaValle Transportation, Inc.*, which was an appeal from an Appeal Board determination that decided whether the claimant and similarly situated long-haul truck drivers were employees.<sup>40</sup> The court’s majority reversed the Appeal Board’s determination and decided that the drivers were independent contractors.<sup>41</sup> The majority relied on evidence that the drivers could refuse work without penalty; were permitted to work for other trucking companies; were not required to lease trucks from the company; were unsupervised; had some, albeit limited ability to negotiate compensation; received IRS 1099 forms; and reported themselves as self-

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32. *Id.* at 1146–47, 32 N.Y.S.3d at 337.

33. *Id.* at 1147, 32 N.Y.S.3d at 338.

34. *Greene*, 139 A.D.3d at 1147, 32 N.Y.S.3d at 338.

35. *Id.* at 1148, 32 N.Y.S.3d at 339 (Rose, J., dissenting).

36. *Id.*

37. *Id.* at 1149, 32 N.Y.S.3d at 339 (first quoting *Empire State Towing & Recovery Ass’n v. Comm’r of Labor*, 15 N.Y.3d 433, 437, 938 N.E.2d 984, 987, 912 N.Y.S.2d 551, 554 (2010); and then quoting *Concourse Ophthalmology Assoc. v. Comm’r of Labor*, 60 N.Y.2d 734, 736, 456 N.E.2d 1201, 1202, 469 N.Y.S.2d 78, 79 (1983)).

38. *Id.* at 1149, 32 N.Y.S.3d at 339–40.

39. *Greene*, 139 A.D.3d at 1149–50, 32 N.Y.S.3d at 340 (Rose, J., dissenting).

40. 140 A.D.3d 1217, 1218, 34 N.Y.S.3d 195, 196 (3d Dep’t 2016).

41. *Id.* at 1220, 34 N.Y.S.3d at 197.

employed for tax purposes.<sup>42</sup>

The dissenting justices argued that the majority's decision was inconsistent with two of the court's most recent decisions involving drivers working under similar circumstances.<sup>43</sup> The dissent observed that while there was no mandatory vehicle leasing requirement, the claimant and many of the other drivers did lease their vehicles from the company.<sup>44</sup> Such leases, the dissent contended, imposed material restrictions on a driver's permissible use of the vehicle, inter alia, permitted the company to make weekly deductions for a "repair reserve" fund.<sup>45</sup> The dissent also pointed to the burdensome restrictions imposed on the claimant and other drivers by a two-year non-competition agreement, and ultimately concluded that there was sufficient indicia of control demonstrating that the drivers were employees.<sup>46</sup>

### *C. The Commercial Goods Transportation and Newspaper Delivery Drivers*

New York State's Commercial Goods Transportation Act (CGTA) was enacted in 2014 in an effort to combat the high incidence of misclassification of employees in the commercial trucking industry.<sup>47</sup> The CGTA includes a "presumption of employment" for covered drivers, and enumerates a series of factors to be used to determine whether a worker is genuinely independent from the employer.<sup>48</sup>

Governor Cuomo vetoed a bill in November of 2015 to exclude certain newspaper delivery workers from coverage under the CGTA, and to establish a test that would make it easier to demonstrate that such workers were independent contractors.<sup>49</sup> In January 2016, a second bill pertaining to these workers was introduced, and a modified version of that bill became law in November 2016.<sup>50</sup> The new law establishes a three part test under which a newspaper delivery "person" will be treated as an

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42. *Id.* at 1219, 34 N.Y.S.3d at 197.

43. *Id.* at 1221, 34 N.Y.S.3d at 198 (Rose, J., dissenting) (first citing *Harold v. Leonard's Transp.*, 133 A.D.3d 1069, 1069, 19 N.Y.S.3d 149, 149–50 (3d Dep't 2016); and then citing *Wilder v. RB Humphreys Inc.*, 133 A.D.3d 1073, 1074, 20 N.Y.S.3d 221, 222–23 (3d Dep't 2015)).

44. *Id.*

45. *Bogart*, 140 A.D.3d at 1221, 34 N.Y.S.3d at 198 (Rose, J., dissenting).

46. *Id.* at 1222–23, 34 N.Y.S.3d at 199–200.

47. Levine, *supra* note 18, at 1031–33 (citing N.Y. LAB. LAW § 862 (McKinney 2015)).

48. N.Y. LAB. LAW § 862-b (McKinney 2015).

49. Levine, *supra* note 18, at 1032 (citing N.Y. Assembly Bill No. 7753, 238th Sess., Veto 273 (2015)).

50. Act of Nov. 28, 2016, 2016 McKinney's Sess. Law News no. 8, ch. 502, at 1014 (to be codified at N.Y. LAB. LAW § 511(23)).

independent contractor if he or she (1) is engaged in the “trade or business” of delivering newspapers; (2) is principally paid based on the number of newspapers distributed or delivered, rather than on an hourly basis; and (3) has signed a written agreement stating that he or she is an independent contractor.<sup>51</sup> The amendment excludes drivers who are otherwise covered by the CGTA.<sup>52</sup>

*D. Employee Misclassification Issues Under Federal Law*

The Fair Labor Standards Act (FLSA) broadly defines an employee as “any individual employed by an employer.”<sup>53</sup> The FLSA defines “employ” as including “to suffer or permit to work.”<sup>54</sup> FLSA misclassification disputes are resolved with an “economic realities” test that is designed to determine employment relationships in a manner that is consistent with the FLSA’s broad employment definition.<sup>55</sup>

The FLSA’s broad employment definition was illustrated by the Court of Appeals’ decision in *Carver v. State*.<sup>56</sup> The Court, in a split decision, held that the plaintiff, who worked for a city in exchange for public assistance under a “workfare” program, was an employee under the FLSA.<sup>57</sup> The plaintiff received public assistance in an amount equal to what he would have received if he were paid the minimum wage.<sup>58</sup> He commenced an action against the State alleging minimum wage violations under both state law and the FLSA, to challenge the State’s decision to withhold a portion of a lottery prize he won in order to recoup public assistance he had received under the workfare program.<sup>59</sup>

The Court majority agreed with the plaintiff that workfare participants could be employees under the FLSA’s broad employment definition.<sup>60</sup> The majority observed that that the DOL had expressly endorsed this position, and that Congress, by implication, had done so as well.<sup>61</sup> The majority also observed that the plaintiff performed the same work as his coworker employees, and ultimately that what the public

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51. *Id.* (to be codified at LAB. § 511(23)(a)–(c)).

52. *Id.* (to be codified at LAB. § 511(16)).

53. 29 U.S.C. § 203(e) (2012).

54. *Id.* § 203(g).

55. *See Levine, supra* note 18, at 1036.

56. 26 N.Y.3d 272, 278, 44 N.E.3d 154, 158, 23 N.Y.S.3d 79, 83 (2015) (citing 29 U.S.C. § 203(g)).

57. *Id.* at 275–76, 280, 44 N.E.3d at 156, 159, 23 N.Y.S.3d at 81, 84.

58. *Id.* at 281–82, 44 N.E.3d at 160, 23 N.Y.S.3d at 85.

59. *Id.* at 276–77, 44 N.E.3d at 156, 23 N.Y.S.3d at 81.

60. *Id.* at 283, 44 N.E.3d at 161, 23 N.Y.S.3d at 86.

61. *Carver*, 26 N.Y.3d at 280, 44 N.E.3d at 159, 23 N.Y.S.3d at 84.

assistance plaintiff received in exchange for working was no different than the compensation his coworkers received in exchange for the same work.<sup>62</sup>

The respondent State contended that the petitioner should not be treated as an employee because to do so would interfere with the goal of the workfare program to develop and train welfare recipients for gainful employment.<sup>63</sup> Rejecting this contention, the Court majority pointed to the Supreme Court's rejection of a similar argument made by a not-for-profit religious organization, and stated that an "employer's purposes and objectives are not relevant in determining a worker's status as an employee."<sup>64</sup>

## II. WAGE AND HOUR DEVELOPMENTS

### A. New York State Developments

On April 4, 2016, Governor Cuomo signed two historic pieces of legislation.<sup>65</sup> The first piece of legislation will phase in an increase to the minimum hourly wage for employees in New York State to fifteen dollars.<sup>66</sup> The second establishes a statewide program that will eventually provide employees in the state with up to twelve weeks of paid annual medical leave.<sup>67</sup>

#### 1. General Minimum Wage

The fifteen dollars minimum wage will be phased in over various periods based on geographical area and employer size.<sup>68</sup> New York City employers with eleven or more employees shall be subject to the fifteen

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62. *Id.* at 281, 44 N.E.3d at 160, 23 N.Y.S.3d at 85.

63. *Id.* at 281–82, 44 N.E.3d at 160, 23 N.Y.S.3d at 85.

64. *Id.* at 282, 44 N.E.3d at 159, 23 N.Y.S.3d at 84 (citing *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 291 (1985)). The Court of Appeals also noted the Second Circuit's holding that welfare recipients could be employees under Title VII. *Id.* at 282, 44 N.E.3d at 160, 23 N.Y.S.3d at 85 (citing *United States v. City of New York*, 359 F.3d 83, 86–87 (2d Cir. 2004)).

65. *Governor Cuomo Signs \$15 Minimum Wage Plan and 12 Week Paid Family Leave Policy into Law*, *supra* note 4; see also Act of Apr. 4, 2016, 2016 McKinney's Sess. Law News no. 2, ch. 54, at 134–36 (codified at N.Y. WORKERS' COMP. LAW §§ 204, 205 (McKinney Supp. 2017)).

66. *Programs: Mario Cuomo Campaign for Economic Justice*, N.Y. ST., <https://www.ny.gov/programs/mario-cuomo-campaign-economic-justice> (last visited Apr. 18, 2017) (explaining the 2016–2017 state budget will compensate state employees at a minimum fifteen dollars an hour).

67. Act of Apr. 4, 2016, 2016 McKinney's Sess. Law News no. 2, ch. 54, at 134–36 (codified at WORKERS' COMP. §§ 204, 205).

68. *Id.* at 95 (codified at N.Y. LAB. LAW § 652(1)(a)–(c) (McKinney Supp. 2017)).

dollars minimum wage as of December 31, 2018.<sup>69</sup> Employers in New York City with fewer than ten employees will be required to pay the fifteen dollars minimum wage as of December 31, 2019.<sup>70</sup> The fifteen dollars minimum wage for workers employed by employers in Nassau, Suffolk, and Westchester counties will be effective as of December 31, 2021.<sup>71</sup> The minimum wage for all other workers in New York State will be increased by \$0.70 to \$12.50 as of December 31, 2020 and thereafter shall be increased to \$15.00 based on an indexed schedule to be established by the Director of the Division of the Budget and the Department of Labor.<sup>72</sup> The Department of Labor can request temporary suspension of any of the scheduled increases based on economic circumstances in a particular region of the state.<sup>73</sup>

## 2. *Fast Food Employees*

On July 22, 2015, the commissioner of labor issued a wage order adopting the recommendation of a wage panel to incrementally increase the minimum wage for workers in the fast food industry to fifteen dollars.<sup>74</sup> The wage order was upheld by the Third Department on appeal in *National Restaurant Ass'n v. Commissioner of Labor*.<sup>75</sup>

## 3. *Minimum Wage for New York State Employees*

On November 10, 2015, Governor Cuomo announced that the fifteen-dollar minimum wage would be phased in for workers employed by New York State.<sup>76</sup> These employees will be covered in accordance with the schedule established for phasing in minimum wage increases in

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69. The minimum hourly wage for these workers was increased to \$11.00 as of December 31, 2016; and shall be increased to \$13.00 as of December 31, 2017; and to \$15.00 as of December 31, 2018. *Id.* (codified at LAB. § 652(1)(a)(i)).

70. The minimum hourly rate for these workers was increased to \$10.50 as of December 31, 2016; and shall be increased to \$12.00 as of December 31, 2017; to \$13.50 as of December 31, 2018; and to \$15.00 as of December 31, 2019. *Id.* (codified at LAB. § 652(1)(a)(ii)).

71. The minimum hourly rate for these workers was increased to \$10.00 as of December 31, 2016; and shall thereafter be increased by \$1.00 at the end of each calendar year until December 31, 2021, when it shall be set at fifteen dollars. *Id.* (codified at LAB. § 652(1)(b)).

72. Act of Apr. 4, 2016, 2016 McKinney's Sess. Law News no. 2, ch. 54, at 96 (codified at LAB. § 652(1)(c)).

73. *Id.* (codified at LAB. § 652(6)).

74. Fast food establishments are covered by the wage order if they are part of a chain of at least thirty similar establishments nationwide. Levine, *supra* note 18, at 1038–39, 1039 n.57.

75. 141 A.D.3d 185, 191, 34 N.Y.S.3d 232, 237 (3d Dep't 2016).

76. *Governor Cuomo Raises Minimum Wage for State Workers to \$15 Per Hour—Making New York First in Nation to Enact \$15 State Public Sector Minimum Wage*, N.Y. ST. GOVERNOR (Nov. 10, 2015), <https://www.governor.ny.gov/news/governor-cuomo-raises-minimum-wage-state-workers-15-hour-making-new-york-first-nation-enact-15>.

the fast food industry.<sup>77</sup>

#### A. *Tipped Employees*

Effective December 31, 2015, the minimum hourly wage for certain tipped employees in the hospitality industry was increased to \$7.50.<sup>78</sup> A maximum hourly tip credit of \$3.50 also became effective on December 31, 2016.<sup>79</sup>

#### B. *Municipal Employees*

The mayors of the cities of Buffalo and Rochester both committed to phasing in a fifteen-dollar minimum wage for municipal employees.<sup>80</sup>

#### 4. *Paid Family Leave*

The bill signed by Governor Cuomo will eventually provide employees working in the state with up to twelve weeks of annual paid family leave.<sup>81</sup> The purpose of the plan is to provide pay protection (1) for an employee who must care for a family member with a serious illness; (2) for an employee within the first twelve months of a birth, adoption, or caring for a foster child; or (3) in the event of circumstances relating to an immediate family member's armed services obligations.<sup>82</sup>

Effective January 1, 2018, employees shall be eligible for paid leave for a period of up to eight weeks, and thereafter, with annual phased in increases, employees shall be eligible for up to twelve weeks of paid family leave.<sup>83</sup> The timing of the plan is subject to a provision in the law that permits the state's superintendent of financial services to request a

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77. *Id.*

78. Fact Sheet, N.Y. State Dep't of Labor, Minimum Wage for Tipped Workers (2016), <https://labor.ny.gov/formsdocs/factsheets/pdfs/p717.pdf>.

79. *Id.*

80. *Governor Cuomo and Mayor Brown Announce \$15 Minimum Wage for Employees of City of Buffalo*, N.Y. ST. GOVERNOR (Nov. 18, 2015), <https://www.governor.ny.gov/news/governor-cuomo-and-mayor-brown-announce-15-minimum-wage-employees-city-buffalo>; *Governor's Press Office, Governor Cuomo and Mayor Warren Announce \$15 Minimum Wage for Employees of the City of Rochester*, N.Y. ST. GOVERNOR (Nov. 18, 2015), <https://www.governor.ny.gov/news/governor-cuomo-and-mayor-warren-announce-15-minimum-wage-employees-city-rochester>.

81. *Programs: New York State Paid Family Leave*, N.Y. ST., <https://www.ny.gov/programs/paid-family-leave-strong-families-strong-ny> (last visited Apr. 18, 2017); *see* Act of Apr. 4, 2016, 2016 McKinney's Sess. Law News no. 2, ch. 54, at 134 (codified at N.Y. WORKERS' COMP. LAW § 204(2)(a) (McKinney Supp. 2017)).

82. Act of Apr. 4, 2016, 2016 McKinney's Sess. Law News no. 2, ch. 54, at 132 (codified at N.Y. WORKERS' COMP. LAW § 201(15) (McKinney Supp. 2017)).

83. *Id.* at 134 (codified at WORKERS' COMP. § 204(2)(a)).

delay in the implementation schedule.<sup>84</sup>

The benefits will be funded by earmarked employee payroll deductions.<sup>85</sup> Employees will be permitted to use leave all at once or intermittently, but they will be required to use paid leave concurrently with leave taken pursuant to the federal Family and Medical Leave Act (FMLA).<sup>86</sup> Paid family leave benefits will not be available during any period in which an employee is collecting disability insurance payments.<sup>87</sup>

Finally, employees will be able to receive health insurance benefits while collecting paid leave benefits as if they were working and not on leave.<sup>88</sup> In addition, employees returning from paid family leave are entitled to reinstatement to their former position, or to one that is comparable.<sup>89</sup>

#### 5. *Payment of Wages by Direct Deposit or Debit Card*

Last year's *Survey* included a report on proposed regulations restricting an employer's right to pay wages with a debit card.<sup>90</sup> Final regulations were issued and are scheduled to take effect on March 7, 2017.<sup>91</sup> The regulations will require employers to obtain the employee's informed and written consent concerning the payment of wages by debit card. In addition, consenting employees must have reasonable access to a nearby ATM machine from which they will incur no fee for converting the card into cash.<sup>92</sup>

#### 6. *Prevailing Wage Decisions*

In *Suit-Kote Corp. v. Rivera*, the Third Department upheld the prevailing wage schedule established by the state labor commissioner

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84. *Id.* at 135 (codified at WORKERS' COMP. § 204(2)(a)).

85. *Id.* at 139–40 (codified at N.Y. WORKERS' COMP. LAW § 209(3)(b) (McKinney Supp. 2017)).

86. *Id.* at 138 (codified at N.Y. WORKERS' COMP. LAW §§ 204(2)(a), 206(4) (McKinney Supp. 2017)).

87. Act of Apr. 4, 2016, 2016 McKinney's Sess. Law News no. 2, ch. 54, at 139 (codified at N.Y. WORKERS' COMP. LAW § 208(1) (McKinney Supp. 2017)).

88. *Id.* at 134 (codified at N.Y. WORKERS' COMP. LAW § 203-c (McKinney Supp. 2017)).

89. *Id.* at 134 (codified at N.Y. WORKERS' COMP. LAW § 203-b (McKinney Supp. 2017)).

90. Levine, *supra* note 18, at 1039.

91. *Governor Cuomo Enacts Country's Most Comprehensive Worker Protections Against Hidden Payroll Card Fees*, N.Y. ST. GOVERNOR (Sept. 8, 2016), <https://www.governor.ny.gov/news/governor-cuomo-enacts-countrys-most-comprehensive-worker-protections-against-hidden-payroll>; *see also* 12 N.Y.C.R.R. § 192-2.2 (2016).

92. 12 N.Y.C.R.R. § 192-2.3(b)(1).



pursuant to Labor Law § 220.<sup>93</sup> Section 220 directs the state labor commissioner to establish prevailing wage rates for work performed for various public works projects.<sup>94</sup> The statute permits the commissioner to rely on wage data contained in collective bargaining agreements that cover at least thirty percent of the workers in a trade or locality.<sup>95</sup>

The petitioner claimed that the commissioner failed to demonstrate that the rates it established were the product of an appropriate investigation.<sup>96</sup> The Third Department noted that the statute placed the burden on the petitioner to prove that less than thirty percent of the relevant workers are covered by the wage rate adopted by the commissioner.<sup>97</sup> The court also rejected the petitioner's contention that the collective bargaining data relied upon by the commissioner was incomplete and instead found it to be reasonable and consistent with the commissioner's obligations under the statute.<sup>98</sup>

In the case of *Central City Roofing Co., Inc. v. Musolino*, the Third Department considered the appeal of a determination that the petitioner, an experienced highway contractor, willfully violated state prevailing wage law.<sup>99</sup> The petitioner had a "clean record" dating back to 1979 but was found to have willfully failed to adjust wage rates in accordance with changes published on the commissioner's wage schedule, and to have misclassified and underpaid a forklift operator.<sup>100</sup>

The court affirmed the willfulness determination even though there was no evidence that the petitioner had actual knowledge of the violations.<sup>101</sup> Alluding to the experience of the contractor, the court observed that the petitioner should have known to take steps to avoid

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93. 137 A.D.3d 1361, 1364, 26 N.Y.S.3d 642, 645–46 (3d Dep't 2016); *see also* N.Y. LAB. LAW § 220 (McKinney 2015).

94. LAB. § 220(3)(a).

95. *Id.* § 220(5)(a).

96. *Suit-Kote Corp.*, 137 A.D.3d at 1363, 26 N.Y.S.3d at 644.

97. *Id.* at 1362–63, 26 N.Y.S.3d at 644 (first citing *Liquid Asphalt Distribs. Ass'n v. Roberts*, 116 A.D.2d 295, 298, 501 N.Y.S.2d 483, 484 (3d Dep't 1986); then citing *Lantry v. State*, 12 A.D.3d 864, 866, 785 N.Y.S.2d 758, 760 (3d Dep't 2004); and then citing *N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 272 A.D.2d 741, 744, 707 N.Y.S.2d 715, 717 (3d Dep't 2000)).

98. *Id.* at 1364, 26 N.Y.S.3d at 645. The court also found that the lower court did not abuse its discretion in denying the petitioner's alternative request for discovery. *Id.* at 1634, 26 N.Y.S.3d at 645–46. It was found to be "exceedingly broad," requiring the involvement of numerous non-parties, which was likely to result in substantial delay. *Id.* at 1364, 26 N.Y.S.3d at 645.

99. 136 A.D.3d 1186, 1186–87, 25 N.Y.S.3d 433, 435 (3d Dep't 2016).

100. *Id.* at 1187, 25 N.Y.S.3d at 436.

101. *Id.* at 1187, 25 N.Y.S.3d at 435.

violations such as those he was cited for.<sup>102</sup>

On the other hand, the Third Department agreed with the petitioner that it should not have assessed the maximum civil penalty provided for under the statute.<sup>103</sup> The court found that lack of actual knowledge of the violations, while insufficient to overcome the willfulness determination, did not establish the type of bad faith conduct that would have justified the imposition of a maximum civil penalty.<sup>104</sup> The court alluded to the petitioner's long and unblemished prevailing wage record, and held that the maximum assessment was improper because "it [was] so disproportionate to the underlying offenses that it shock[ed] one's sense of fairness."<sup>105</sup>

## *B. Federal Wage and Hour Developments*

### *1. United States Supreme Court Decisions*

The Supreme Court issued two notable FLSA decisions during the *Survey* year.<sup>106</sup> In *Tyson Foods, Inc. v. Bouaphakeo*, the Supreme Court approved the use of expert statistical evidence to estimate the average amount of time spent by a class of slaughterhouse workers seeking overtime pay for time spent "donning and doffing" protective gear.<sup>107</sup> Different protective gear was required for different classifications of employees, and consequently, some workers spent more time donning and doffing than others.<sup>108</sup> The employer, however, had not maintained contemporaneous time records of the time spent by individual employees donning and doffing protective gear.<sup>109</sup> The Court held that in the absence of such records, individual employees would have been permitted to present statistical evidence, and accordingly, the collective reliance on such evidence was held to be proper as well.<sup>110</sup>

In *Encino Motorcars, LLC v. Navarro*, the Supreme Court held that the DOL failed to provide adequate explanation for its 2011 reversal of a long-standing regulation, dating back to 1979, that included "service

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102. *Id.* at 1187, 25 N.Y.S.3d at 436. The court also found that willfulness was properly imputed to entities sharing common familial ownership and interchanging employees with the petitioner. *Id.* at 1188, 25 N.Y.S.3d at 436.

103. *Musolino*, 136 A.D.3d at 1190, 25 N.Y.S.3d at 438.

104. *Id.*

105. *Id.*

106. *See* *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *see also* *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016).

107. *Tyson Foods*, 136 S. Ct. at 1041.

108. *Id.* at 1052.

109. *Id.* at 1043.

110. *Id.* at 1046–47.

advisors” among those employees covered by the overtime exemption for employees engaged in the service and sale of automobiles.<sup>111</sup> The Court found that the DOL’s failure to adequately explain the reversal of its interpretation was particularly egregious because the reversal affected an entire industry that had relied upon a contrary interpretation for over three decades.<sup>112</sup> The Court held that, under these circumstances, the DOL was not entitled to the deference it ordinarily has to interpret FLSA provisions.<sup>113</sup>

## 2. Second Circuit Wage and Hour Decisions

### A. Mandatory Arbitration

In *Holick v. Cellular Sales of New York, LLC*, the Second Circuit affirmed the district court’s decision that the plaintiffs were not required to arbitrate their state and federal wage claims.<sup>114</sup> The defendant-employer sought retroactive application of an arbitration clause in an employment agreement that had not been in effect when the plaintiffs’ claims first arose.<sup>115</sup> The agreement that was in effect at that time did not require arbitration.<sup>116</sup> The court found no evidence to suggest that the parties intended to apply the arbitration clause in the parties’ successor agreement retroactively.<sup>117</sup>

### B. Stipulated Dismissals

In *Cheeks v. Freeport Pancake House, Inc.*, the Second Circuit held that the parties to a voluntary settlement of an FLSA action were required to comply with Rule 41 of the Federal Rules of Civil Procedure and thus could not agree to discontinue the litigation without the court’s approval.<sup>118</sup> Following the appearance of the defendant in an FLSA action, and during discovery, the parties reached a private settlement in

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111. *Encino Motorcars*, 136 S. Ct. at 2126. Section 213(b)(10)(A) of the FLSA exempts from overtime “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles.” 29 U.S.C. § 213(b)(10)(A).

112. *Encino Motorcars*, 136 S. Ct. at 2126.

113. *Id.* at 2127. See generally *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (establishing a test when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, entitling it to deference).

114. 802 F.3d 391, 393 (2d Cir. 2015).

115. *Id.* at 399.

116. *Id.* at 398.

117. *Id.* at 399.

118. 796 F.3d 199, 200 (2d Cir. 2015).

which they agreed to discontinue the lawsuit with prejudice.<sup>119</sup> The district court advised the parties that it could not discontinue the action without settlement terms and ordered that the agreement be produced for the court's review.<sup>120</sup> The district court then granted the parties' joint request to stay the action and to certify the dispute for interlocutory appeal.<sup>121</sup>

The Second Circuit affirmed the district court, holding that "the FLSA [was] within Rule 41's 'applicable federal statute' exception," and, therefore, court approval under that provision was mandatory.<sup>122</sup> The court acknowledged that such a decision presented challenges and that other courts were correct in pointing out the inefficiencies and expenses associated with judicial review under Rule 41 of every private settlement negotiated in FLSA cases.<sup>123</sup> It nonetheless observed that scrutiny by the court (or DOL as appropriate) would be "consistent with what both the Supreme Court and [the Second Circuit] have long recognized as the FLSA's underlying purpose: 'to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.'"<sup>124</sup>

### *C. Amusement and Receptions Establishment Exemption*

In *Chen v. Major League Baseball Properties, Inc.*, the Second Circuit held that a five-day baseball festival was an "establishment" as used in the FLSA's minimum wage exemption for amusement and recreational establishments.<sup>125</sup> The statute exempts employees from minimum wage protection if they are "employed by [a seasonal] establishment which is an amusement or recreational establishment."<sup>126</sup>

The Second Circuit, affirming the district court, found that while FLSA exemptions must be narrowly construed, in this case the legislative history of the exemption and subsequent DOL interpretations pointed to congressional intent to define "establishment" to include "a distinct, physical place of business as opposed to an integrated multiunit business

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119. *Id.*

120. *Id.* at 200–01. Section 216(c) of the FLSA vests the Secretary of Labor with authority "to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees." 29 U.S.C. § 216(c) (2012).

121. *Cheeks*, 796 F.3d at 201.

122. *Id.* at 206 (quoting FED. R. CIV. P. 41(a)(1)(A)).

123. *Id.* at 206–07 (quoting *Picerni v. Bilingual Seit & Preschool, Inc.*, 925 F. Supp. 2d 368, 377 (E.D.N.Y. 2013)).

124. *Id.* at 206 (quoting *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)).

125. 798 F.3d 72, 74 (2d Cir. 2015).

126. 29 U.S.C. § 213(a)(3) (2012).

or enterprise.”<sup>127</sup>

#### *D. Expert Witness Fees*

Section 16(b) of the FLSA authorizes courts in FLSA cases to “allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.”<sup>128</sup> In *Gorpat v. Capala Bros., Inc.*, the Second Circuit held that such “costs” could not include expert witness fees incurred by the plaintiff.<sup>129</sup> The court relied on precedent interpreting similar provisions in other statutes holding that, absent express statutory authority, courts should not include witness fees in an award of costs.<sup>130</sup> The court observed that the FLSA was silent on the issue of such fees, and that accordingly such fees should not have been included in the district court’s award of costs.<sup>131</sup>

#### *E. Sovereign Immunity*

In *Beaulieu v. Vermont*, the Second Circuit affirmed the district court’s dismissal of an FLSA action based on the State’s defense of sovereign immunity.<sup>132</sup> Several hundred current and former state employees filed a state court FLSA action for nonpayment of overtime.<sup>133</sup> The case was removed to federal court, and dismissed by the district court based on the State’s assertion of sovereign immunity.<sup>134</sup> The plaintiffs appealed from the dismissal, contending that the State’s removal and subsequent participation in litigation constituted a waiver of its right to assert sovereign immunity as a defense.<sup>135</sup>

The Second Circuit noted the important distinction between sovereign immunity under the Eleventh Amendment to the United States Constitution, which protects states from being sued in federal court, and the broader strain of sovereign immunity that developed under the common law and which protects a state against being sued in both state

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127. *Chen*, 798 F.3d at 79 (citing *Brennan v. Yellowstone Park Lines, Inc.*, 478 F.2d 285, 289 (10th Cir. 1973)).

128. 29 U.S.C. § 216(b) (2012).

129. 795 F.3d 292, 296 (2d Cir. 2015).

130. *Id.* (first citing *Bd. of Educ. v. Murphy*, 548 U.S. 291, 301 (2006), then citing *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 86 (1991), and then citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)).

131. *Id.* (first citing 15 U.S.C. § 2618(d) (2012), then citing 15 U.S.C. § 2619(c)(2) (2012), then citing 15 U.S.C. § 2060(c) (2012), and then citing 42 U.S.C. § 1988(c) (2012)).

132. 807 F.3d 478, 481 (2d Cir. 2015).

133. *Id.* at 481.

134. *Id.*

135. *Id.*

and federal courts.<sup>136</sup> The court found that the State was asserting the broader common law strain immunity de in this case.<sup>137</sup>

The court first held that Vermont's enactment of its own minimum wage law was not an express statutory waiver of either strain of immunity, and emphasized that the State's imposition of a substantive obligation on itself was not the same as an agreement by that state to permit a private party to enforce that obligation against it in court.<sup>138</sup> The Second Circuit also held that the removal of the case to federal court was not a waiver of the State's common law sovereign immunity defense.<sup>139</sup> The court explained that such removal would bar the State from asserting sovereign immunity under the Eleventh Amendment, because the Constitution only protected states from being forced to defend themselves in federal court.<sup>140</sup>

### 3. "White Collar" Overtime Exemptions

On May 18, 2016, the DOL issued final regulations for the "salaried" portion of the test used to determine whether a worker is exempt from overtime under the FLSA's various white collar overtime exemptions (i.e., the administrative, professional, executive and computer employee exemptions).<sup>141</sup> The regulations are effective as of December 1, 2016.<sup>142</sup> Under the new rule, in order to establish that an employee is covered by one of the "white collar" overtime exemptions, it first must be shown that the employee is paid on a salaried basis, and that the weekly salary received by the employee is equal to at least \$913.<sup>143</sup> The minimum weekly salary had been \$455 under the old rule.<sup>144</sup>

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136. *Id.* at 483.

137. *Beaulieu*, 807 F.3d at 484.

138. *Id.* at 485.

139. *Id.* at 486.

140. *Id.* at 488. The court also rejected the plaintiffs' contention that defendants waived the right to assert immunity as a defense because they had represented during the litigation that they would not raise the issue with the court. *Id.* at 491. The court did not decide whether prejudice caused by such a representation could constitute a waiver of immunity because it did not believe that the plaintiffs in this appeal were prejudiced. *Beaulieu*, 807 F.3d at 491.

141. 29 C.F.R. § 541.0 (2016); see Fact Sheet, U.S. Dep't Labor Wage & Hour Div., Final Rule to Update the Regulations Defining and Delimiting the Exemption for Executive, Administrative, and Professional Employees 1 (2006), <https://www.dol.gov/whd/overtime/final2016/overtime-factsheet>.

142. 29 C.F.R. § 541.0.

143. 29 C.F.R. § 541.600 (2016).

144. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38,516, 38,546 (Jul. 6, 2015) (codified at 20 C.F.R. pt. 541); see Fact Sheet, U.S. Dep't Labor Wage & Hour Div., *supra* note 141, at 1.

#### 4. *Paid Sick Leave Executive Order*

On September 7, 2015, President Obama signed Executive Order 13,706, requiring certain federal contractors and subcontractors to provide their employees with a minimum of seven paid annual sick days.<sup>145</sup> On September 30, 2016, the DOL issued final regulations concerning the administration of the executive order.<sup>146</sup> The final rule was effective as of November 29, 2016.<sup>147</sup>

### III. EMPLOYMENT DISCRIMINATION DEVELOPMENTS

#### A. *New York State Developments*

##### 1. *Amendments to New York State Human Rights Law*

On October 21, 2015, Governor Cuomo signed laws expanding protections against discrimination under the Human Rights Law.<sup>148</sup> The amendments (1) add “family status” as a protected class,<sup>149</sup> expanding protection for pregnant employees by designating pregnancy as a protected disability,<sup>150</sup> (2) require employers to provide reasonable accommodations,<sup>151</sup> (3) permit sexual harassment claims to be filed against any employer regardless of size,<sup>152</sup> and (4) prohibit discrimination on the basis of gender identity.<sup>153</sup> The statute also expands the rights of prevailing employers and employees to obtain an award of attorneys’ fees.<sup>154</sup> The amendments went into effect on January 19, 2016.<sup>155</sup>

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145. Exec. Order No. 13,706, 3 C.F.R. 367, 367 (2016).

146. Establishing Paid Sick Leave for Federal Contractors, 81 Fed. Reg. 67,598, 67,598 (Sept. 30, 2016) (to be codified at 29 C.F.R. pt. 13).

147. 29 C.F.R. § 13.1 (2016).

148. *Governor Cuomo Signs Legislation to Protect and Further Women’s Equality in New York State*, N.Y. ST. GOVERNOR (Oct. 21, 2015), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-protect-and-further-women-s-equality-new-york-state>.

149. Act effective Jan. 19, 2016, 2015 McKinney’s Sess. Laws of N.Y., ch. 365, at 953–54 (codified at N.Y. EXEC. LAW § 296(1)(a) (McKinney Supp. 2017)).

150. Act effective Jan. 19, 2016, 2015 McKinney’s Sess. Laws of N.Y., ch. 369, at 973 (codified at N.Y. EXEC. LAW §§ 292(21-e), 292(21-f) (McKinney Supp. 2017)).

151. Act effective Jan. 19, 2016, 2015 McKinney’s Sess. Laws of N.Y., ch. 369, at 973 (codified at EXEC. §§ 292(21-e), 292(21-f)).

152. Act effective Jan. 19, 2016, 2015 McKinney’s Sess. Laws of N.Y., ch. 363, at 950 (codified at EXEC. § 292(5)).

153. Act effective Jan. 19, 2016, 2015 McKinney’s Sess. Laws of N.Y., ch. 362, at 949 (codified at N.Y. LAB. LAW § 194(1)(d) (McKinney Supp. 2017)).

154. N.Y. EXEC. LAW §§ 296-a(7)(c)(3), 297(10) (McKinney Supp. 2017).

155. See sources cited *supra* notes 149–153.

## 2. *Transgender Discrimination*

On October 22, 2015, Governor Cuomo announced the introduction of new regulations concerning protection against employment discrimination based on transgender identity.<sup>156</sup> The new regulations went into effect on January 20, 2016.<sup>157</sup>

## 3. *Discrimination Based on Association*

In May 2016, the State Division of Human Rights (SDHR) issued final regulations concerning protections against employment discrimination based on an employee's relationship to, or association with, a member of a protected class.<sup>158</sup>

### *B. State Discrimination Cases*

#### *1. Discrimination Based on Gender*

##### *A. Individual Liability*

The Third Department addressed the imposition of individual liability on co-owners of a restaurant in *New York State Division of Human Rights v. Miranda*.<sup>159</sup> Human Rights Law § 296(6) authorizes the imposition of individual liability for, inter alia, aiding or abetting discriminatory conduct.<sup>160</sup> The court found substantial evidence to support SDHR's determination that the petitioners, two former waitresses, were exposed to a hostile work environment on account of their gender.<sup>161</sup> The evidence established that the restaurant's head chef subjected the petitioners to ongoing harassment, consisting of "repeated lewd gestures, demeaning comments and graphic descriptions of his oft-stated desire to engage in various sexual acts with [the] petitioners."<sup>162</sup>

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156. 9 N.Y.C.R.R. § 466.13 (2016); see also *Governor Cuomo Introduces Regulations to Protect Transgender New Yorkers from Unlawful Discrimination*, N.Y. ST. GOVERNOR (Oct. 22, 2015), <https://www.governor.ny.gov/news/governor-cuomo-introduces-regulations-protect-transgender-new-yorkers-unlawful-discrimination>.

157. 9 N.Y.C.R.R. § 466.13.

158. 9 N.Y.C.R.R. § 466.14 (2016).

159. 136 A.D.3d 1240, 1240, 26 N.Y.S.3d 610, 611–12 (3d Dep't 2016).

160. *Id.* at 1241, 26 N.Y.S.3d at 612 (first citing N.Y. EXEC. LAW § 296(6) (McKinney 2010); then citing *Murphy v. ERA United Realty*, 251 A.D.2d 469, 472, 674 N.Y.S.2d 415, 417 (2d Dep't 1998); then citing *Med. Express Ambulance Corp. v. Kirkland*, 79 A.D.3d 886, 888, 913 N.Y.S.2d 296, 299 (2d Dep't 2010); and then citing *Strauss v. Dep't of Educ.*, 26 A.D.3d 67, 73, 805 N.Y.S.2d 704, 709 (3d Dep't 2005)).

161. *Id.* (citing *Rensselaer Cty. Sheriff's Dep't v. N.Y. State Div. of Human Rights*, 131 A.D.3d 777, 778, 15 N.Y.S.3d 227, 230–31 (3d Dep't 2015)).

162. *Id.*



The court reached a different conclusion concerning the imposition of personal liability on the two respective co-owners of the restaurant.<sup>163</sup> The court found that one of the two co-owners aided and abetted the hostile work environment by failing to take steps in response to the repeated complaints from the petitioners about the chef's conduct.<sup>164</sup> However, the court disagreed that the second co-owner should have been held to be individually liable.<sup>165</sup> There was no evidence that the second co-owner had ever observed the chef's conduct.<sup>166</sup> Moreover, the petitioners conceded that they never complained to the second co-owner and that, to their knowledge, the second co-owner had never been made aware of the chef's behavior.<sup>167</sup> The court held that the SDHR failed to meet "its 'affirmative burden' to prove that [the second owner] condoned the discriminatory conduct."<sup>168</sup>

### *B. Hostile Work Environment Claims and Damage Awards*

In *Rensselaer County Sheriff's Department v. New York State Division of Human Rights*, the threshold issue on appeal was whether SDHR rationally determined that the complainant, a female correction officer, had been exposed to a hostile work environment because of her gender.<sup>169</sup> Noting the narrow scope of its review and the deference to which SDHR was entitled, the court held that there was a rational basis for SDHR's determination that, "but for [the complainant's] gender, she would not have suffered the harassment that she described and that such harassment altered the conditions of her employment so as to create an abusive work environment."<sup>170</sup> The evidence established that the complainant's male coworkers subjected her to an ongoing pattern of gender-based abuse that eventually caused the complainant to retire sooner than she had intended to.<sup>171</sup> The evidence also established that the

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163. *Id.* at 1241–42, 26 N.Y.S.3d at 611–12.

164. *Miranda*, 136 A.D.3d at 1241, 26 N.Y.S.3d at 612.

165. *Id.* at 1242, 26 N.Y.S.3d at 613 (citing *N.Y. State Div. of Human Rights v. Young Legends, LLC*, 90 A.D.3d 1265, 1269, 934 N.Y.S.2d 628, 632 (3d Dep't 2011)).

166. *Id.*

167. *Id.*

168. *Id.* (quoting *Young Legends*, 90 A.D.3d at 1269, 934 N.Y.S.2d at 632); *see also* *N.Y. State Div. of Human Rights v. Team Taco Mex., Corp.*, 140 A.D.3d 965, 967, 33 N.Y.S.3d 452, 454 (2d Dep't 2016).

169. 131 A.D.3d 777, 777, 783, 15 N.Y.S.3d 227, 230, 235 (3d Dep't 2015) (confirming individual liability determination against owner who was direct cause of hostile work environment; determination that corporate employer liable for acts of its individual owner).

170. *Id.* at 780, 15 N.Y.S.3d at 232.

171. *Id.*

complainant repeatedly complained to her supervisor to no avail.<sup>172</sup> Based on such evidence, the court determined that SDHR had a rational basis supporting its termination that the employer condoned the abuse.<sup>173</sup>

The Third Department also addressed the contours of the damages awarded to the complainant. First, it held that the award of \$300,000 in non-economic damages was “reasonably related to the wrongdoing, supported by substantial evidence and comparable to other awards for similar injuries.”<sup>174</sup> Reviewing the record, the court explained,

[Complainant] testified that the male coworkers’ harassment led to extensive psychological trauma that included suicidal ideations and required medication. [Complainant’s] psychiatrist confirmed these reports and testified that he had diagnosed [complainant] with posttraumatic stress disorder and major depressive disorder. The psychiatrist opined that the causes of such conditions were [complainant’s] frequent and recurring thoughts regarding the harassment that she suffered at the correctional facility. Considering [complainant’s] testimony and the medical proof elaborating on the severe effects that the discrimination had on her, the award is reasonably related to the wrongdoing, supported by substantial evidence and comparable to awards for similar injuries.<sup>175</sup>

The court next addressed two contentions raised by the complainant on appeal. First, the court agreed with the complainant that SDHR erred in offsetting her award based on past and prospective workers’ compensation benefits.<sup>176</sup> The court noted that state workers’ compensation law provides an insurance carrier with a lien on any recovery obtained from a third party to the extent of compensation paid.<sup>177</sup> In addition, the court agreed with the complainant that the award

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172. *Id.* at 779, 15 N.Y.S.3d at 232.

173. *Id.* at 780, 15 N.Y.S.3d at 232 (citing N.Y. State Dep’t of Corr. Servs. v. N.Y. State Div. of Human Rights, 53 A.D.3d 823, 825, 861 N.Y.S.2d 494, 497–98 (3d Dep’t 2008)).

174. *Rensselaer Cty. Sheriff’s Dep’t*, 131 A.D.3d at 781, 15 N.Y.S.3d at 233 (citing *Freudenthal v. County of Nassau*, 99 N.Y.S.2d 285, 291, 784 N.E.2d 1165, 1168, 755 N.Y.S.2d 56, 59 (2003)).

175. *Id.*

176. *Id.*

177. *Id.* (citing N.Y. WORKERS’ COMP. LAW § 29(1) (McKinney 2015) (“In such case, the state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney’s fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid or to be paid by it and to such extent such recovery shall be deemed for the benefit of such fund, person, association, corporation or carrier. . . .”)).

should have properly reflected losses the complainant sustained by retiring and going on pension status sooner than she had planned to.<sup>178</sup> The court noted that such an award would “make the victim whole for injuries suffered as a result of discriminatory employment practices.”<sup>179</sup>

Damages were also at issue in *New York State Division of Human Rights v. Team Taco Mexico, Corp.*<sup>180</sup> The Second Department granted SDHR’s petition to enforce its determination that the employer-respondent and its individual owner were jointly and severally liable for exposing the complainant to a gender-based hostile work environment, and then considered several challenges to the award of damages.<sup>181</sup> The court found substantial evidence to support the amount of back pay awarded to the complainant, and that the compensatory damages for mental anguish and humiliation were “reasonably related to the wrongdoing” and supported both by the evidence and awards in similar cases.<sup>182</sup> It also held that the SDHR did not abuse its discretion in imposing a civil fine and penalty in the amount of \$75,000.<sup>183</sup> Such civil fines and penalties can be awarded in an amount up to \$100,000 for discriminatory conduct that is “willful, wanton, and malicious.”<sup>184</sup> The court held that SDHR’s determination that the conduct at issue was well within this standard was supported by substantial evidence.<sup>185</sup>

### C. Non-Actionable Offensive Conduct

In *Pawson v. Ross*, the Third Department held that a group of former female employees failed to establish a claim of hostile work environment based on gender, notwithstanding undisputed evidence of offensive

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178. *Id.* at 782, 15 N.Y.S.3d at 234.

179. *Rensselaer Cty. Sheriff’s Dep’t*, 131 A.D.3d at 782, 15 N.Y.S.3d at 234 (quoting *Beam v. DeLeon*, 87 N.Y.2d 289, 297, 662 N.E.2d 752, 756, 639 N.Y.S.2d 272, 276 (1995)).

180. *N.Y. State Div. of Human Rights v. Team Taco Mex., Corp.*, 140 A.D.3d 965, 965, 33 N.Y.S.3d 452, 453 (2d Dep’t 2016).

181. *Id.*

182. *Id.* at 967, 33 N.Y.S.3d at 454 (first citing *N.Y.C. Transit Auth. v. N.Y. State Div. of Human Rights*, 78 N.Y.2d 207, 219, 577 N.E.2d 40, 41, 573 N.Y.S.2d 49, 56 (1991); then citing *N.Y. State Div. of Human Rights, v. ABS Elecs., Inc.*, 102 A.D.3d 967, 969, 958 N.Y.S.2d 502, 504 (2d Dep’t 2013); then citing *Columbia Sussex Corp. v. N.Y. State Div. of Human Rights*, 63 A.D.3d 736, 736, 879 N.Y.S.2d 722, 722 (2d Dep’t 2009); and then citing *N.Y. State Div. of Human Rights v. Koch*, 60 A.D.3d 777, 777–78, 875 N.Y.S.2d 180, 181 (2d Dep’t 2009)).

183. *Id.* at 966, 33 N.Y.S.3d at 453.

184. *Id.* at 967, 33 N.Y.S.3d at 453 (citing N.Y. EXEC. LAW § 297(4)(c)(vi) (McKinney 2013)).

185. *Team Taco Mex., Corp.*, 140 A.D.3d at 967, 33 N.Y.S.3d at 454 (first citing *Kelly v. Safir*, 96 N.Y.2d 32, 38, 747 N.E.2d 1280, 1284, 724 N.Y.S.2d 680, 683 (2001); and then citing *N.Y. State Div. of Human Rights v. Stennett*, 98 A.D.3d 512, 513–14, 949 N.Y.S.2d 459, 461 (2d Dep’t 2012)).

behavior on the part of the sole owner of an accounting firm.<sup>186</sup> The court held that the plaintiff's allegations did not adequately establish "severe and pervasive" and "objectively hostile" conduct to establish a hostile work environment claim.<sup>187</sup> One plaintiff alleged the owner called her "stupid" and threw papers at her.<sup>188</sup> A second plaintiff alleged that the owner called her a "dumb blond" and on two separate occasions over the course of a year he referred to her as "Mae West." A third plaintiff claimed the owner once stated at a staff meeting that he would share a hotel room with her and once told a client that he had taken a shower with her.<sup>189</sup> One final plaintiff alleged that the owner would call her "Blondie" and "Money Bunny," once swatted her backside with papers, and threatened to bring a paddle from home if her work did not improve.<sup>190</sup>

The court found that the conduct complained of, while "reprehensible," was insufficient to establish a claim of hostile work environment under the Human Rights Law.<sup>191</sup> The Third Department noted that it "[did] not, by any means, condone [the owner's] alleged actions toward [the] plaintiffs."<sup>192</sup> It concluded, however, that none of the plaintiffs "[could] establish, as a matter of law, that they were subjected to a sexually hostile work environment."<sup>193</sup>

In *Minckler v. United Parcel Service, Inc.*, the Third Department once again held that plainly offensive conduct was insufficient to establish claims for gender discrimination and hostile work environment.<sup>194</sup> The plaintiff alleged that over the period of approximately five years, a coworker working in close proximity had on two occasions called her a derogatory name, had discussed a party in

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186. 137 A.D.3d 1536, 1539, 29 N.Y.S.3d 600, 604 (3d Dep't 2016).

187. *Id.* at 1537, 29 N.Y.S.3d at 602.

188. *Id.* at 1538, 29 N.Y.S.3d at 602.

189. *Id.* at 1538, 29 N.Y.S.3d at 603.

190. *Id.* at 1538–39, 29 N.Y.S.3d at 603.

191. *Pawson*, 137 A.D.3d at 1539, 29 N.Y.S.3d at 603.

192. *Id.* at 1539, 29 N.Y.S.3d at 604.

193. *Id.*; see also *Gordon v. N.Y. State Dep't of Corrs. & Cmty. Supervision*, 138 A.D.3d 1477, 1478–79, 31 N.Y.S.3d 338, 339 (4th Dep't 2016) (confirming determination that transfer of employee to a new post did not materially change employee's employment conditions and did not establish hostile work environment); *Russo v. N.Y. State Div. of Human Rights*, 137 A.D.3d 1600, 1601, 28 N.Y.S.3d 156, 159 (4th Dep't 2016) (finding three-day suspension was an adverse employment action but was justified by legitimate and nondiscriminatory reasons concerning employees misconduct); *Anderson v. Edminston & Co.*, 131 A.D.3d 416, 417, 14 N.Y.S.3d 376, 377 (1st Dep't 2015) (finding claim for gender-based discrimination stated by allegations that supervisor "routinely made deprecatory, vulgar and offensive remarks about women, including that they were useful only for administrative services and sex").

194. See 132 A.D.3d 1186, 19 N.Y.S.3d 602 (3d Dept. 2015).

sexually graphic terms, had on several occasions referred to her using a derogatory term for lesbian, discussed the purchase of sexually explicit materials, pulled her bra strap once and her hair on a separate occasion, and once rubbed a lubricant on her arm.<sup>195</sup> The Third Department, explaining how such alleged conduct did not create a hostile environment claim, stated,

[T]he record clearly establishes that the workplace was one in which the banter was occasionally uncivil and crude. Under the totality of the circumstances, however, *we are unable to conclude that the conduct, while offensive, either permeated the workplace or was so “severe or pervasive” as to constitute a hostile work environment under the Human Rights Law.* With the exception of the bra strap, hair pulling and lubricant incidents in September 2009, February 2010 and August 2010, respectively, plaintiff does not allege any physical conduct. Without minimizing the impropriety of [the conduct] we note that, in her deposition, plaintiff conceded that [her coworker’s] comments, while crude, *did not objectify or disparage women in general.*<sup>196</sup>

#### *D. Arbitration Awards and Public Policy*

In *Phillips v. Manhattan and Bronx Surface Transit Operating Authority*, the First Department vacated an arbitration award which ordered the reinstatement of an employee who had been terminated for sexual harassment.<sup>197</sup> The court found that the arbitrator’s reinstatement order, which was based on the employer’s failure to comply with contractual disciplinary protections for workers on union time, was contrary to state public policy.<sup>198</sup> The court explained that although there are narrow grounds for vacatur of an arbitration award, “this is one of the relatively rare cases where a CBA arbitration award—reinstating a sexual harassment offender—runs counter to the strong public policy against sexual harassment in the workplace.”<sup>199</sup>

#### *2. Discrimination Based on Race*

In *Cadet-Legros v. New York University Hospital Center*, a case based on claims under the NYCHRL, the First Department held that the

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195. *Id.* at 1187–88, 19 N.Y.S.3d at 605.

196. *Id.* at 1188–89, 19 N.Y.S.3d at 605 (emphasis added) (citations omitted). In addition, the court found that the plaintiff failed to establish a claim for retaliation because she failed to establish that adverse employment action. However, it modified the order of the lower court dismissing the plaintiff’s claim against her coworker for assault and battery. *Id.* at 1189–90, 19 N.Y.S.3d at 606–07.

197. *See* 132 A.D.3d 149, 157–58, 15 N.Y.S.3d 331, 338 (1st Dep’t 2015).

198. *Id.* at 157, 15 N.Y.S.3d at 338.

199. *Id.*

plaintiff, an African American former employee of the defendant-hospital, was terminated for legitimate and nondiscriminatory reasons having nothing to do with her race.<sup>200</sup> The hospital produced evidence that the plaintiff, a clinical supervisor, was terminated due to repeated complaints about her “insubordination and disruptive behavior.”<sup>201</sup> The plaintiff alleged that at one point a supervisor referred to the plaintiff and stated that a “leopard does not change its spots.” She also alleged that she was falsely accused of engaging in a “tirade.”<sup>202</sup>

The court held that the employer had produced evidence establishing a legitimate and nondiscriminatory basis for the plaintiff’s termination.<sup>203</sup> It also held that the plaintiff failed to establish that the grounds asserted by the employer were pretextual, or motivated in part by race discrimination.<sup>204</sup> The court specifically rejected the plaintiff’s contention that the “leopard” reference was evidence of racial malice and motivation, stating, “A jury could not reasonably conclude that [the] plaintiff’s supervisors intended to employ the phrase in a racially charged manner.”<sup>205</sup>

### 3. Discrimination Based on Age

In *Bennett v. Time Warner Cable, Inc.*, the First Department reaffirmed the rule that age discrimination claims based on the disparate impact theory of discrimination could be raised under both the state and city anti-discrimination laws.<sup>206</sup> The plaintiffs were in their late 50s and 60s and were employed as general foremen.<sup>207</sup> They commenced an age discrimination action under both the Human Rights Law and NYCHRL after the employer decided to eliminate the general foremen position.<sup>208</sup> The plaintiffs claimed that the elimination of the position had an

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200. 135 A.D.3d 196, 198, 21 N.Y.S.3d 221, 224 (1st Dep’t 2015).

201. *Id.*

202. *Id.* at 204, 21 N.Y.S.3d at 228.

203. *Id.* at 198, 21 N.Y.S.3d at 224.

204. *Id.* at 206, 21 N.Y.S.3d at 230.

205. *Cadet-Legros*, 135 A.D.3d at 206, 21 N.Y.S.3d at 230. The court also found that the plaintiff failed to establish her claim for retaliation because there was insufficient evidence of a causal connection between an internal complaint of discrimination and her termination. *See Johnson v. Northshore Long Island Jewish Health Sys., Inc.*, 137 A.D.3d 977, 978, 27 N.Y.S.3d 598, 600 (2d Dep’t 2016) (finding hospital offered legitimate, nondiscriminatory reasons for the plaintiff’s termination in response to a claim under state law for race discrimination and retaliation).

206. 138 A.D.3d 598, 28 N.Y.S.3d 859 (1st Dep’t 2016).

207. *Id.* at 598, 28 N.Y.S.3d at 859.

208. *Id.*

unlawful, disparate impact on older workers.<sup>209</sup> The court observed that it had previously held that disparate impact claims could be made under state law and declined to follow a contrary result reached by the Third Department.<sup>210</sup> With respect to the NYCHRL claim, the court observed that it “must be construed broadly in favor of [the] plaintiffs alleging discrimination and assessed under more liberal standards, going beyond the counterpart state or federal civil rights laws.”<sup>211</sup>

In *Godino v. Premier Salons, Ltd.*, the Second Department held that the plaintiff stated a claim for both age discrimination and age-based hostile work environment under the Human Rights Law.<sup>212</sup> The plaintiff was an experienced, fifty-four-year-old hair stylist with an allegedly loyal local client base.<sup>213</sup> She alleged that her coworkers, supervisors, and managers “frequently ridiculed and harassed her because of her age by stating that she was ‘too old’ and that she ‘should retire.’”<sup>214</sup> The plaintiff also alleged that her workstation was moved to a less desirable location, causing her to lose income, and that a younger coworker was assigned to her former work station.<sup>215</sup> She alleged that she was told this was done because her younger colleague had “lots of energy.”<sup>216</sup> Finally, the plaintiff alleged that she was terminated after her supervisors observed and failed to stop a verbal assault on her by two coworkers, who told her that she was “ugly and old” and “should retire.”<sup>217</sup>

The court held that there were sufficient allegations in the complaint to state a claim that her termination “occurred under circumstances giving

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209. *Id.* (first citing N.Y. EXEC. LAW § 296 (McKinney 2010); then citing *Mete v. N.Y. State Office of Mental Retardation & Developmental Disabilities*, 21 A.D.3d 288, 296, 800 N.Y.S.2d 161, 167 (1st Dep’t 2005); and then citing *Teasdale v. City of New York*, No. 08-CV-1684 (KAM), 2013 U.S. Dist. LEXIS 133764, at \*11–12 (E.D.N.Y. Sept. 18, 2013)).

210. *Id.* at 599, 28 N.Y.S.3d at 859. Defendants relied on *Bohlke v. General Electric Co.*, 293 A.D.2d 198, 200, 742 N.Y.S.2d 131, 132 (3d Dep’t), *lv. dismissed*, 98 N.Y.2d 693, 775 N.E.2d 1289, 747 N.Y.S.2d 410 (2002), where the Third Department held that disparate impact claims for age discrimination could not be raised under the Human Rights Law. The court relied instead on its own decision holding to the contrary in *Mete*, 21 A.D.3d at 289, 800 N.Y.S.2d at 162.

211. *Bennett*, 138 A.D.3d at 599, 28 N.Y.S.3d at 859 (citing *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 66, 872 N.Y.S.2d 27, 31 (1st Dep’t)).

212. 140 A.D.3d 1118, 1120, 35 N.Y.S.3d 197, 200 (2d Dep’t 2016) (first citing *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 372 N.E.2d 17, 20, 401 N.Y.S.2d 182, 185 (1977); then citing *Wiesen v. N.Y. Univ.*, 304 A.D.2d 459, 460, 758 N.Y.S.2d 51, 52 (1st Dep’t 2003); and then citing *Terranova v. Liberty Lines Transit, Inc.*, 292 A.D.2d 441, 442, 738 N.Y.S.2d 693, 695 (2d Dep’t 2002)).

213. *Id.* at 1119, 35 N.Y.S.3d at 199.

214. *Id.*

215. *Id.*

216. *Id.* at 1119, 35 N.Y.S.3d at 200.

217. *Godino*, 140 A.D.3d at 1120, 35 N.Y.S.3d at 200.

rise to an inference of age discrimination.”<sup>218</sup> It also held that the plaintiff alleged sufficient facts to state a claim for hostile work environment based on age.<sup>219</sup> The court, in making this second determination, focused on the frequency of the alleged hostile actions, their alleged severity, whether physical threats or humiliation were allegedly involved, and whether the alleged conduct interfered with the plaintiff’s work performance.<sup>220</sup>

#### 4. *Discrimination Based on Disability*

##### A. *Proof Issues and Damages*

In *Serdans v. New York and Presbyterian Hospital*, the First Department held that a jury verdict awarding a plaintiff compensatory and punitive damages in the amount of \$4.05 million was partially sufficient and not against the weight of the evidence.<sup>221</sup> There was evidence that the defendant-employer reneged on its agreement to accommodate the plaintiff’s disability by permitting her to work exclusively in a certain medical unit.<sup>222</sup> There was also evidence that the employer began to deny the plaintiff’s requests for shift assignments with greater frequency after she had been granted the accommodation.<sup>223</sup>

However, the court did find error in the jury’s award of punitive damages to the plaintiff.<sup>224</sup> Such an award, the court held, was unsupported by sufficient evidence that the “defendant engaged in

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218. *Id.* at 1119, 35 N.Y.S.3d at 199 (first citing *Ferrante v. Am. Lung Ass’n*, 90 N.Y.2d 623, 629, 687 N.E.2d 1308, 1311, 665 N.Y.S.2d 25, 28 (1997); then citing *Ehmann v. Good Samaritan Hosp. Med. Ctr.*, 90 A.D.3d 985, 985, 935 N.Y.S.2d 639, 640 (2d Dep’t 2011); then citing *Balsamo v. Savin Corp.*, 61 A.D.3d 622, 623, 877 N.Y.S.2d 146, 147 (2d Dep’t 2009); then citing *Wiesen v. N.Y. Univ.*, 304 A.D.2d 459, 460, 758 N.Y.S.2d 51, 52 (1st Dep’t 2003); then citing *Terranova v. Liberty Lines Transit, Inc.*, 292 A.D.2d 441, 442, 738 N.Y.S.2d 693, 695 (2d Dep’t 2002); and then citing *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 238 (2d Cir. 2007)); *see also* *Lester v. N.Y. State Office of Parks, Recreation & Historic Pres.*, 139 A.D.3d 767, 767, 769, 32 N.Y.S.3d 225, 227–28 (2d Dep’t 2016) (holding that a material fact existed on the issue of whether refusal to allow fifty-eight-year-old lifeguard applicant to take a swim test with a “jammer” swimsuit constituted discrimination and holding defendant-employer failed to prove that restriction was legitimate and nondiscriminatory); *Krebaum v. Capital One, N.A.*, 138 A.D.3d 528, 529, 29 N.Y.S.3d 351, 353 (1st Dep’t 2016) (holding that material issues of fact precluded summary judgment award in favor of employer on issue of whether the plaintiff’s termination was for legitimate, nondiscriminatory reasons).

219. *Id.* at 1120, 35 N.Y.S.3d at 200.

220. *Id.* (citing *Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 605 (2d Cir. 2006)).

221. 138 A.D.3d 524, 524, 30 N.Y.S.3d 45, 46 (1st Dep’t 2016) (citing *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 498–99, 382 N.E.2d 1145, 1147, 410 N.Y.S.2d 282, 285 (1978)).

222. *Id.*

223. *Id.*

224. *Id.*



intentional conduct with malice or a reckless indifference to [the] plaintiff's rights."<sup>225</sup>

In *Duckett v. New York Presbyterian Hospital*, the First Department held that there was a genuine issue of material fact as to whether the plaintiff was terminated by the employer on account of her disability.<sup>226</sup> The court found evidence in the record that the plaintiff suffered from a mental illness which had affected her job performance.<sup>227</sup> There was also evidence that the defendant was aware of the plaintiff's physical and medical issues, and that her supervisor had expressed concern about the plaintiff's fitness to work upon the plaintiff's return from a medical leave.<sup>228</sup>

In *Whitfield v. New York State Division of Human Rights*, the First Department upheld the SDHR's dismissal of a complaint alleging disability discrimination.<sup>229</sup> The court found substantial evidence to support SDHR's determination that the petitioner failed to establish that he suffered from a disability.<sup>230</sup> The petitioner was a paraprofessional who worked with children with special needs.<sup>231</sup> An orthopedic examination found that the petitioner could not lift more than forty pounds, and it was undisputed that most of the students he worked with weighed more than forty pounds.<sup>232</sup> The court found no evidence that there was a paraprofessional position available for someone who was unable to lift more than forty pounds, and determined from this that no reasonable accommodation was available to the petitioner.<sup>233</sup> The court pointed out that the employer did make an attempt to accommodate the petitioner by extending a medical leave, but that no further accommodation was available.<sup>234</sup>

### *B. Collateral Estoppel and Election of Remedies*

In *Clifford v. County of Rockland*, the Second Department held that

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225. *Id.* at 525, 30 N.Y.S.3d at 46 (citing *Jordan v. Bates Advert. Holdings, Inc.*, 11 Misc. 3d 764, 776–77, 816 N.Y.S.2d 310, 322 (Sup. Ct. N.Y. Cty. 2006)).

226. 130 A.D.3d 473, 474, 14 N.Y.S.3d 10, 10 (1st Dep't 2015).

227. *Id.*

228. *Id.*

229. 137 A.D.3d 709, 709, 29 N.Y.S.3d 287, 288 (1st Dep't 2016).

230. *Id.*

231. *Id.* at 710, 29 N.Y.S.3d at 288.

232. *Id.* at 709–10, 29 N.Y.S.3d at 288.

233. *Id.* at 709–10, 29 N.Y.S.3d at 288–89 (first citing *Jacobsen v. N.Y.C. Health & Hosps. Corp.*, 22 N.Y.3d 824, 838, 11 N.E.3d 159, 169, 988 N.Y.S.2d 86, 96 (2014); and then citing N.Y. EXEC. LAW § 292(21) (McKinney 2010)).

234. *Whitfield*, 137 A.D.3d at 710, 29 N.Y.S.3d at 289.

a county employee was collaterally estopped from asserting a state court claim for disability discrimination.<sup>235</sup> The plaintiff had previously filed a disability discrimination claim under federal law, and that case had been dismissed.<sup>236</sup> The court observed that the standards under state and federal law were virtually identical, and that the federal court had already determined that the employer had offered legitimate, nondiscriminatory reasons for the alleged unlawful treatment of the plaintiff.<sup>237</sup>

In *Nizamuddeen v. New York City Transit Authority*, the Second Department held that a former probationary bus driver was barred from pursuing an Article 78 action to contest his termination because he had already filed a complaint of discrimination with the SDHR.<sup>238</sup> Executive Law § 297(9) states that the filing of a complaint of discrimination with the SDHR precludes the complainant from bringing a separate action in court based on the same alleged discriminatory conduct.<sup>239</sup> The court held that the petition was barred because it was based on the same alleged discriminatory conduct included in the plaintiff's SDHR complaint.<sup>240</sup>

##### 5. Discrimination Based on Criminal Conviction

In *Hall v. New York State Division of Human Rights*, the Fourth Department affirmed the SDHR's determination of "no probable cause" in a case alleging unlawful discrimination based on a petitioner's prior criminal record.<sup>241</sup> The petitioner had completed an online application to work with an employer in the health care industry.<sup>242</sup> He received a verbal offer of employment, but approximately one week later he was advised

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235. 140 A.D.3d 1108, 1110, 35 N.Y.S.3d 211, 213 (2d Dep't 2016) (first citing *Ji Sun Jennifer Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 A.D.3d 18, 23, 987 N.Y.S.2d 338, 342 (1st Dep't 2014); and then citing *Sanders v. Grenadier Realty, Inc.*, 102 A.D.3d 460, 461, 958 N.Y.S.2d 120, 121 (1st Dep't 2013)).

236. *Id.* at 1109, 35 N.Y.S.3d at 212.

237. *Id.* at 1110, 35 N.Y.S.3d at 213 (first citing *Margerum v. City of Buffalo*, 24 N.Y.3d 721, 731, 28 N.E.3d 515, 519, 5 N.Y.S.3d 336, 340 (2015); and then citing *Clifford v. County of Rockland*, No. 10 CV 9679 (VB), 2012 U.S. Dist. LEXIS 98783, at \*12 (S.D.N.Y. June 25, 2012)).

238. 140 A.D.3d 880, 881, 33 N.Y.S.3d 399, 400 (2d Dep't 2016).

239. N.Y. EXEC. LAW § 297(9) (McKinney 2013); *Nizamuddeen*, 140 A.D.3d at 881, 33 N.Y.S.3d at 400 (first citing *Wrenn v. Verizon*, 106 A.D.3d 995, 995–96, 965 N.Y.S.2d 362, 362–63 (2d Dep't 2013); then citing EXEC. § 297(9); and then citing *James v. Coughlin*, 124 A.D.2d 728, 729–30, 508 N.Y.S.2d 231, 232 (2d Dep't 1986)).

240. *Nizamuddeen*, 140 A.D.3d at 882, 33 N.Y.S.3d at 400 (first citing EXEC. § 297(9); then citing *James*, 124 A.D.2d at 729–30, 508 N.Y.S.2d at 232; then citing *Wrenn*, 106 A.D.3d at 995–96, 965 N.Y.S.2d at 362–63; then citing *Ehrlich v. Kantor*, 213 A.D.2d 447, 447, 624 N.Y.S.2d 888, 889 (2d Dep't 1995); and then citing *Craig-Oriol v. Mount Sinai Hosp.*, 201 A.D.2d 449, 450, 607 N.Y.S.2d 391, 391 (2d Dep't 1994)).

241. 137 A.D.3d 1583, 1583, 28 N.Y.S.3d 154, 155 (4th Dep't 2016).

242. *Id.*

that the offer was rescinded.<sup>243</sup> The court explained that the petitioner possessed a “certificate of relief,” which created a presumption that he was rehabilitated.<sup>244</sup> The potential employer, however, had no legal obligation to rebut that presumption, and was free to consider additional factors in choosing whether to hire the petitioner.<sup>245</sup>

In *Belgrave v. City of New York*, the First Department held that the defendant police department’s refusal to hire the petitioner to work in a non-enforcement civilian technician position did not constitute discrimination based on the petitioner’s prior criminal conviction.<sup>246</sup> Article 23-A of Correction Law prohibits unfair discrimination based on one’s prior criminal conviction but expressly excludes coverage over positions involving “membership in any law enforcement agency.”<sup>247</sup> The court, noting it was being asked to decide a matter of first impression, interpreted “membership in any law enforcement agency” to include the civilian technician position sought by the petitioner.<sup>248</sup> The court noted that its interpretation was consistent with the position of the state’s attorney general.<sup>249</sup>

#### 6. Discrimination Under the NYCHRL

Claims under the NYCHRL must be based on matters impacting New York City.<sup>250</sup> In *Vangas v. Montefiore Medical Center*, the Second Circuit affirmed a directed verdict issued in favor of the defendant-employer and holding that the plaintiff, a cancer patient who had not returned to work upon the expiration of a medical leave, failed to state a disability claim under the NYCHRL.<sup>251</sup> The court found that the plaintiff’s contacts with the city were merely tangential.<sup>252</sup> The plaintiff worked in Westchester County and was terminated there as well.<sup>253</sup> Although she spoke by telephone with patients located in New York City, the court held that such telephone contacts were insufficient to establish that the termination of the plaintiff impacted New York City within the

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243. *Id.*

244. *Id.* at 1584, 28 N.Y.S.3d at 155 (citing *Arrocha v. Bd. of Educ.*, 93 N.Y.2d 361, 365, 712 N.E.2d 669, 671–72, 690 N.Y.S.2d 503, 505 (1999)).

245. *Id.*

246. 137 A.D.3d 439, 439, 27 N.Y.S.3d 2, 4 (1st Dep’t 2016).

247. *Id.* at 440, 27 N.Y.S.3d at 4 (citing N.Y. CORRECT. LAW § 750(5) (McKinney 2014)).

248. *Id.* at 439, 27 N.Y.S.3d at 4.

249. *Id.* at 441, 27 N.Y.S.3d at 5.

250. *Vangas v. Montefiore Med. Ctr.*, 823 F.3d 174, 182 (2d Cir. 2016).

251. *Id.* at 179.

252. *Id.* at 182.

253. *Id.* at 183.

meaning of the NYCHRL.<sup>254</sup>

In *Singh v. Covenant Aviation Sec., LLC*, the Second Department reaffirmed that the NYCHRL permits a broader range of claims than do analogous state and federal claims.<sup>255</sup> The plaintiff worked as an airport security guard and was terminated for sleeping on the job.<sup>256</sup> Affirming the lower court, the Second Department held that the plaintiff was terminated for sleeping on the job and that this was a legitimate and nondiscriminatory reason under state anti-discrimination law.<sup>257</sup> However, with respect to the claim under city law, the court held that a genuine issue of material fact concerning whether the plaintiff's supervisor's discriminatory conduct played a role in his termination precluded an award of summary judgment.<sup>258</sup> The court observed that the NYCHRL is to be broadly construed, and that a claim for discrimination under the NYCHRL should not be dismissed unless it is determined that discrimination played "no role" in the termination decision.<sup>259</sup>

## 7. Local Developments

### A. Amendments to New York City Human Rights Law

On January 5, 2016, Mayor de Blasio signed a bill to amend the NYCHRL to add protection against discrimination to home "caregivers."<sup>260</sup> The amendment went into effect in May 2016.<sup>261</sup>

On March 28, 2016, Mayor de Blasio signed three bills amending the NYCHRL. First, the law was amended to reinforce the NYCHRL's broad construction and independence from the more narrowly construed

254. *Id.* at 182–83 (citing *Hoffman v. Parade Publ'ns*, 15 N.Y.3d 285, 292, 933 N.E.2d 744, 748, 907 N.Y.S.2d 145, 149 (2010)). The court also held that that the petitioner was not capable of performing the essential elements of her job, and could therefore not state a claim for disability discrimination under state law. *Vangas*, 823 F.3d at 181.

255. 131 A.D.3d 1158, 1161, 16 N.Y.S.3d 611, 615 (2d Dep't 2015) (citing *Zakrzewska v. New Sch.*, 14 N.Y.3d 469, 479, 928 N.E.2d 1035, 1039, 902 N.Y.S.2d 838, 842 (2010)); *see also* *Llanos v. T-Mobile USA, Inc.*, 132 A.D.3d 823, 824, 18 N.Y.S.3d 666, 667 (2d Dep't 2015) (first citing N.Y. EXEC. LAW § 296 (McKinney 2010); and then citing N.Y.C. ADMIN. CODE § 8-107 (2015)) (noting claims under NYCHRL were not duplicative of claims brought under the Human Rights Law).

256. *Singh*, 131 A.D.3d at 1158, 16 N.Y.S.3d at 613.

257. *Id.* at 1159–60, 16 N.Y.S.3d at 614.

258. *Id.* at 1162, 16 N.Y.S.3d at 616.

259. *Id.* at 1161, 16 N.Y.S.3d at 615 (quoting *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 76, 872 N.Y.S.2d 27, 38 (1st Dep't 2009)) (citing *Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29, 40, 936 N.Y.S.2d 112, 120 (1st Dep't 2011)).

260. N.Y.C. Local Laws No. 1 (Jan. 5, 2016) (codified at N.Y.C. ADMIN. CODE § 8-101 (2017)).

261. *Id.*

protections afforded under state and federal law.<sup>262</sup> Second, the NYCHRL was amended to authorize the inclusion of expert witness fees as part of an award of attorney's fees and costs.<sup>263</sup> Third, the law was amended to eliminate old language concerning sexual orientation that could be read to conflict with the broad sexual orientation protections now provided under the current law.<sup>264</sup>

### *B. NYC Guidelines on Transgender Discrimination*

On December 21, 2015, the New York City Commission on Human Rights (the "Commission") issued guidelines relating to discrimination based on transgender identity.<sup>265</sup> The guidelines include examples of potentially discriminatory conduct, including the intentional misuse of an employee's "preferred name, pronouns or title"; the refusal to permit the use of single-sex bathrooms or locker rooms or to participate in single-sex programs; the enforcement of gender-based dress codes; and the failure to accommodate employees undergoing gender transition treatment.<sup>266</sup>

### *C. NYC Pregnancy Accommodation Guidelines*

On May 6, 2016, the Commission issued guidelines concerning protection for pregnant employees under the NYCHRL.<sup>267</sup> The guidelines address various examples of potential pregnancy discrimination, and propose potential accommodations for pregnant employees.<sup>268</sup> The

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262. N.Y.C. Local Laws No. 35 (Mar. 28, 2016) (codified at N.Y.C. ADMIN. CODE § 8-130 (2017)).

263. N.Y.C. Local Laws No. 36 (Mar. 28, 2016) (codified at N.Y.C. ADMIN. CODE § 8-120 (2017)).

264. N.Y.C. Local Laws No. 37 (Mar. 28, 2016) (repealing N.Y.C. ADMIN. CODE § 8-107(16) (2016)).

265. NYC COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3 (2002); N.Y.C. ADMIN. CODE § 8-102(23) (2015), [https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/GenderID\\_InterpretiveGuide\\_2015.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/GenderID_InterpretiveGuide_2015.pdf).

266. *Id.*; see also NYC Commission on Human Rights Announces Strong Protections for City's Transgender and Gender Non-Conforming Communities in Housing, Employment and Public Spaces, NYC (Dec. 21, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/961-15/nyc-commission-human-rights-strong-protections-city-s-transgender-gender>.

267. NYC COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF PREGNANCY: LOCAL LAW NO. 78 (2013) N.Y.C. ADMIN. CODE § 8-107(22) (2016), [http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy\\_InterpretiveGuide\\_2016.pdf](http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2016.pdf); see also N.Y.C. ADMIN. CODE § 8-107(22) (2017).

268. Mayor de Blasio Announces Stronger Pregnancy Protections in the Workplace, Housing and Public Spaces, NYC (May 6, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/436-16/mayor-de-blasio-stronger-pregnancy-protections-the-workplace-housing-public-spaces>.

Commission reported,

Although employers in New York City have been required to provide reasonable accommodations to pregnant workers since 2014, many pregnant employees are still routinely denied basic accommodations—such as minor changes to work schedules and bathroom breaks—and are unfairly passed up for promotions due to their pregnancy, putting their careers and health in jeopardy. Today’s guidance clearly defines such violations and makes clear how employers should accommodate pregnant employees, providing examples and policies to help employers comply with law.<sup>269</sup>

### *C. Discrimination Under Federal Law*

#### *1. Supreme Court Decisions*

##### *A. Timeliness in Constructive Discharge Cases*

In *Green v. Brennan*, the Supreme Court resolved a split among the circuits concerning the accrual of a constructive discharge claim under Title VII of the Civil Rights Act of 1964 (“Title VII”).<sup>270</sup> An African American postal employee was issued an ultimatum to resign or accept a lower paying position in a remote location.<sup>271</sup> The ultimatum was allegedly made after the employee had complained internally about discrimination.<sup>272</sup> The employee resigned and filed a report with the EEOC, which under the statute is required to be filed no later than forty-five days after the occurrence of the alleged violation.<sup>273</sup> The report was filed more than forty-five days after the employee’s receipt of the ultimatum, but only forty-one days after his resignation.<sup>274</sup>

Both the district court and the circuit court held that the report was untimely because the limitations period began to run when the alleged discriminatory ultimatum was issued.<sup>275</sup> The Supreme Court aligned itself with circuit courts holding that the limitations period in a constructive discharge case begins to run at the time of the employee’s resignation.<sup>276</sup> The Court noted that there were two components to a claim

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269. *Id.*

270. *See generally* *Green v. Brennan*, 136 S. Ct. 1769 (2016) (discussing the split among circuit court holdings of when the statute of limitations period begins in a constructive-discharge claim).

271. *Id.* at 1774.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Green*, 136 S. Ct. at 1775.

276. *Id.* at 1776.

for constructive discharge: (1) that the employee has been placed in such an intolerable position that a reasonable person would resign and (2) that the employee has actually resigned.<sup>277</sup> The Court reasoned that an actual resignation, an essential element of a constructive discharge claim, must occur before the limitations period can begin to run.<sup>278</sup>

### *B. Attorney's Fees Awards*

In *CRST Van Expedited v. Equal Employment Opportunity Commission*, the Supreme Court addressed the circumstances under which attorney's fees may be awarded to employers as the "prevailing party" in Title VII cases.<sup>279</sup> The EEOC filed a Title VII complaint alleging that the employer-defendant engaged in unlawful sex discrimination.<sup>280</sup> The district court subsequently granted the defendant's motion to dismiss the complaint based on a number of legal deficiencies, about which the district court wrote that the EEOC had "wholly abandoned its statutory duties."<sup>281</sup>

The issue on appeal was whether the defendant-employer was entitled to attorney's fees based on Title VII's "fee-shifting" provision authorizing the award of such fees to a "prevailing party."<sup>282</sup> The circuit court held that the term "prevailing party" only applied to decisions resolving the actual merits of a claim, as distinguished from cases disposed of without consideration of the merits.<sup>283</sup> The Supreme Court reversed this decision and held that the definition of "prevailing party" should be more broadly construed to include cases disposed of short of an actual determination on the merits.<sup>284</sup> Such a construction, the Court explained, was consistent with cases construing other federal statutes with similar fee-shifting provisions.<sup>285</sup> The Court also observed an expanded definition of "prevailing party" would be consistent with the goal of the fee-shifting provision of reducing frivolous lawsuits, many of which must be litigated before they are resolved without a decision on the

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277. *Id.* at 1777 (citing *Pa. State Police v. Suders*, 542 U.S. 129, 148 (2004)).

278. *Id.*

279. *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1646 (2016) (quoting 42 U.S.C. § 2000e-5(k) (2012)).

280. *Id.* at 1647.

281. *Id.* at 1649 (quoting *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2009 U.S. Dist. LEXIS 71396, at \*51 (N.D. Iowa Aug. 13, 2009)).

282. *Id.* at 1647.

283. *Id.* at 1646 (quoting *EEOC v. CRST Van Expedited, Inc.*, 774 F.3d 1169, 1179 (8th Cir. 2014)) (citing *Marquart v. Lodge 837, Machinists & Aerospace Workers*, 26 F.3d 842, 851–52 (1994)).

284. *See CRST Van Expedited, Inc.*, 136 S. Ct. at 1652.

285. *Id.* at 1646.

merits.<sup>286</sup>

## 2. *Second Circuit Decisions*

### A. *Legitimate Reasons for Challenged Conduct*

In *Ya-Chen Chen v. City University of New York*, the Second Circuit affirmed the district court's award of summary judgment in favor of the defendant-employer and several individual defendants, dismissing an action under Title VII and the Equal Protection clause for retaliation and discrimination based on race, gender, and national origin.<sup>287</sup> The plaintiff-appellant was a female professor of Taiwanese descent who brought her lawsuit after she was not reappointed to her current post.<sup>288</sup>

The Second Circuit held that the University satisfied its burden of establishing a legitimate and nondiscriminatory rationale for its decision to not reappoint the plaintiff.<sup>289</sup> The Second Circuit found that there were no genuine issues of material fact precluding an award of summary judgment in favor of the employer.<sup>290</sup> The record included evidence of complaints about the plaintiff's "overaggressiveness and lack of tact," and problems stemming from the plaintiff's interactions with at least one student, whom she claimed was harassing her.<sup>291</sup> The court concluded,

Given the absence of evidence giving rise to an inference of discrimination, we agree with the district court's decision that no reasonable jury could conclude that CUNY and the Individual Defendants were motivated, in whole or in part, by a desire to discriminate on the basis of Chen's race, national origin, or gender.<sup>292</sup>

### B. *Sufficiency of Pleadings*

In *Littlejohn v. City of New York*, the Second Circuit clarified the standard for assessing the adequacy of pleadings asserting claims for unlawful discrimination and hostile work environment under Title VII and 42 U.S.C. § 1983.<sup>293</sup> The plaintiff-appellant was an African American female employee of the defendant city, who sued her employer under Title VII and 42 U.S.C. §§ 1981 and 1983, alleging disparate treatment, sexual harassment, retaliation, and the creation of a gender-based hostile

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286. *Id.* at 1652.

287. 805 F.3d 59, 63 (2d Cir. 2015).

288. *Id.* at 63, 69.

289. *Id.* at 77 n.14.

290. *Id.* at 75 n.12.

291. *Id.* at 77.

292. *Ya Chen-Chen*, 805 F.3d at 75.

293. 795 F.3d 297, 302 (2d Cir. 2015).



working environment.<sup>294</sup> The Second Circuit first considered the plaintiff's claim of disparate treatment in connection with her demotion, and reversed the district court's dismissal of that claim.<sup>295</sup> The Second Circuit held that absent "direct" evidence of discrimination, a plaintiff can avoid dismissal by alleging "plausible" facts that present "more than a sheer possibility that a defendant has acted unlawfully."<sup>296</sup> The court was guided by the Supreme Court's decision in *Ashcroft v. Iqbal*, which highlighted the distinction between inadequate pleadings based on the remote possibility of a meritorious claim, and adequate pleadings based on plausible allegations of a meritorious claim:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"<sup>297</sup>

The court next considered the pleading requirements for claims against individual defendants, and affirmed the district court's dismissal of the plaintiff's claims against two of her coworkers, neither of whom fell within the definition of "employer" under Title VII.<sup>298</sup> The court also affirmed the dismissal of the 42 U.S.C. §§ 1981 and 1983 claims against one individual defendant, but found error in and reversed the district court's dismissal of claims asserted against a second individual defendant.<sup>299</sup> The court explained that individual defendants can be held liable for deprivation of constitutional rights claims when they are "personally involved in the alleged deprivation."<sup>300</sup> The facts alleged in the complaint were only sufficient to permit the plaintiff to pursue her 42 U.S.C. §§ 1981 and 1983 claims against the one individual defendant who

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294. *Id.* at 302–03.

295. *Id.* at 303.

296. *Id.* at 310–11 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

297. *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57, 570 (2006)).

298. *Littlejohn*, 795 F.3d at 313 (quoting *Rasparido v. Carlone*, 770 F.3d 97, 113 (2d Cir. 2014)).

299. *Id.* at 315.

300. *Id.* at 314 (quoting *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 127 (2d Cir. 2004)) (citing *Patterson v. County of Oneida*, 375 F.3d 206, 229 (2d Cir. 2004)).

directly participated in the decision to demote the plaintiff.<sup>301</sup>

Finally, the court affirmed the district court's dismissal of the plaintiff's claim for hostile work environment, because the complaint did not include the necessary allegations of "severe or pervasive" conduct.<sup>302</sup> The court also affirmed the district court's dismissal of the plaintiff's sexual harassment claim, because it was not "reasonably related" to the claims of race and color discrimination contained in the charge that the plaintiff had originally filed with the EEOC.<sup>303</sup>

The Second Circuit also considered the adequacy of a discrimination-based pleading case in *Legg v. Ulster County*.<sup>304</sup> The plaintiff, a county corrections officer, filed a complaint under Title VII alleging pregnancy discrimination.<sup>305</sup> She alleged that the defendant-employer discriminated against her by refusing her light duty accommodation request.<sup>306</sup>

The Second Circuit reversed the district court and held that the plaintiff was able to rely on a facially neutral policy to make out a prima facie case of discrimination.<sup>307</sup> Notably, during the pendency of the appeal, the Supreme Court issued its decision in *Young v. United Parcel Service, Inc.*<sup>308</sup> The Court in *Legg* explained *Young* held a facially neutral accommodation policy "gives rise to an inference of pregnancy discrimination if it imposes a significant burden on pregnant employees that is not justified by the employer's nondiscriminatory explanations."<sup>309</sup> Applying this standard, the court found that the plaintiff "presented sufficient evidence to support a pregnancy discrimination claim."<sup>310</sup> While disagreeing with the plaintiff's contention that the policy was not

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301. *Id.* at 315.

302. *Id.* at 320–21 (first citing *Fleming v. MaxMara USA, Inc.*, 371 F. App'x 115, 119 (2010); and then citing *Davis-Molina v. Port Auth. of N.Y. & N.J.*, No. 08 CV 7584 (GBD), 2011 U.S. Dist. LEXIS 93868, at \*43 (S.D.N.Y. Aug. 19, 2011)).

303. *Littlejohn*, 795 F.3d at 321–24 (citing *Williams v. N.Y.C. Hous. Auth.*, 485 F.3d 67, 70 (2d Cir. 2006)). The Second Circuit also held that the allegations in the complaint, relating to the plaintiff's internal complaints of discrimination, could plausibly establish her retaliation claim. *Id.* at 315. In particular, the court noted that allegations that she made internal complaints of discrimination to at least two individuals, one of whom participated in the demotion decision, could be used to demonstrate that she had engaged in "protected activities," which is an essential element of the claim of retaliation. *Id.* (citing *Hicks v. Baines*, 593 F.3d 159, 164 (2d Cir. 2010)).

304. 820 F.3d 67, 70 (2d Cir. 2016).

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* (citing *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015)).

309. *Legg*, 820 F.3d at 70 (citing *Young*, 135 S. Ct. at 1338).

310. *Id.*

facially neutral, the court still found that the plaintiff established a prima facie case of pregnancy discrimination by, inter alia, alleging that the County permitted other employees to work light duty when they sustained work-related injuries.<sup>311</sup>

### *C. Evidentiary Issues*

In *Village of Freeport v. Barrella*, the Second Circuit considered an appeal from a jury verdict finding that the mayor of the defendant-village failed to promote a white police officer to the position of police chief on account of his race.<sup>312</sup> The plaintiff was a white male of Hispanic descent, and the threshold issue on appeal was whether a white, Hispanic plaintiff could assert a claim against a non-Hispanic, white employer for race discrimination under Title VII and 42 U.S.C. § 1981.<sup>313</sup> The court held that to permit such claims under Title VII would promote uniformity with 42 U.S.C. § 1981, under which such claims were cognizable.<sup>314</sup> As a caveat, the court observed that it would be up to a jury to determine whether a white Hispanic was able to establish a national origin and/or race claim.<sup>315</sup>

The Second Circuit also considered the defendant-employer's contention that the district court abused its discretion and committed prejudicial error when it permitted lay opinion testimony on the issue of whether the mayor was motivated by discrimination.<sup>316</sup> The court held that such testimony failed to meet the standards under Rule 701 of the Federal Rules of Evidence for permissible lay opinion testimony.<sup>317</sup> The testimony relating to the motivation of the mayor was found to be the type of naked speculation that is not permitted under that rule.<sup>318</sup>

### *D. Election of Remedies*

In *Cortes v. MTA New York City Transit*, the Second Circuit held that a plaintiff was not precluded by SDHR's dismissal of his administrative complaint from commencing an action under the

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311. *Id.* at 74.

312. 814 F.3d 594, 600 (2d Cir. 2014).

313. *Id.* at 598.

314. *Id.* at 604–07.

315. *Id.* at 607; *see, e.g., Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 87 (2d Cir. 2015) (confirming the legitimacy of claims under Title VII based on the plaintiff's Hispanic ethnicity).

316. *Barrella*, 814 F.3d at 611.

317. *Id.* (citing *Hester v. BIC Corp.*, 225 F.3d 178, 180 (2d Cir. 2000)).

318. *Id.* at 610–12. The court also held that the city was liable for the acts of its mayor under the doctrine of respondeat superior. *Id.* at 616.

Americans with Disabilities Act (ADA).<sup>319</sup> In making this determination, the court noted that an agency decision cannot be preclusive unless and until the decision has been upheld on review by a court.<sup>320</sup>

### *E. EEOC Investigations.*

In *EEOC v. Sterling Jewelers Inc.*, the Second Circuit addressed an appeal based on the alleged failure of the EEOC to conduct a proper investigation.<sup>321</sup> The EEOC commenced a nationwide action alleging that the employer-defendant had engaged in a pattern and practice of gender discrimination, by underpaying and denying promotional opportunities to female employees.<sup>322</sup> The EEOC appealed from the district court's award of summary judgment in favor of the defendant-employer based on the alleged failure of the EEOC to conduct a proper investigation before it filed the complaint.<sup>323</sup> The Second Circuit observed that although courts can examine whether an investigation had been conducted, they are without jurisdiction to review the adequacy of an EEOC investigation.<sup>324</sup> Here, the court declined to review the defendant-employer's "laundry list" of objections to the investigation conducted by the EEOC, noting, "For a court to second guess the choices made by the EEOC in conducting an investigation 'is not to enforce the law Congress wrote, but to impose extra procedural requirements. Such judicial review extends too far.'"<sup>325</sup>

## *3. Additional Federal Developments*

### *A. Employer Wellness Programs*

On May 17, 2016, the EEOC published two final regulations and an interpretive guidance memorandum addressing the relationship between employer incentives to promote employee wellness programs and an employer's obligations under the ADA.<sup>326</sup> The regulations address the ADA's general prohibition against requests for disability-related information from employees, and requests that employees submit to a physical exam, but also point out that the statute includes an exception

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319. 802 F.3d 226, 233 (2d Cir. 2015).

320. *Id.* at 231 (citing *Nestor v. Pratt & Whitney*, 466 F.3d 65, 73 (2d Cir. 2006)). The court also found that the complaint failed to establish a prima facie case of retaliation. *Id.* at 230.

321. 801 F.3d 96, 98 (2d Cir. 2015).

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* at 103 (quoting *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1654–55 (2015)).

326. 29 C.F.R. § 1630.1(a) (2016).

when such requests are made in connection with employer wellness programs.<sup>327</sup>

The EEOC also published a final rule on employer wellness programs and the Genetic Information Nondiscrimination Act.<sup>328</sup> The rule permits the limited use of financial incentives to obtain genetic information that would ordinarily be protected from disclosure by the statute.<sup>329</sup>

#### IV. PUBLIC SECTOR DEVELOPMENTS

##### *A. New York Public Employment Relations Board*

###### *1. Collective Bargaining Under Taylor Law*

In *Kent v. Lefkowitz*, the Court of Appeals reversed the Third Department's decision and upheld the Public Employment Relations Board's (PERB) determination that the appellant-employer, a racing board, satisfied its duty to negotiate in good faith over seasonal employee compensation.<sup>330</sup> The Court's decision highlights the limited scope of judicial review of PERB determinations falling within its areas of expertise, including the meaning of good faith bargaining under the Taylor Law.<sup>331</sup>

The union-appellant appealed from the dismissal of its Article 78 petition to review PERB's dismissal of its improper practice charge against the appellant.<sup>332</sup> The Union alleged that the employer failed to bargain in good faith over its recent unilateral reduction in pay for seasonal employees.<sup>333</sup> PERB determined that the parties "implicitly" agreed to the terms of a lengthy side agreement to permit the disputed unilateral reduction, and that the employer's negotiation of the side agreement satisfied its good faith bargaining obligation.<sup>334</sup>

Good faith bargaining under the Taylor Law "occurs when a specific

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327. 29 C.F.R. §§ 1630.13(a)–(b), 1630.14(3)(iv) (2016).

328. 29 C.F.R. § 1635.1 (2016).

329. 29 C.F.R. § 1635.8(2)(i)(D)(ii) (2016).

330. 27 N.Y.3d 499, 506–07, 54 N.E.3d 1149, 1153–54, 35 N.Y.S.3d 278, 282–83 (2016).

331. *Kent*, 27 N.Y.3d at 505, 54 N.E.3d at 1152, 35 N.Y.S.3d at 281 (first quoting N.Y. C.P.L.R. 7803(3) (McKinney 2008); and then quoting *Town of Islip v. N.Y. State Pub. Emp't Relations Bd.*, 23 N.Y.3d 482, 492, 15 N.E.3d 338, 344, 991 N.Y.S.2d 583, 589 (2014)); *see generally* 19 N.Y. JUR. 2D CIVIL SERVANTS § 432 (2011) (explaining that the Public Employees' Fair Employment Act in Civil Service Law is commonly referred to as the Taylor Law).

332. *Id.* at 504, 54 N.E.3d at 1152, 35 N.Y.S.3d at 281.

333. *Id.* at 504, 54 N.E.3d at 1153, 35 N.Y.S.3d at 282.

334. *Id.* at 506–07, 54 N.E.3d at 1154, 35 N.Y.S.3d at 283.

subject has been negotiated to fruition and may be established by contractual terms that either expressly or implicitly demonstrate that the parties had reached accord on that specific subject.”<sup>335</sup> The Court of Appeals, in a split decision, reversed the appellate division and upheld PERB’s determination that the parties’ side agreement “implicitly” reflected agreement over seasonal employee compensation.<sup>336</sup> It emphasized the limited scope of its authority to review a PERB improper practice determination, and stated that it could not overturn PERB’s determination unless it “was affected by an error of law or was arbitrary and capricious or an abuse of discretion.”<sup>337</sup>

The Court majority held that it was not arbitrary and capricious for PERB to determine that the side agreement reflected the implicit agreement of the parties to permit the unilateral action of the employer.<sup>338</sup> It noted that the agreement incorporated substantial portions of the parties’ agreement, some of which specifically addressed the employer’s unilateral authority over compensation issues.<sup>339</sup>

The dissent contended that PERB’s finding of an implicit agreement was not entitled to ordinary deference.<sup>340</sup> The dissent noted the sophistication of the bargaining parties involved in the appeal and criticized the weight given by the majority to the size of the side agreement:

Said another way, in assessing the side letter we should not confuse quantity with specificity so as to conclude that the absent item is present. Under these circumstances, I cannot agree that an item absent from an agreement containing a comprehensive explanation of negotiated items prepared by sophisticated parties somehow is encompassed by that compact.<sup>341</sup>

*In City of Schenectady v. New York State Public Employment Relations Board*, the Third Department held that article 9 of Second Class

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335. *Kent*, 27 N.Y.3d at 505, 54 N.E.3d at 1152, 35 N.Y.S.3d at 281 (quoting Sheriff’s Corr. Officers Benevolent Ass’n, 48 P.E.R.B. ¶ 3014 (2015)).

336. *Id.* at 506–07, 54 N.E.3d at 1154, 35 N.Y.S.3d at 283.

337. *Id.* at 505, 54 N.E.3d at 1152, 35 N.Y.S.3d at 281 (first quoting N.Y. C.P.L.R. 7803(3) (McKinney 2008); and then quoting *Town of Islip v. N.Y. State Pub. Emp’t Relations Bd.*, 23 N.Y.3d 482, 492, 15 N.E.3d 338, 344, 991 N.Y.S.2d 583, 589 (2014)).

338. *Id.* at 506, 54 N.E.3d at 1153, 35 N.Y.S.3d at 282.

339. *Id.*

340. *Kent*, 27 N.Y.3d at 508, 54 N.E.3d at 1155, 35 N.Y.S.3d at 284 (Fahey, J., dissenting) (citing *Town of Southampton v. N.Y. State Pub. Emp’t Relations Bd.*, 2 N.Y.3d 513, 520, 813 N.E.2d 602, 607, 780 N.Y.S.2d 522, 527 (2004)).

341. *Id.* The majority, addressing the dissent, asserted that its decision was not just based on the size of the agreement, “but by specific items expressly” addressing limitations on the appellant’s discretion. *Id.* at 506, 54 N.E.3d at 1154, 35 N.Y.S.3d at 283 (majority opinion).

Cities Law (SCCL), vesting a city's public safety commissioner with exclusive authority over police disciplinary matters, was superseded by the subsequent enactment of the Taylor Law, under which police disciplinary procedures are a mandatory subject of bargaining.<sup>342</sup>

The city appealed from the dismissal of its Article 78 petition to review PERB's determination in an improper practice proceeding.<sup>343</sup> The Third Department noted that in this case PERB had no special competence over the construction of the two statutes and was not entitled to the deference that it ordinarily received in appeals of its determinations.<sup>344</sup> In endorsing PERB's construction of the statutes, the Third Department referred to language in the SCCL identifying changes in the law as one of several ways in which provisions of the SCCL would be superseded.<sup>345</sup> The court explained,

As PERB aptly noted in its decision, the foregoing language reveals a “statutorily planned obsolescence for [the SCCL] resulting from subsequent enactment of state or local legislation.” Put differently, the clear and unambiguous language of Second Class Cities Law § 4 provides the best evidence that the Legislature intended to allow any or all of the provisions of the Second Class Cities Law to be supplanted by later laws applicable to the same subject matter.<sup>346</sup>

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342. 136 A.D.3d 1086, 1088, 24 N.Y.S.3d 784, 786 (3d Dep't 2016) (first citing N.Y. SECOND CLASS CITIES LAW § 130 (McKinney 1994); and then citing N.Y. SECOND CLASS CITIES LAW § 4 (McKinney 1994)). The court cites to a series of cases establishing that disciplinary procedures are mandatory subjects over which the parties must negotiate in good faith. *Id.* at 1088, 24 N.Y.S.3d at 785 (first citing *Binghamton Civil Serv. Forum v. Binghamton*, 44 N.Y.2d 23, 28, 374 N.E.2d 380, 382, 403 N.Y.S.2d 482, 484 (1978); then citing *City of Mt. Vernon v. Cuevas*, 289 A.D.2d 674, 674–75, 733 N.Y.S.2d 793, 795 (3d Dep't 2001); then citing N.Y. CIV. SERV. LAW § 204(1) (McKinney 2011); then citing *City of New York v. Patrolmen's Benevolent Ass'n*, 14 N.Y.3d 46, 57–58, 924 N.E.2d 336, 342–43, 897 N.Y.S.2d 382, 388–89 (2009); then citing *Cohoes City Sch. Dist. v. Cohoes Teachers Ass'n*, 40 N.Y.2d 774, 778, 358 N.E.2d 878, 880, 390 N.Y.S.2d 53, 55 (1976); and then citing *City of Watertown v. N.Y. State Pub. Emp't Relations Bd.*, 95 N.Y.2d 73, 79, 733 N.E.2d 171, 174, 711 N.Y.S.2d 99, 102 (2000)).

343. *Id.* at 1087, 24 N.Y.S.3d at 785.

344. *Id.* (first citing *N.Y.C. Transit Auth. v. N.Y. State Pub. Emp't Relations Bd.*, 8 N.Y.3d 226, 231, 864 N.E.2d 56, 57, 832 N.Y.S.2d 132, 133 (2007); and then citing *Rosen v. N.Y. State Pub. Emp't Relations Bd.*, 72 N.Y.2d 42, 47–48, 526 N.E.2d 25, 28, 530 N.Y.S.2d 534, 537 (1988)).

345. *Id.* at 1089, 24 N.Y.S.3d at 786 (first citing SECOND CLASS CITIES § 4; then citing *Town of Wallkill v. Civil Serv. Emps. Ass'n, Local 1000*, 19 N.Y.3d 1066, 1069, 979 N.E.2d 1147, 1149, 955 N.Y.S.2d 821, 823 (2012); and then citing *Patrolmen's Benevolent Ass'n v. N.Y. State Pub. Emp't Relations Bd.*, 6 N.Y.3d 563, 573–74, 848 N.E.2d 448, 452, 815 N.Y.S.2d 1, 5 (2006)).

346. *City of Schenectady*, 136 A.D.3d at 1088, 24 N.Y.S.3d at 786 (first citing *Schenectady Police Benevolent Ass'n*, 46 P.E.R.B. ¶ 3025 (2013); then citing *Liberius v. N.Y.C. Health & Hosps. Corp.*, 129 A.D.3d 1170, 1171, 11 N.Y.S.3d 305, 307 (3d Dep't

## 2. PERB's Jurisdiction over Contractual Disputes

In *Evans v. Deposit Central School District*, the Third Department reversed the lower court's dismissal of a state court action and held that PERB did not have exclusive jurisdiction over a contractual dispute regarding health insurance issues.<sup>347</sup> A group of school retirees commenced a state court action to challenge changes made to their health insurance benefits.<sup>348</sup> The court held that the dispute was contractual and, accordingly, it was not encompassed by PERB's exclusive jurisdiction.<sup>349</sup> The court noted that the complaint referred to at least two collective bargaining agreements and concluded that the "plaintiffs rais[ed], in essence, a contractual dispute as to whether they [were] entitled" to the benefits under the terms of an expired CBA.<sup>350</sup>

## 3. Taylor Law Retaliation

In *Hudson Valley Community College v. New York State Public Employment Relations Board*, the Third Department upheld PERB's determination that the appellant, a community college, unlawfully retaliated against non-instructional employees in response to the advocacy by their union representative in an overtime pay dispute.<sup>351</sup> The union representative filed an improper practice charge alleging that the college eliminated "second job" opportunities for bargaining unit employees was retaliatory.<sup>352</sup> The college appealed from the lower court's dismissal of its Article 78 petition to review PERB's determination, and to review PERB's remedial order requiring the college to reinstate employees to their "second jobs" with back pay for time lost on account of the retaliation.<sup>353</sup>

The Third Department found that PERB's retaliation determination was supported by substantial evidence.<sup>354</sup> It also found that the appellant-college failed to demonstrate that the elimination of the second jobs was

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2015); and then citing *Retired Pub. Emps. Ass'n, Inc. v. Cuomo*, 123 A.D.3d 92, 94–95, 995 N.Y.S.2d 757, 760 (3d Dep't 2014)).

347. 139 A.D.3d 1172, 1173, 31 N.Y.S.3d 274, 276 (3d Dep't 2016).

348. *Id.* at 1172–73, 31 N.Y.S.3d at 275–76.

349. *Id.* at 1173–74, 31 N.Y.S.3d at 276.

350. *Id.* at 1173, 31 N.Y.S.3d at 276.

351. 132 A.D.3d 1132, 1133, 1136, 18 N.Y.S.3d 734, 736, 739 (3d Dep't 2015).

352. *Id.* at 1133, 18 N.Y.S.3d at 736 (citing N.Y. CIV. SERV. LAW § 209-a(1)(a), (c) (McKinney 2011)).

353. *Id.* (citing N.Y. C.P.L.R. 7804(g) (McKinney 2008)).

354. *Id.* at 1134–35, 18 N.Y.S.3d at 737 (first citing *Civil Serv. Emps. Ass'n, Local 1000 v. N.Y. State Pub. Emp't Relations Bd.*, 276 A.D.2d 967, 969, 714 N.Y.S.2d 614, 616 (3d Dep't 2000); and then citing *Bd. of Educ. v. N.Y. State Pub. Emp't Relations Bd.*, 167 A.D.2d 398, 399, 561 N.Y.S.2d 810, 810 (2d Dep't 1990)).



motivated by non-retaliatory economic considerations.<sup>355</sup> The court also held that the reinstatement with back pay order was “lawful and within PERB’s broad remedial powers.”<sup>356</sup>

#### 4. *Stipulated Settlements*

In *State v. New York State Public Employment Relations Board*, the Third Department held that PERB did not act arbitrarily and capriciously when it declined the request of the appellant State to vacate a stipulated settlement and an interim remedial order based on the terms of the stipulated settlement.<sup>357</sup> The stipulated settlement was reached during the pendency of a PERB representation proceeding concerning a petition filed by the respondent Union, in which it sought to represent approximately two thousand additional employees in its existing professional, scientific, and technical unit.<sup>358</sup> PERB was subsequently advised that the parties had agreed to the terms of a stipulated settlement and that the State had agreed in the settlement to include 250 positions in the bargaining unit.<sup>359</sup> The settlement agreement provided that none of the 250 positions involved confidential or managerial duties that would prevent a worker in that position from being included in the existing unit.<sup>360</sup>

The State appealed from the state supreme court’s dismissal of its Article 78 petition seeking review of PERB’s refusal to vacate the stipulated settlement, and an interim order issued by PERB’s director pursuant to the settlement’s terms.<sup>361</sup> The Third Department, in affirming the dismissal of the State’s petition, noted the limited scope of its

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355. *Id.* at 1135, 18 N.Y.S.3d at 738 (first citing *Village of Scotia v. N.Y. State Pub. Emp’t Relations Bd.*, 241 A.D.2d 29, 32, 670 N.Y.S.2d 602, 604 (3d Dep’t 1998); and then citing *Bd. of Educ.*, 167 A.D.2d at 400, 561 N.Y.S.2d at 811).

356. *Hudson Valley Cmty. Coll.*, 132 A.D.3d at 1135–36, 18 N.Y.S.3d at 738 (citing *City of Poughkeepsie v. Newman*, 95 A.D.2d 101, 105, 466 N.Y.S.2d 752, 755 (3d Dep’t 1983)). The court did not consider the implications of the appellant’s contention that some of the “second jobs” no longer existed because that issue was not raised before PERB, and was thus not an issue before the court. It did, however, remit the proceeding to PERB to resolve disputes over specific job vacancies and back pay amounts. *Id.* at 1136, 18 N.Y.S.3d at 738 (first citing *Lippman v. N.Y. State Pub. Emp’t Relations Bd.*, 296 A.D.2d 199, 203, 746 N.Y.S.2d 77, 80 (3d Dep’t 2002); then citing *Town of Islip v. N.Y. State Pub. Emp’t Relations Bd.*, 23 N.Y.3d 482, 494, 15 N.E.3d 338, 345, 991 N.Y.S.2d 583, 590 (2014); then citing *Manhasset Union Free Sch. Dist. v. N.Y. State Pub. Emp’t Relations Bd.*, 61 A.D.3d 1231, 1235, 877 N.Y.S.2d 497, 501 (3d Dep’t 2009); and then citing *Village of Scotia*, 241 A.D.2d at 33, 670 N.Y.S.2d at 605).

357. 137 A.D.3d 1467, 1469, 28 N.Y.S.3d 462, 465 (3d Dep’t 2016).

358. *Id.* at 1467, 28 N.Y.S.3d at 464.

359. *Id.*

360. *Id.* at 1467–68, 28 N.Y.S.3d at 464.

361. *Id.* at 1467, 28 N.Y.S.3d at 464.

reviewing authority and emphasized the State's well settled policy in favor of voluntary settlements.<sup>362</sup> The court also rejected the State's contention that PERB failed to inquire into whether any of the 250 positions included were confidential or managerial positions.<sup>363</sup> The court referred to the State's representation in the stipulated settlement that none of the 250 positions were managerial or confidential, and the court held that the parties' agreement on this point relieved PERB of any obligation to conduct further inquiry.<sup>364</sup>

Finally, the court rejected the State's contention that it was arbitrary and capricious for PERB to refuse its request to vacate the stipulated settlement and interim order.<sup>365</sup> The court found no evidence to support the State's claim that the stipulated settlement had been "improvidently" entered into.<sup>366</sup> Nor did it find evidence that the State's agreement to the terms of the stipulated settlement was fraudulent, collusive, a mistake or accident, or against public policy.<sup>367</sup> The court also rejected the significance of the State's assertion on appeal that it had "reason to believe" that some of the 250 positions involved in the stipulated settlement were confidential or managerial positions.<sup>368</sup> It noted that the State failed to take the opportunity to address this issue in the two and a half years that elapsed between the filing of the original representation petition and its execution of the settlement.<sup>369</sup>

## *B. Collective Bargaining Agreements*

### *1. Arbitrability*

Disputes over arbitrability under a collective bargaining agreement require contractual interpretations that a court must resolve.<sup>370</sup> Although

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362. *N.Y. State Pub. Emp't Relations Bd.*, 137 A.D.3d at 1468–69, 28 N.Y.S.3d at 464–65 (first citing Cold Spring Harbor Teachers Ass'n v. N.Y. State Pub. Emp't Relations Bd., 12 A.D.3d 442, 443, 783 N.Y.S.2d 835, 836 (2d Dep't 2004); and then citing Suffolk Cty. Legislature v. Cuevas, 303 A.D.2d 415, 415, 755 N.Y.S.2d 859, 859 (2d Dep't 2003)).

363. *Id.* at 1469, 28 N.Y.S.3d at 465.

364. *Id.* (citing 4 N.Y.C.R.R. § 201.9(a)(1), (g) (2016)).

365. *Id.*

366. *Id.*

367. *N.Y. State Pub. Emp't Relations Bd.*, 137 A.D.3d at 1469, 28 N.Y.S.3d at 465 (first citing *Hallock v. State*, 64 N.Y.2d 224, 230, 474 N.E.2d 1178, 1180, 485 N.Y.S.2d 510, 512 (1984); then citing *In re McLaughlin*, 97 A.D.3d 1051, 1052, 949 N.Y.S.2d 264, 265 (3d Dep't 2012); then citing *McCoy v. Feinman*, 99 N.Y.2d 295, 302, 785 N.E.2d 714, 719, 755 N.Y.S.2d 693, 698 (2002); and then citing *Willie L.C. v. Ada S.*, 65 A.D.3d 683, 685, 884 N.Y.S.2d 468, 469 (2d Dep't 2009)).

368. *Id.* at 1470, 28 N.Y.S.3d at 466.

369. *Id.*

370. *See generally* *County of Chautaugua v. Civil Serv. Emps. Ass'n, Local 1000*, 8

there is a strong public policy that favors the voluntary resolution of disputes through arbitration, that policy standing alone is not dispositive in determining whether a particular dispute must be arbitrated.<sup>371</sup>

The courts apply a two part test to determine whether a dispute is arbitrable.<sup>372</sup> The courts first look to whether arbitration of the grievance is precluded under statutory or constitutional law, or because arbitration of the dispute would otherwise conflict with public policy.<sup>373</sup> The courts then look to whether the parties to the collective bargaining agreement agreed to submit the disputed issue to arbitration.<sup>374</sup>

In *Board of Education v. Catskill Teachers Ass'n*, the Third Department affirmed the denial of the appellant School District's petition to stay an arbitration demanded by a teacher's union.<sup>375</sup> The Union demanded arbitration over the School District's retention of a pre-kindergarten teacher without complying with applicable vacancy provisions under the collective bargaining agreement.<sup>376</sup> The School District contended that the disputed retention was made pursuant to a grant application under Education Law § 3602-3 for funding to establish a district-wide pre-kindergarten program and that arbitration would violate both that law and public policy.<sup>377</sup> The School District filed an Article 78 petition to stay the Union's arbitration demand and appealed from the lower court's denial of that stay request.<sup>378</sup>

The Third Department held that the arbitration demanded by the Union was not prohibited by law or otherwise.<sup>379</sup> The court explained that the strong public policy in favor of arbitration could not be overcome without "plain and clear or inescapably implicit" statutory support.<sup>380</sup> The

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N.Y.3d 513, 869 N.E.2d 1, 838 N.Y.S.2d 1 (2007) (analyzing a dispute over the arbitrability of a collective bargaining agreement by resolving contractual interpretations).

371. *Id.* at 519, 869 N.E.2d at 4, 838 N.Y.S.2d at 4 (first citing *Patrolmen's Benevolent Ass'n v. N.Y. State Pub. Emp't Relations Bd.*, 6 N.Y.3d 563, 575-76, 848 N.E.2d 448, 453, 815 N.Y.S.2d 1, 6 (2006); then citing *N.Y.C. Dep't of Sanitation v. MacDonald*, 87 N.Y.2d 650, 656, 664 N.E.2d 1218, 1220, 642 N.Y.S.2d 156, 158 (1996); and then citing *Union Free Sch. Dist. v. Nyquist*, 38 N.Y.2d 137, 143, 341 N.E.2d 532, 535, 379 N.Y.S.2d 10, 15 (1975)).

372. *Id.*

373. *Id.* (citing *City of Johnstown v. Johnstown Police Benevolent Ass'n*, 99 N.Y.2d 273, 278, 784 N.E.2d 1158, 1161, 755 N.Y.S.2d 49, 52 (2002)).

374. *Id.*

375. 130 A.D.3d 1287, 1290, 14 N.Y.S.3d 553, 557 (3d Dep't 2015).

376. *Id.* at 1288, 14 N.Y.S.3d at 554.

377. *Id.* at 1288, 14 N.Y.S.3d at 555.

378. The Union's cross motion to compel arbitration was granted by the court. *Id.* at 1288, 14 N.Y.S.3d at 554-55.

379. *Id.* at 1289, 14 N.Y.S.3d at 556 (citing *Sprinzen v. Nomberg*, 46 N.Y.2d 623, 631, 389 N.E.2d 456, 460, 415 N.Y.S.2d 974, 978 (1979)).

380. *Bd. of Educ.*, 130 A.D.3d at 1288, 14 N.Y.S.3d at 555 (quoting *Webster Cent. Sch.*

School District claimed Education Law § 3602-e(5)(d) permitted it to bypass the CBA and unilaterally retain teachers when it was using funds earmarked for the establishment of a universal pre-kindergarten program.<sup>381</sup> The Third Department found that a “more natural reading” of the statute would be “that the statute *permits* school districts to enter into such contracts, without in any way necessarily affecting the enforceability of a bargained-for agreement to secure such services through a CBA.”<sup>382</sup>

The Third Department also rejected the School District’s challenge to the arbitration demand based on public policy.<sup>383</sup> In doing so the court noted that the public policy objection, were it valid, still would not require that the arbitration be stayed.<sup>384</sup> The same public policy objections could still be raised in a proceeding to enforce any award ultimately issued by the arbitrator, and this approach would permit the arbitrator to use his or her broad remedial authority in an attempt to reconcile the CBA with any genuine conflicts with public policy.<sup>385</sup>

In *Monroe County v. Monroe County Law Enforcement Ass’n*, the Fourth Department affirmed the denial of a request by a county sheriff’s department to stay an arbitration demand filed by a union of law enforcement officers.<sup>386</sup> The grievance concerned a dispute over compensation for time spent at “roll call briefings.”<sup>387</sup>

The appellant sheriff’s department contended that the Union waived its right to arbitration because of an FLSA law suit filed by a group of employees who were among those employees underlying the Union’s demand.<sup>388</sup> The Union was not a party to or otherwise involved in that lawsuit.<sup>389</sup> The Fourth Department, emphasizing the distinction between the statutory rights of individual employees under the FLSA and union rights under a CBA, held that the lawsuit was entirely independent from and unrelated to the Union’s rights under the contract to arbitrate disputes

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Dist. v. N.Y. State Pub. Emp’t Relations Bd., 75 N.Y.2d 619, 627, 554 N.E.2d 886, 889, 555 N.Y.S.2d 245, 248 (1990)).

381. *Id.* at 1289, 14 N.Y.S.3d at 555 (quoting N.Y. EDUC. LAW § 3602-e(5)(d) (McKinney 2015)).

382. *Id.*

383. *Id.* at 1289–90, 14 N.Y.S.3d at 556.

384. *Id.*

385. *Bd. of Educ.*, 130 A.D.3d at 1290, 14 N.Y.S.3d at 556 (quoting *Enlarged City Sch. Dist. v. Troy Teacher’s Ass’n*, 69 N.Y.2d 905, 906, 508 N.E.2d 930, 931, 516 N.Y.S.2d 195, 196–97 (1987)).

386. 132 A.D.3d 1373, 1373, 18 N.Y.S.3d 245, 246 (4th Dep’t 2015).

387. *Id.*

388. *Id.*

389. *Id.*

arising under the CBA.<sup>390</sup>

The First Department affirmed the lower court's stay of an arbitration in *New York City Transit Authority v. Transport Workers Union Local 100*.<sup>391</sup> The appellant Union demanded arbitration over the transfer rights of its members assigned to positions in Staten Island, which was a separate division and whose employees were represented by a different union and separate CBA.<sup>392</sup> The First Department held that the appellant Union lacked standing to arbitrate the grievance because once an employee was transferred to Staten Island he became an employee in a separate division represented by a separate union.<sup>393</sup> In short, such employees were no longer "covered employees" under the terms of the grievance-arbitration provisions of the parties' agreement.<sup>394</sup> The court also noted that the appellant was essentially seeking to enforce rights contained in the Staten Island collective bargaining agreement, which risked creating inconsistent interpretations of the Staten Island agreement and would violate public policy.<sup>395</sup>

The Second Department affirmed the lower court's stay of an untimely arbitration demand in *City of Long Beach v. Long Beach Professional Firefighters Ass'n*.<sup>396</sup> The petitioner municipality commenced an action under Civil Practice Law and Rules (CPLR) 75 to permanently stay an arbitration that was plainly untimely under the terms of the parties' agreement.<sup>397</sup> The Union had cross moved to compel arbitration, and appealed upon the lower court's issuance of a stay.<sup>398</sup> The appellant Union's principal argument was that the arbitrator should

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390. *Id.* (quoting *Radziewsky v. Macmillan, Inc.*, 170 A.D.2d 400, 400, 566 N.Y.S.2d 285, 286 (1st Dep't 1991)) (first citing *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 745–46 (1981); and then citing *Polanco v. Brookdale Hosp. Med. Ctr.*, 819 F. Supp. 2d 129, 133 (E.D.N.Y. 2011)). The court also held that *res judicata* did not preclude arbitration because the parties were not identical in the two proceedings. *Monroe Cty. Law Enforcement Ass'n*, 132 A.D.3d at 1374, 18 N.Y.S.3d at 246 (first citing *Tuper v. Tuper*, 34 A.D.3d 1280, 1281, 824 N.Y.S.2d 857, 859 (4th Dep't 2006); and then citing *O'Riordan v. Suffolk Chapter, Local No. 852, Civil Serv. Emps. Ass'n*, 89 A.D.2d 558, 558–59, 452 N.Y.S.2d 114, 115 (2d Dep't 1982)).

391. 130 A.D.3d 507, 507, 14 N.Y.S.3d 15, 16 (1st Dep't 2015).

392. *Id.* at 507–08, 14 N.Y.S.3d at 16.

393. *Id.* at 508, 14 N.Y.S.3d at 16–17.

394. *Id.* at 508, 14 N.Y.S.3d at 17.

395. *Id.* (first citing *Civ. Serv. Emps. Ass'n*, 23 P.E.R.B. ¶ 3008 (1990); then citing *Sperry Syss. Mgmt. Div., Sperry Rand Corp. v. NLRB*, 492 F.2d 63, 67 (2d Cir. 1974); and then citing *Welch Sci. Co. v. NLRB*, 340 F.2d 199, 202–03 (2d Cir. 1965)).

396. 136 A.D.3d 813, 813, 26 N.Y.S.3d 109, 109–10 (2d Dep't 2016) (citing *N.Y. C.P.L.R. 7501* (McKinney. 2013)).

397. *Id.* at 814, 26 N.Y.S.3d at 110.

398. *Id.*

determine the procedural issue of timeliness under the collective bargaining agreement.<sup>399</sup> The court held that the arbitration provision in the parties' collective bargaining agreement "[was] so narrowly drawn as to clearly withhold the issue of timeliness from the arbitrator."<sup>400</sup>

### *C. Individual Public Employee Rights*

#### *1. Civil Service Promotions*

In *Crociata v. Cassano*, the petitioner sought reconsideration of the decision of the New York City Fire Department not to promote the petitioner to the position of fire marshal.<sup>401</sup> The lower court ruled in the petitioner's favor and ordered that both his name be placed on "a special eligible list for promotion," and the fire department reconsider the petitioner for promotion.<sup>402</sup> The Second Department observed that judicial reconsideration order was the sole remedy available "to a Civil Service examinee who is determined to have been improperly passed over for an appointment or promotion."<sup>403</sup> However, the court also found that in this case the relief ordered by the lower court was improper because the promotion list and the promotional rights associated with persons on that list had expired as a matter of law.<sup>404</sup>

#### *2. Probationary Employees*

Civil Service Law provides for the short-term classification of new employees as "probationary employees."<sup>405</sup> Probationary employees are entitled to more limited civil service protections than their non-probationary colleagues, and this is illustrated in the Second Department's decision in *Johnson v. County of Orange*.<sup>406</sup> The petitioner was a probationary sheriff's deputy who appealed from the lower court's

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399. *Id.*

400. *Id.* at 814–15, 26 N.Y.S.3d at 111.

401. 140 A.D.3d 751, 751–52, 30 N.Y.S.3d 894, 894 (2d Dep't 2016).

402. *Id.* at 752, 30 N.Y.S.3d at 894.

403. *Id.* at 752, 30 N.Y.S.3d at 895 (first citing *Andriola v. Ortiz*, 82 N.Y.2d 320, 325, 624 N.E.2d 667, 669, 604 N.Y.S.2d 530, 532 (1993); then citing *Imburgia v. Procopio*, 98 A.D.3d 617, 619, 949 N.Y.S.2d 727, 729 (2d Dep't 2012); and then citing *Trager v. Kampe*, 16 A.D.3d 426, 428, 791 N.Y.S.2d 153, 155 (2d Dep't 2005)).

404. *Id.* (citing N.Y. CIV. SERV. LAW § 56(1) (McKinney 2011) (governing the timing and duration of eligibility lists for civil service lists)).

405. *See* N.Y. CIV. SERV. LAW § 63 (McKinney 2011).

406. 138 A.D.3d 850, 850, 29 N.Y.S.3d 502, 502 (2d Dep't 2016) (quoting *Lane v. City of New York*, 92 A.D.3d 786, 786, 938 N.Y.S.2d 597, 598 (2d Dep't 2012)) (first citing *Swinton v. Safir*, 93 N.Y.2d 758, 762–63, 720 N.E.2d 89, 91, 697 N.Y.S.2d 869, 871 (1999); and then citing *Johnson v. Katz*, 68 N.Y.2d 649, 650, 496 N.E.2d 223, \_\_\_, 505 N.Y.S.2d 64, 64 (1986)).

dismissal of her petition to review her termination.<sup>407</sup> In affirming the dismissal, the Second Department noted that the scope of its reviewing authority was confined to whether the termination was “in bad faith, for a constitutionally impermissible or an illegal purpose, or in violation of statutory or decisional law.”<sup>408</sup> It also observed that a civil service probationary employee can be terminated at any time and without a statement of reasons (provided that the termination is otherwise constitutional and consistent with applicable law).<sup>409</sup>

The Second Department held that the petitioner failed to establish bad faith.<sup>410</sup> The petitioner claimed that her First Amendment rights to “intimate association” were violated because she alleged she was terminated as a result of a personal relationship she had.<sup>411</sup> She claimed other employees were permitted to have similar relationships, and that there was no formal policy in place.<sup>412</sup> The court concluded that “claims that the [sheriff’s office] tolerated other relationships as the one in which [the petitioner] was involved and did not have a formal anti-fraternization policy were inadequate to state a cause of action that she was terminated in bad faith.”<sup>413</sup>

### 3. Retaliation Under the SDHR

In *Troge v. State Division of Human Rights*, the petitioner, a local town employee, filed a SDHR complaint alleging that she was terminated after complaining internally about being subjected to an “offensive” work environment.<sup>414</sup> The alleged harassment consisted of a demand by a town official that the petitioner produce notes from her investigation of a workplace dispute between two employees.<sup>415</sup> The petitioner appealed

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407. *Id.* at 850, 29 N.Y.S.3d at 502–03.

408. *Id.* at 851, 29 N.Y.S.3d at 503 (quoting *Lane*, 92 A.D.3d at 786, 938 N.Y.S.2d at 598) (citations omitted).

409. *Id.* at 851, 29 N.Y.S.3d 503–04 (citations omitted).

410. *Id.* at 851, 29 N.Y.S.3d at 503 (first citing *Lane*, 92 A.D.3d at 786, 938 N.Y.S.2d at 599; then citing *Johnson v. N.Y.C. Dep’t of Educ.*, 73 A.D.3d 927, 928, 900 N.Y.S.2d 737, 738 (2d Dep’t 2010); then citing *Ward v. Metro. Transp. Auth.*, 64 A.D.3d 719, 720, 883 N.Y.S.2d 282, 283 (2d Dep’t 2009); and then citing *Walsh v. N.Y. Thruway Auth.*, 24 A.D.3d 755, 757, 808 N.Y.S.2d 710, 712 (2d Dep’t 2005)).

411. *Johnson*, 138 A.D.3d at 851, 29 N.Y.S.3d at 503 (first citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–618 (1984); then citing *Beecham v. Henderson Cty.*, 422 F.3d 372, 375 (6th Cir. 2005); then citing *Marcum v. McWhorter*, 308 F.3d 635, 637 (6th Cir. 2002); then citing *Bates v. Bigger*, 192 F. Supp. 2d 160, 169 (S.D.N.Y. 2002); and then citing *Baron v. Meloni*, 602 F. Supp. 614, 618 (W.D.N.Y. 1985)).

412. *Id.* (citing *Walsh*, 24 A.D.3d at 757, 808 N.Y.S.2d at 712).

413. *Id.*

414. 136 A.D.3d 1047, 1048, 25 N.Y.S.3d 350, 351–52 (2d Dep’t 2016).

415. *Id.* at 1048, 25 N.Y.S.3d at 351.

from the SDHR's determination that she failed to state a prima facie case of retaliation.<sup>416</sup> The court found that the plaintiff's allegations centered on the request for notes she took, and thus could not be used to establish that such "adverse employment action was taken based upon her having engaged in protected activity."<sup>417</sup>

#### 4. *Union's Duty of Fair Representation*

The standard for evaluating an improper practice charge based on a union's alleged breach of the duty of fair representation is whether the union's action was "deliberately invidious, arbitrary, or founded in bad faith."<sup>418</sup> In *DeOliveira v. New York State Public Employment Relations Board*, the Third Department applied this standard to determine that there was substantial evidence to support PERB's dismissal of an improper practice claim that a teacher's union breached the duty of fair representation.<sup>419</sup> The petitioner was one of four teachers laid off due to the elimination of an equal number of elementary education positions.<sup>420</sup> The layoffs were determined based on an elementary tenure list.<sup>421</sup> The petitioner claimed that she should have received seniority credit for time she spent on maternity leave, and that she would not have been laid off had she received credit for this time.<sup>422</sup> She filed an improper practice charge after the Union advised her that her claim was "not viable," and thereafter appealed from the lower court's dismissal of its Article 78 petition for review of PERB's determination.<sup>423</sup>

The Third Department, in affirming the lower court, referred to evidence that the Union met with the petitioner on "multiple occasions," conducted a thorough investigation, and ultimately provided the petitioner with a written explanation for its decision.<sup>424</sup> The court found no evidence of bad faith or intentional misrepresentation by the Union in

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416. *Id.* at 1048–49, 25 N.Y.S.3d at 352.

417. *Id.* at 1049, 25 N.Y.S.3d at 352 (first citing *Bowler v. N.Y. State Div. of Human Rights*, 77 A.D.3d 1380, 1382, 908 N.Y.S.2d 508, 509–10 (4th Dep't 2010); then citing *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 313, 819 N.E.2d 998, 1012, 786 N.Y.S.2d 382, 396 (2004); and then citing *Bendeck v. N.Y. Univ. Hosps. Ctr.*, 77 A.D.3d 552, 553, 909 N.Y.S.2d 439, 441 (1st Dep't 2010)).

418. *DeOliveira v. N.Y. State Pub. Emp't Relations Bd.*, 133 A.D.3d 1010, 1011, 19 N.Y.S.3d 627, 629 (3d Dep't 2015) (quoting *Civil Serv. Emps. Ass'n v. N.Y. State Pub. Emp't Relations Bd.*, 132 A.D.2d 430, 432, 522 N.Y.S.2d 709, 710–11 (3d Dep't 1987)) (citing *Higgins v. La Paglia*, 281 A.D.2d 679, 681, 722 N.Y.S.2d 592, 595 (3d Dep't 2001)).

419. *Id.*

420. *Id.* at 1010, 19 N.Y.S.3d at 628.

421. *Id.*

422. *Id.* at 1010–11, 19 N.Y.S.3d at 629.

423. *DeOliveira*, 133 A.D.3d at 1010–11, 19 N.Y.S.3d at 629.

424. *See id.* at 1012, 19 N.Y.S.3d at 630.



connection with the Union's failure to consult with one of its attorneys, despite telling the petitioner that it would do so.<sup>425</sup>

The court also found no evidence to support the petitioner's contention that the Union made a "clandestine agreement" with the district to transfer two less senior teachers from the elementary tenure list to positions unaffected by the layoff.<sup>426</sup> The court observed that neither of these teachers was certified to teach elementary education, and thus the Union's assent to their transfer from the elementary tenure list was not arbitrary.<sup>427</sup>

Finally, the court emphasized that it would have reached the same decision even if the Union made a mistake in assenting to the transfers, because such a mistake, standing alone, would not constitute a breach of the duty of fair representation.<sup>428</sup>

### 5. Attorney's Fees for Individual Defendants

In *Scimeca v. Brentwood Union Free School District*, the Second Department held that a group of school employees who were individually named in a work-related legal action were not entitled to reimbursement for private counsel legal fees.<sup>429</sup> The petitioners, along with the School District, were named in an SDHR complaint filed by one of their coworkers.<sup>430</sup> They sought reimbursement for attorney's fees and expenses they incurred for private counsel, despite having been offered representation at no cost by the School District's attorneys.<sup>431</sup> The petitioners contended that they required private counsel because they had a conflict of interest with the School District.<sup>432</sup> The petitioners appealed from the lower court's dismissal of their petition for reimbursement.<sup>433</sup>

The petitioners claimed that reimbursement was authorized under Public Officers Law § 18, which provides for reimbursement and indemnification of legal expenses under proper circumstances.<sup>434</sup> The

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425. *Id.*

426. *Id.*

427. *Id.*

428. *DeOliveira*, 133 A.D.3d at 1012, 19 N.Y.S.3d at 630 (first citing *Braatz v. Mathison*, 180 A.D.2d 1007, 1008, 581 N.Y.S.2d 112, 113 (3d Dep't 1992); and then citing *Ahrens v. N.Y. State Pub. Emps. Fed'n*, 203 A.D.2d 796, 798, 610 N.Y.S.2d 680, 682 (3d Dep't 1994)).

429. 140 A.D.3d 1174, 1176, 35 N.Y.S.3d 379, 381 (2d Dep't 2016) (first citing *Galligan v. Schenectady*, 116 A.D.2d 798, 799, 497 N.Y.S.2d 186, 187 (3d Dep't 1986); and then citing *Death v. Salem*, 111 A.D.2d 778, 780, 490 N.Y.S.2d 526, 528 (2d Dep't 1985)).

430. *Id.* at 1174, 35 N.Y.S.3d at 380.

431. *Id.*

432. *Id.*

433. *Id.*

434. *Scimeca*, 140 A.D.3d at 1175, 35 N.Y.S.3d at 380 (first citing N.Y. EDUC. LAW §

respondent School District claimed that the case was solely governed by the procedural requirements in Education Law § 3811, and that it satisfied those procedures in denying the petitioners' request for private counsel.<sup>435</sup> The court held that Education Law § 3811 was not exclusive and had to be reconciled with Public Officers Law § 18, which *inter alia* provides for the retention of private counsel "in the event that either the employer or a court determines that a conflict of interest exists."<sup>436</sup> However, the court also found that in the instant case there was no conflict of interest justifying reimbursement of private counsel fees and expenses.<sup>437</sup> It pointed out that the School District had denied and provided detailed responses to each and every allegation in the complaint, including those specifically relating to one or more of the petitioners.<sup>438</sup> The court also found it significant that the School District did not take the position that the petitioners acted outside the scope of their employment.<sup>439</sup>

## V. WHISTLEBLOWER CLAIMS

### A. New York State

#### 1. Amendments to Public Employee Whistleblower Protection Act

On December 28, 2015, Governor Cuomo signed a bill amending the Public Employee Whistleblower Protection Act (the "Act").<sup>440</sup> The amendment eliminates the requirement that, in order to receive whistleblower protection under the Act, an employee must first report any suspicion of wrongdoing to his or her supervisors.<sup>441</sup> The elimination of this requirement is meant to protect employees with legitimate concerns about the consequences of making an internal report of suspected

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3811(1) (McKinney 2015); and then citing N.Y. PUB. OFF. LAW § 18(3)(a), (4)(a) (McKinney 2008)).

435. *Id.* at 1175, 35 N.Y.S.3d at 381.

436. *Id.*

437. *Id.* at 1176, 35 N.Y.S.3d at 381 (first citing *Galligan v. Schenectady*, 116 A.D.2d 798, 798, 497 N.Y.S.2d 186, 187 (3d Dep't 1986)).

438. *Id.*

439. *Scimeca*, 140 A.D.3d at 1176, 35 N.Y.S.3d at 381.

440. Act of Dec. 28, 2015, 2015 McKinney's Sess. Laws of N.Y., ch. 585, at 1261 (codified at N.Y. CIV. SERV. LAW § 75-b (McKinney Supp. 2017)).

441. Legislative Memorandum of Assemb. Abbate, *reprinted in* 2015 McKinney's Sess. Laws of N.Y., ch. 585, at 1900-01 (repealing certain provisions of Civil Service Law related to early disclosure for certain alleged violations of certain public employees); *see Tipaldo v. Lynn*, 26 N.Y.3d 204, 211, 42 N.E.3d 670, 673, 21 N.Y.S.3d 173,176 (2015) (addressing requirement repealed by the amendment to notify internal supervision).

wrongdoing.<sup>442</sup>

## 2. State Court Decisions

### A. Public Employee Whistleblower Protection Act

In *Tipaldo v. Lynn*, the Court of Appeals held that prejudgment interest could be awarded to a prevailing party under the Public Employee Whistleblower Protection Act.<sup>443</sup> The Court found that awarding prejudgment interest would promote the Act's objective of providing whistleblowers with make-whole relief.<sup>444</sup>

### B. Labor Law § 740

An employee asserting a whistleblower claim under Labor Law § 740 (“Section 740”) is barred from asserting additional claims arising out of the same set of facts and circumstances.<sup>445</sup> In *Seung Won Lee v. Woori Bank*, the First Department held that the inclusion of a Section 740 claim in a complaint was not a bar to the assertion of additional claims for negligence and sexual harassment.<sup>446</sup> Such claims, the court explained, were genuinely independent from the whistleblower's claim:

[The negligence and sexual harassment] claims 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. We further agree with plaintiffs that the mere incorporation by reference of various allegations in the complaint alleging retaliation in the sexual harassment and negligence causes of action does not warrant a contrary conclusion.<sup>447</sup>

In *Kamdem-Ouaffo v. Pepsico, Inc.*, the Second Department affirmed an award of summary judgment dismissing a complaint alleging a whistleblower violation under Section 740.<sup>448</sup> The plaintiff-employee alleged that he was disciplined for reporting on his employer's alleged

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442. Legislative Memorandum of Assemb. Abbate, *supra* note 441, at 1900–01 (repealing certain provisions of Civil Service Law related to early disclosure for certain alleged violations of certain public employees).

443. *Tipaldo*, 26 N.Y.3d at 208, 42 N.E.3d at 671, 21 N.Y.S.3d at 174.

444. *Id.* at 214, 42 N.E.3d at 675, 21 N.Y.S.3d at 178.

445. N.Y. LAB. LAW § 740(7) (McKinney 2015).

446. 131 A.D.3d 273, 274, 14 N.Y.S.3d 359, 359 (1st Dep't 2015).

447. *Id.* at 278, 14 N.Y.S.3d at 362.

448. 133 A.D.3d 825, 825, 21 N.Y.S.3d 150, 152 (2d Dep't 2015). The plaintiff also asserted claims for negligence, breach of contract, negligent and intentional infliction of emotional distress, and battery. *See id.* at 828, 21 N.Y.S.3d at 154.

misuse of formaldehyde.<sup>449</sup> Affirming the lower court's award of summary judgment dismissing that claim, the court held that the plaintiff failed to establish that the employer had committed an actual violation of law or regulation, and that proof of such an actual violation was necessary to prevail on a claim under Section 740.<sup>450</sup>

### 3. Federal Court Decisions

In *Berman v. Neo@Ogilvy LLC*, the Second Circuit, in a split decision, deferred to an SEC interpretation of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), concerning whether an employee claiming retaliation for making an internal report of suspected wrongdoing only was entitled to whistleblower protection under Dodd-Frank.<sup>451</sup> The SEC interpreted Dodd-Frank to permit claims by individuals who do not complain directly to the SEC, and the court majority held that the SEC was entitled to substantial so-called "Chevron" deference.<sup>452</sup> The court majority found sufficient ambiguity in the statute to warrant such deference, as reflected in differences between statutory language expressly limiting Dodd-Frank whistleblower protection to employees who provide information "to the commission," and language incorporating sections the Sarbanes-Oxley Act of 2002, for which providing information to the SEC was not required.<sup>453</sup>

Justice Jacobs dissented from the majority, claiming that Dodd-Frank was unambiguous in limiting whistleblower protection to individuals providing information "to the commission."<sup>454</sup> He criticized the majority for creating a split among the circuits, and for misconstruing the statute to create "arguable tension" by a misreading of references in the statute to Sarbanes-Oxley whistleblower protections.<sup>455</sup>

### 4. Federal Deposit Insurance Act

In *Segarra v. Federal Reserve Bank of New York*, the Second Circuit

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449. *Id.* at 826, 21 N.Y.S.3d at 152.

450. *Id.* at 826–27, 21 N.Y.S.3d at 152–53 (first citing *Webb-Weber v. Cmty. Action for Human Servs., Inc.*, 23 N.Y.3d 448, 451, 15 N.E.3d 1172, 1173, 992 N.Y.S.2d 163, 164 (2014); then citing *Bordell v. Gen. Elec. Co.*, 88 N.Y.2d 869, 871, 667 N.E.2d 922, \_\_\_, 644 N.Y.S.2d 912, 913 (1996); and then citing *Khan v. State Univ. of N.Y. Health Ctr. at Brooklyn*, 288 A.D.2d 350, 351, 734 N.Y.S.2d 92, 94 (2d Dep't 2001)).

451. 801 F.3d 145, 147 (2d Cir. 2015).

452. *See id.* at 146, 148.

453. *Id.* at 146, 148 (first citing *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34,300, 34,304 (June 13, 2011) (codified at 17 C.F.R. pts. 240, 249); and then citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

454. *See id.* at 156 (Jacobs, J., dissenting).

455. *Id.* at 155, 157, 159.

affirmed the district court's dismissal of a complaint alleging a whistleblower violation under the Federal Deposit Insurance Act (the "Act").<sup>456</sup> The complaint was asserted against both the employer and three individual employees.<sup>457</sup> The Act permits the assertion of a whistleblower claim against a "person" who performs a direct or indirect "function or service" for the Federal Deposit Insurance Corporation (FDIC).<sup>458</sup> The Second Circuit, in affirming the district court, observed that the question on appeal was "whether [the plaintiff-appellant's] allegations creat[ed] a plausible and sufficient link between the Individual Defendants and the FDIC."<sup>459</sup> The court accused the plaintiff-appellant of making the "silly" argument that the court could have "inferred" such a link from the possibility that the FDIC might benefit from the internal investigation of the bank underlying the plaintiff's whistleblower claim.<sup>460</sup> The court observed that "[n]either sharing an interest in the financial well-being of a company nor sharing information about that company [led] to a reasonable inference that the Individual Defendants, all of whom were [employees of the defendant bank] were performing services for the FDIC."<sup>461</sup>

## VI. ADDITIONAL DEVELOPMENTS UNDER FEDERAL LAW SUPREME COURT DECISIONS

### A. Supreme Court Decisions

#### 1. 42 U.S.C. § 1983

In *Heffernan v. City of Patterson*, the Supreme Court held that an employee was not required to actually engage in "protected political activity" in order to state a claim for deprivation of constitutionally protected rights under 42 U.S.C. § 1983.<sup>462</sup> The plaintiff was a demoted detective who was falsely accused of illegal electioneering on behalf of the opponent of the sitting mayor.<sup>463</sup> The Supreme Court reversed the circuit court's determination that the plaintiff failed to state a claim because he had not engaged in protected activity, explaining that "[i]n a word, it was the employer's motive, and in particular the facts as the

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456. 802 F.3d 409, 410 (2d Cir. 2015).

457. *Id.* at 410.

458. *Id.* at 411–12 (quoting 12 U.S.C. § 1831j(a)(2) (2012)).

459. *Id.* at 412.

460. *Id.*

461. *Segarra*, 802 F.3d at 412.

462. 136 S. Ct. 1412, 1416 (2016).

463. *Id.*

employer reasonably understood them, that mattered.”<sup>464</sup>

## 2. ERISA

### A. Fiduciary Breach Claims

In *Amgen v. Harris*, the Supreme Court clarified pleading requirements for ERISA fiduciary breach and prudence claims against fiduciaries.<sup>465</sup> The Court established a bright-line test for establishing claims for breach of fiduciary duty and duty of prudence.<sup>466</sup> Under the test, “a plaintiff must plausibly allege an alternative action . . . that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.”<sup>467</sup> The Court emphasized that an allegation of a plausible alternative must be based on something more than an assertion that the proposed alternative would not cause injury.<sup>468</sup>

### B. Welfare Plan Subrogation Rights

In *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, the Supreme Court held that a welfare plan lacked authority to assert rights over a participant’s personal assets to enforce a lien on amounts recovered by the participant from a third party.<sup>469</sup> The welfare funds’ trustees sought to enforce a lien under section 502(a)(3) of ERISA, which states that a plan may sue “to obtain . . . appropriate equitable relief . . . to enforce . . . the terms of the plan.”<sup>470</sup> The Supreme Court observed that the enforcement of a lien against personal assets was historically an action at law, and that before the merger of the legal and equity courts, the plaintiffs could enforce equitable liens “only against specifically identified funds that remained in the defendant’s possession or against traceable items that the defendant purchased with the funds.”<sup>471</sup> Based on the foregoing, the Supreme Court held that a plan could not assert liens on a participant’s general assets in a subrogation case, because this was not “appropriate equitable relief” within the meaning of section 502(a)(3) of ERISA.<sup>472</sup>

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464. *Id.* at 1418.

465. *See* 136 S. Ct. 758, 760 (2016).

466. *See id.* at 759.

467. *Id.* (citing *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2472 (2014)).

468. *See id.* at 760 (citing *Fifth Third Bancorp*, 134 S. Ct. at 2473).

469. 136 S. Ct. 651, 655 (2016).

470. *Id.* (omissions in original) (citing 29 U.S.C. § 1132(a)(3) (2012)).

471. *Id.* at 658.

472. *Id.* at 655.

### C. Preemption

In *Gobeille v. Liberty Mutual Insurance Co.*, the Supreme Court held that state law reporting requirements applicable to self-funded and self-insured healthcare plans were preempted by ERISA.<sup>473</sup> The state law required the disclosure of claims data and health care information as part of an effort to develop a statewide database of such information.<sup>474</sup> The Court held that issues relating to the disclosure of confidential medical information were “relate[d] to” employee benefits, and therefore preempted by ERISA.<sup>475</sup> In making this determination, the Court noted that the test to determine whether a state law “relates to” a plan is whether the state law “governs . . . a central matter of plan administration” or “interferes with nationally uniform plan administration.”<sup>476</sup> The Court specifically warned of the burden that ERISA plans would face if they had to comply with different disclosure rules in each of the fifty states, and stated that such a burden would interfere with the intent of Congress to have a uniform national regulatory scheme for ERISA benefit plans.<sup>477</sup>

### 3. Mandatory Union Fees

The one sentence order issued by the Supreme Court in *Friedrichs v. California Teachers Ass’n* dramatically understates the importance of the dispute underlying the case.<sup>478</sup> As reported in last year’s *Survey*, the issue before the Court was whether public employee compulsory agency fees violated the plaintiffs’ free speech and association rights under the First and Fourteenth Amendments.<sup>479</sup> In 2014, Justice Alito, writing for the Court in *Harris v. Quinn*, hinted that well-established precedent upholding the constitutionality of such payments “failed to appreciate the difference between the core union speech involuntarily subsidized by dissenting public-sector employees and the core union speech involuntarily funded by their counterparts in the private sector.”<sup>480</sup>

On January 11, 2016, the Court heard oral argument, and many anticipated that the Court would find compulsory fees to be unconstitutional by a five-to-four vote.<sup>481</sup> One month later, with the

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473. 136 S. Ct. 936, 947 (2016).

474. *Id.* at 940–41.

475. *Id.* at 943 (citing 29 U.S.C. § 1144(a) (2012)).

476. *Id.* (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001)).

477. *Id.* at 944 (quoting *Egelhoff*, 532 U.S. at 149–50) (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987)).

478. *See* 136 S. Ct. 1083 (2016).

479. *See* Levine, *supra* note 18, at 1063.

480. 134 S. Ct. 2618, 2632 (2014).

481. *See, e.g.*, Garrett Epps, *Will the U.S. Supreme Court Gut Public-Employee Unions?*,

sudden passing of Justice Scalia, the Court, by a four-to-four vote, left the precedent undisturbed.<sup>482</sup> The issue is very likely to be addressed by the Court again.

## *B. National Labor Relations Board Developments*

### *1. Joint Employer Doctrine*

There are likely to be a number of NLRB decisions issued during the Obama Administration that will not survive in the course of the current Administration.<sup>483</sup> The NLRB's *Browning-Ferris* decision concerning the "joint employer" doctrine is on top of the list of those decisions on the proverbial chopping block.<sup>484</sup> In *Browning-Ferris*, the NLRB, in a three-to-two decision, held that two separate entities, one of which leased workers to the other, were joint employers based on the direct and indirect control exercised over the workers at issue.<sup>485</sup>

For many years, the NLRB has applied the same test to determine if two entities are joint employers of a single group of workers.<sup>486</sup> Under this test, two entities will constitute a joint employer of a single group of workers if (1) each entity would be considered an employer under the common law, and (2) both entities share or jointly determine matters relating to essential terms and conditions of employment.<sup>487</sup> In *Browning-Ferris*, the Board expanded the evidence that could be used to establish control to include evidence of indirect control—whether exercised or not—over the workforce.<sup>488</sup> The NLRB stated that such an expansion was consistent with the evolving nature of the modern-day workplace.<sup>489</sup>

The NLRB stirred up additional controversy in holding in *Trustees*

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ATLANTIC (Jan. 12, 2016), <https://www.theatlantic.com/politics/archive/2016/01/will-the-supreme-court-gut-public-employee-unions/423666/>; Adam Liptak, *Supreme Court Seems Poised to Deal Unions a Major Setback*, N.Y. TIMES (Jan. 11, 2016), <http://www.nytimes.com/2016/01/12/us/politics/at-supreme-court-public-unions-face-possible-major-setback.html>.

482. See Adam Liptak, *Victory for Unions as Supreme Court, Scalia Gone, Ties 4-4*, N.Y. TIMES (Mar. 29, 2016), <https://www.nytimes.com/2016/03/30/us/politics/friedrichs-v-california-teachers-association-union-fees-supreme-court-ruling.html>.

483. See Steven M. Swirsky & Laura C. Monaco, *Is National Labor Relations Board at Turning Point?*, NAT'L L. REV. (Dec. 25, 2016), <http://www.natlawreview.com/article/national-labor-relations-board-turning-point>.

484. See *Browning-Ferris Indus., Inc.*, 362 N.L.R.B. No. 186, 2014-2015 NLRB Dec. (CCH) ¶ 16,006 (Aug. 27, 2015).

485. *Id.* at 18, 21.

486. *Id.* at 1.

487. *Id.* at 2.

488. *Id.*

489. See *Browning-Ferris Indus., Inc.*, 362 N.L.R.B. No. 186.



of *Columbia University in the City of New York* that student teaching assistants were “employees” entitled to protection under the National Labor Relations Act.<sup>490</sup> The NLRB reversed its earlier decision in *Brown University*, and in doing so observed that nothing in the statute expressly excluded student teachers from the definition of “employee,” and that it had the authority to expand the statutory definition of “employee.”<sup>491</sup>

Finally, the NLRB’s *Whole Foods Market Group, Inc.* decision illustrates that the Act’s protections extend to both union and non-union workers alike.<sup>492</sup> In *Whole Foods*, the NLRB held that it was an unfair labor practice for an employer to ban the recording of workplace conversations.<sup>493</sup> The Board majority held that the blanket ban interfered with the rights of employees to engage in work-related communications rejected by the Act.<sup>494</sup> The majority rejected the position taking by the employer and the dissenting Board members that such a ban was implemented to encourage workplace discussions by assuring employees that their conversations were not being recorded.<sup>495</sup>

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490. 364 N.L.R.B. No. 90, 2016-2017 NLRB Dec. (CCH) ¶ 16,216 (Aug. 23, 2016).

491. *Id.* at 1–2 (citing *Brown Univ.*, 342 N.L.R.B. 483, 483 (2004)).

492. *See* 363 N.L.R.B. No. 87, 2014-2015 NLRB Dec. (CCH) ¶ 16,082 (Dec. 24, 2015).

493. *Id.*

494. *Id.* at 4.

495. *Id.*