LABOR & EMPLOYMENT LAW

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INTRODUCTION

The writer of last year's *Survey* speculated that "it does seem fair to assume that President Trump will be less predictable on workplace issues than are most of his Republican colleagues."[1] The Administration's actions in its first six months suggest that his policy positions are in line with those of his Party. In particular, the President's actions at the U.S. Department of Labor (USDOL) during the first six months of his Administration have dismantled much of the Obama Administration's hallmark workplace initiatives,[2] and we review at these changes up front in this year's *Survey*.

The impact of the new Administration at the Equal Employment Opportunity Commission (EEOC) was not entirely clear at the end of this *Survey* year. Indeed, even at the end of 2017, the President had not yet appointed his own commissioner or general counsel.[3]

Similarly, the transition to a Republican-controlled National Labor Relations Board (NLRB) was completed after the *Survey* year and the results of that transition will undoubtedly be an important component of what is reported in next year's *Survey*.[4]

At the state level, there was no change in leadership during the

1. Bruce Levine, *2015–16 Survey of New York Law: Labor & Employment*, 67 SYRACUSE L. REV. 1061, 1064 (2017).

2. *See* Jennifer Hansler, *These are the Bills Trump Signed into Law in His First Year as President*, CNN (Jan. 20, 2018, 2:16 PM), https://www.cnn.com/2017/06/29/politics/president-trump-legislation/index.html.

3. Jan Diehm et al., *Tracking Trump's Nominations*, CNN (Dec. 31, 2017), https://www.cnn.com/interactive/2017/politics/trump-nominations/. Trump did not fill the positions of General Counsel of the Department of Defense or Commissioner of the Equal Employment Opportunity Commission as of December 2017. *Id.*

4. Daniel Wiessner, *U.S. Senate Tips Labor Board to Republican Majority*, REUTERS (Sept. 25, 2017, 6:54 PM), https://www.reuters.com/article/legal-us-usa-labor/u-s-senate-tips-labor-board-to-republican-majority-idUSKCN1C0322. For example, as anticipated, on December 14, 2017, the NLRB reversed its controversial joint employer decision in *Browning-Ferris* (reported on in last year's *Survey*, Levin, *supra* note 1, at 1124). *Hy-Brand Industrial Contractors, Ltd.*, 365 N.L.R.B. No. 156, 168 Lab. Cas. (CCH) P16,365 (Dec. 14, 2017). The joint employer analysis from Browning-Ferris was identical to the analysis for FLSA cases that was withdrawn by Secretary Acosta in June 2017, and which is discussed *infra*, Part I (A)(2).

Survey year, but of course the states are not immune from what takes place in Washington. Simply put, assuming there is a net decrease in the opportunities for workers to obtain relief under federal law, it is fair to assume with all things equal that worker protections at the state and local level become increasingly important.

The *Survey* article continues with a section on state and federal developments concerning the misclassification of employees as independent contractors. The misclassification section should be read in conjunction with Labor Secretary Acosta's withdrawal of the Obama Administration's administrative interpretation broadly construing the definition of employee under the Fair Labor Standards Act. (FLSA) The impact of that withdrawal should be ripe for consideration in next year's *Survey*.

The Article updates New York's incremental schedule that will bring the state minimum hourly wage to fifteen dollars, and the paid family leave guarantee for every worker in the State that became effective on January 1, 2018.[5] The *Survey* also explores new developments at both the city and state level, including the creation of a permanent joint task force of multiple state agencies to cooperate in joint investigation and enforcement efforts in connection with wage and hour, misclassification, and related violations of state worker protections.[6]

This Article next turns to employment discrimination law that includes a number of cases aimed at clarifying the New York City Human Rights Law (NYCHRL),[7] and comparing the protections it provides with those provided under analogous state and federal law.

This year's whistleblower section was expanded in order to address a number of key decisions, including important case law from outside the Second Circuit.[8] The section address developments under the Dodd-Frank and Sarbanes-Oxley Act, and also includes cases involving whistleblower protections under New York Labor Law § 740.[9]

Finally, the *Survey* concludes with a section on developments regarding public sector employees at both the state and federal level. Although the sampling of cases provides a roadmap of decisions that were issued this year, this section does not address the largest legal issue facing public sector employees.

Last year's *Survey* reported on *Friedrichs v. California Teachers Ass'n*, where the Supreme Court failed to overturn the longstanding rule

5. 12 N.Y.C.R.R. §§ 146-1.2, 355.9 (2017).
6. *See infra* Part III(A)(4).
7. N.Y.C. ADMIN. CODE § 8-107 (2018).
8. *Infra* Part V(A).
9. *Id.*

that public sector unions can mandate that their members pay agency fees.[10] The Supreme Court plans to revisit the issue this year in *Janus v. AFSCME*,[11] and every indication is that the Court will hold on constitutional grounds that public sector unions may no longer rely on mandatory agency fee provisions in their collective bargaining agreements with public employers.[12]

As always, the *Survey* reviews a substantial but nonexhaustive number of court decisions made during the *Survey* year. The cases we report on are intended to provide a representative sample of cases decided during the *Survey* year, and the cases we include are intended to point out something that is both new and material.

I. DEVELOPMENTS AT USDOL

Much of the business community made no secret of the high expectations for a more employer-friendly environment with the election of President Trump and a Republican-controlled Congress. "Elections have consequences," wrote Lauren Brown of the Chamber of Commerce's Institute for Legal Reform.[13] Brown continued:

It is somewhat of a hackneyed phrase, but the fact remains that policy shifts happen when a new administration takes over. In the area of labor and employment policy, the eight years of the Obama administration delivered an avalanche of policies tilted heavily against the business community, and now employers are longing for a shift that will restore a proper balance. Fortunately, one [USDOL] official has signaled that such needed change is on the way.[14]

Brown went on to praise the USDOL's Acting Solicitor for suggesting that the Obama Administration's expanded position concerning joint employer liability would be reexamined.[15] As reported below, the Obama Administration's joint employer position was summarily withdrawn and no longer reflects the official position of USDOL.

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10. Levine, *supra* note 1, at 1123–24 (citing Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083, 1083 (2016) (affirming judgement by an equally divided court due to the passing of Justice Scalia)).

11. 851 F.3d 746, 749 (7th Cir. 2017), *cert. granted*, 138 S. Ct. 54 (2017).

12. *See* Adam Liptak, *Supreme Court Will Hear Case on Mandatory Fees to Unions*, N.Y. TIMES (Sept. 28, 2017), https://www.nytimes.com/2017/09/28/us/politics/supreme-court-will-hear-case-on-mandatory-fees-to-unions.html.

13. Lauren Brown, *Labor Official Offers Hope for Employers*, U.S. CHAMBER COM. (Apr. 19, 2017, 3:45 PM), https://www.uschamber.com/article/labor-official-offers-hope-employers.

14. *Id.*

15. *Id.*

The appointment of Alexander Acosta as Secretary of Labor was warmly received and may have heightened expectations for change at USDOL.[16] National Association of Manufacturers President and CEO Jay Timmons wrote that manufacturers were "encouraged" by Acosta, and looked forward to change from "overreaching and counterproductive" regulatory policies of the Obama Administration.[17] Notably, within weeks of being sworn in, Acosta wrote an op-ed piece for the *Wall Street Journal* (which is linked to on the USDOL's website behind a paywall), where the new Secretary mirrored the views expressed by Timmons and others, and excoriated the regulatory excesses of the Obama Administration and promised to "roll back regulations that harm workers and families."[18]

As set forth below, expectations for a more employer-friendly USDOL appear to have been justified by actions taken within the first six months of the Trump Administration and the closing of the *Survey* year.

A. Changes at Wage and Hour Division

1. Administrative Interpretations and Opinion Letters

Administrative interpretations by the Administrator of the Wage and Hour Division are deemed to be official agency rulings upon which an employer may rely to establish a good faith defense to a violation of the FLSA.[19] The Obama Administration announced back in 2010 that it

16. *See* Josh Eidelson, *What to Expect When You're Expecting Acosta as Labor Secretary*, BLOOMBERG (Mar. 21, 2017, 5:00 AM), https://www.bloomberg.com/news/articles/2017-03-21/what-to-expect-when-you-re-expecting-acosta-as-labor-secretary.

17. Jennifer Drogus, *Manufacturers Welcome President Trump's Nomination of Alexandra Costa*, NAT'L ASS'N MANUFACTURERS (Feb. 16, 2017), http://www.nam.org/Newsroom/Press-Releases/2017/02/Manufacturers-Welcome-President-Trump-s-Nomination-of-Alexander-Acosta/. Similarly, Lauren Brown wrote on behalf of the Chamber of Commerce's Institute for Legal Reform:

> Acosta's confirmation as the new Secretary hopefully will *signify* the beginning of a new approach to key issues of concern to the business community. Employers should hope that under its new leadership, the Department of Labor will restore much-needed balance to labor and employment policy that has been lacking for eight years.

Lauren Brown, *Labor Secretary Confirmed*, U.S. CHAMBER COM. (Apr. 27, 2017, 7:00 PM), https://www.uschamber.com/article/labor-secretary-confirmed.

18. Alexandra Acosta, Opinion, *Deregulators Must Follow the Law, So Regulators Will Too*, WALL ST. J. (May 22, 2017, 7:00 PM), https://www.wsj.com/articles/deregulators-must-follow-the-law-so-regulators-will-too-1495494029; Press Release, U.S. Dep't of Labor, New Fiduciary Rule Guidance from US Labor Department (May 22, 2017), https://www.dol.gov/newsroom/releases/ebsa/ebsa20170522.

19. 29 U.S.C. § 259 (2012); *see* Wage and Hour Division, *Rulings and Interpretations*, U.S. DEP'T LAB., https://www.dol.gov/whd/opinion/guidance.htm (last visited May 22, 2018).

would begin to rely on such administrative interpretations, and would substantially reduce the number of opinion letters for the purpose of providing the public with guidance.[20] This decision was a change in the traditional practice at the Wage and Hour Division of responding to such fact-specific public inquiries, and was opposed by many employers and their advocates who had come to rely on them.[21] In a recent interview with *Bloomberg BNA*, Michael Hancock, who managed the Wage and Hour Office in the final years of the Bush Administration, explained:

It's no secret that the opinion letter process largely serves the interest of employers; it gives them a legal defense if their practices comport with what the opinion letter says, even if the Department of Labor was wrong in what the opinion states . . . . It offers a serious and real significant defense to employers.[22]

On June 7, 2017, Secretary Acosta announced that he was withdrawing two key administrative interpretations that were issued by the Obama Administration's Wage and Hour Division.[23] First, Administration Interpretation 2015-1 had construed the definition of "employ" under the FLSA to mean that "most workers are employees under the FLSA."[24] Second, Administrative Interpretation No. 2016-1 reflected the Obama Administration's position that joint employer relationships were proliferating in the modern economy and should be regularly considered where:

(1) the employee works for two employers who are associated or related in some way with respect to the employee [a horizontal joint employer relationship]; or (2) the employee's employer is an intermediary or otherwise provides labor to another employer [a vertical joint employer relationship].[25]

On June 27, 2017, Secretary Acosta announced that the DOL would resume the practice of issuing fact-specific opinion letters.[26] The

20. Juliet Eilperin, *The Trump Administration Just Changed its Overtime Guidance—and Business Cheers*, WASH. POST (Jan. 8, 2018), https://www.washingtonpost.com/politics/ the-trump-administration-just-changed-its-overtime-guidance—and-business-cheers.

21. *See id.*

22. Ben Penn, *Opinion Letters from DOL Could Help Employers 'Get-Out-of-Jail Free'*, BLOOMBERG L. (Mar. 31, 2017), https://www.bna.com/opinion-letters-dol-n57982086029/.

23. Press Release, U.S. Dep't of Labor, US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance (June 7, 2017), https://www.dol.gov/newsroom/releases/ebsa/ebsa20170522.

24. U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1 (July 15, 2015) (withdrawn, effective June 7, 2017).

25. U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2016-1 (Jan. 20, 2016) (withdrawn, effective June 7, 2017).

26. Press Release, U.S. Dep't of Labor, US Department of Labor Reinstates Wage and Hour Opinion Letters (June 27, 2017), https://www.dol.gov/newsroom/releases/whd/

Secretary explained:

An opinion letter is an official, written opinion by the Wage and Hour Division of how a particular law applies in specific circumstances presented by an employer, employee or other entity requesting an opinion. The letters were a division practice for more than [seventy] years until being stopped and replaced by general guidance in 2010.

Reinstating opinion letters will benefit employees and employers as they provide a means by which both can develop a clearer understanding of the Fair Labor Standards Act and other statutes . . . .[27]

The statement links to a new page on the USDOL website to facilitate the submission of opinion letter requests.[28]

2. Salary Test for Overtime Exemption under the FLSA

On May 23, 2016, the Obama Administration published final regulations modifying the salary test used to determine whether an employee is exempt from FLSA overtime requirements pursuant to one or more of the FLSA's so-called "white collar exemptions" (for executive, administrative, professional, outside sales, and computer employees).[29] The new regulation doubled the minimum salary threshold that an employee must be paid in order to meet white collar exemption requirements.[30]

The Trump Administration had indicated back in January 2017 that it intended to come up with an alternative to the Obama final rule and stated that it would not enforce the final rule in the interim.[31] Secretary Acosta announced on June 7, 2017 that USDOL would be taking the necessary steps under the Administrative Procedure Act to replace the Obama final rule with a more suitable salary test.[32]

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27. *Id.*

28. *Id.*

29. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391 (May 23, 2016) (codified at 29 C.F.R. pt. 541 (2016)); WAGE & HOUR DIVISION, U.S. DEP'T OF LABOR, GUIDANCE FOR PRIVATE EMPLOYERS ON CHANGES TO THE WHITE COLLAR EXEMPTIONS IN THE OVERTIME FINAL RULE 1 (May 18, 2016).

30. *Compare* 29 C.F.R. § 541.600 (2015), *with* 29 C.F.R. § 541.600 (2017) (showing the minimum salary threshold increased from $455 per week to $913 per week under the new regulation).

31. Memorandum from Reince Priebus, Assistant to the President and Chief of Staff, Regulatory Freeze Pending Review (Jan. 20, 2017), https://www.whitehouse.gov/presidential-actions/memorandum-heads-executive-departments-agencies/.

32. *Nomination of Alex Acosta to Serve as Secretary of Labor: Hearing before the S. Comm. On Health, Education, Labor & Pensions*, 114th Cong. (Mar. 22, 2017), https://www.help.senate.gov/hearings/nomination-of-alex-acosta-to-serve-as-secretary-of-labor; News Release, U.S. Dep't of Labor, US Secretary of Labor Withdraws Joint

In addition, Secretary Acosta took steps to change the litigation position taken by the Obama Administration in an action brought by a broad coalition of state governments and employer groups to enjoin the final rule in the U.S. District Court for the Eastern District of Texas.[33] The Obama Administration had appealed to the Fifth Circuit after the district court issued a temporary injunction in November 2016 enjoining the rule from being implemented, as scheduled, on December 1, 2016.[34] On August 31, 2017, the district court held that the rule was invalid because it was not finalized in compliance with the Administrative Procedure Act.[35] Secretary Acosta appealed the district court's decision and, on October 30, 2017, requested that the Fifth Circuit hold the appeal in abeyance to permit the USDOL to promulgate an alternative rule.[36]

B. Fiduciary Rule

In a presidential memorandum to the Secretary of Labor dated February 3, 2017, the Trump Administration announced its intention to reevaluate the final "fiduciary rule" adopted by the Obama Administration to regulate investment advice that is provided to employees.[37] The memorandum stated that the rule could interfere with the manner in which individual Americans make their own financial decisions.[38] Thereafter, on April 4, 2017, the USDOL announced a sixty-day delay in the fiduciary rule's effective date, from April 10 to June 9, 2017.[39]

On May 22, 2017, the USDOL announced a temporary enforcement policy indicating that it would not seek enforcement of the new fiduciary

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Employment, Independent Contractor Informal Guidance (June 7, 2017), https://www.dol.gov/newsroom/releases/opa/opa20170607.

33. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 82 Fed. Reg. 34,616, 34,616–19 (Request for Information July 26, 2017); Wage and Hour Division, *Important Information Regarding Recent Overtime Litigation in the U.S. District Court of Eastern District of Texas*, U.S. DEP'T LABOR, https://www.dol.gov/whd/overtime/final2016/litigation.htm (last visited May 22, 2018) [hereinafter Wage & Hour Division, *Important Information*].

34. Nevada v. U.S. Dep't of Labor, 218 F. Supp. 3d 520, 525 (E.D. Tex. 2016), *stay denied*, 227 F. Supp. 3d 696, 697 (E.D. Tex. 2017).

35. Nevada v. U.S. Dep't of Labor, No. 4:16-CV-731, 2017 U.S. Dist. LEXIS 140522, at *26–*27 (E.D. Tex. Aug. 31, 2017) (citing 29 U.S.C. § 213 (2012)).

36. Wage & Hour Division, *Important Information*, *supra* note 33.

37. Memorandum from President Donald Trump to the Secretary of Labor, Fiduciary Duty Rule (Feb. 3, 2017), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-fiduciary-duty-rule/.

38. *Id.*

39. Press Release, U.S. Dep't of Labor, US Labor Department Extends Fiduciary Rule Applicability Date (Apr. 4, 2017), https://www.dol.gov/newsroom/releases/ebsa/ebsa20170404.

rule against those attempting to comply with the rule "diligently and in good faith."[40] The USDOL notice linked to Secretary Acosta's op-ed piece in the Wall Street Journal, where the Secretary stated that "the Fiduciary Rule as written may not align with President Trump's deregulatory goals[,]" and that "[t]his administration presumes that Americans can be trusted to decide for themselves what is best for them."[41]

On June 29, 2017, the USDOL announced that it was taking steps under the Administrative Procedure Act to reevaluate and possibly amend the rule.[42]

C. "Persuader" Rule

On June 8, 2017, the USDOL announced a Notice of Proposed Rulemaking "to rescind a rule that would have required employers and labor-management consultants to report consultants' indirect contact with workers during union organizing campaigns."[43] Secretary Acosta reserved specific criticism for this Obama-era rule in his May 2017 *Wall Street Journal* op-ed, stating:

Today there are several regulations enacted by the Obama administration that federal courts have declared unlawful. One is the Persuader Rule, which would make it harder for businesses to obtain legal advice. Even the American Bar Association believes the rule goes too far. Last year a federal judge held that "the rule is defective to its core" and blocked its implementation. Now the Labor Department will engage in a new rule-making process, proposing to rescind the rule.[44]

D. Beryllium Rule

On January 9, 2017, the Obama Administration published a final

40. U.S. Dep't of Labor, Emp. Benefits Sec. Admin., Field Assistance Bulletin No. 2017-02 (May 22, 2017), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2017-02.

41. Acosta, *supra* note 18; News Brief, U.S. Dep't of Labor, New Fiduciary Rule Guidance from US Labor Department (May 22, 2017), https://www.dol.gov/newsroom/releases/ebsa/ebsa20170522 (citing Acosta, *supra* note 18).

42. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 82 Fed. Reg. 34,616, 34,616–19 (Request for Information July 26, 2017); News Brief, U.S. Dep't of Labor, U.S. Labor Department to Publish Request for Information on Fiduciary Rule (June 29, 2017), https://www.dol.gov/newsroom/releases/ebsa/ebsa20170629.

43. Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 82 Fed. Reg. 26,877, 26,877–83 (proposed June 12, 2017); News Brief, U.S. Dep't of Labor, US Labor Department to Seek Public Comment on Rescinding 'Persuader Rule' (June 8, 2017), https://www.dol.gov/newsroom/releases/olms/olms20170608.

44. Acosta, *supra* note 18.

rule regulating employee exposure to beryllium dust, which is linked to serious lung conditions, in the general industry, shipbuilding, and construction industries.[45] On March 21, 2017, the USDOL announced that the new rule would be delayed for sixty days pursuant to the White House's January 20, 2017 memorandum calling for a regulatory freeze pending review.[46]

On June 23, 2017, the USDOL announced that it was proposing that the new rule be delayed for the consideration of the construction and shipbuilding industries, but not for general industry.[47] The USDOL stated that the delay was based on complaints from the construction and shipbuilding industries that they had not received a sufficient opportunity to participate in the development of the rule in 2015 and 2016.[48]

II. EMPLOYEE MISCLASSIFICATION

A. Federal Cases

The impact of Secretary Acosta's June 2017 rejection of the Obama Administration's broadly construed definition of "employee" under Wage and Hour Administrative Interpretation No. 2015-1 will be clear as cases are decided in the next year or two. The Second Circuit's decision in *Saleem v. Corporate Transportation Group, Ltd.* is an example of a case in which even under the broad interpretation of the Obama Administration, workers were nonetheless held to be independent contractors.[49] The plaintiff-appellants were "black car drivers" who were granted conditional class certification, and whose FLSA claims were dismissed after their alleged employers were awarded summary judgment by the district court.[50] Most of the drivers operated pursuant to a "franchise" agreement, under which, inter alia, the alleged employers

45. Occupational Exposure to Beryllium, 82 Fed. Reg. 2470, 2470–71 (Jan. 9, 2017) (codified at 29 C.F.R. pts. 1910, 1015, 1926); Press Release, U.S. Dep't of Labor, US Department of Labor Issues Finale Rule to Lower Beryllium Levels, Increase Workplace Protections to Reduce Health Risks (Jan. 6, 2017), https://www.dol.gov/newsroom/releases/osha/osha20170106.

46. News Brief, U.S. Dep't of Labor, US Labor Announces Delay in Beryllium Rule Effective Date (Mar. 21, 2017), https://www.dol.gov/newsroom/releases/osha/osha20170321; Memorandum from Reince Priebus, *supra* note 31.

47. Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors, 82 Fed. Reg. 29,182, 29,182–224 (proposed June 27, 2017); News Release, U.S. Dept. of Labor, US Labor Department's OSHA Publishes Proposed Rule on Beryllium Exposure (June 23, 2017), https://www.dol.gov/newsroom/releases/osha/osha20170623 [hereinafter DOL Beryllium Delay].

48. DOL Beryllium Delay, *supra* note 47.

49. 854 F.3d 131, 149 (2d Cir. 2017).

50. *Id.* at 134.

would provide them with access to its network of customers.[51] These agreements did not prohibit drivers from obtaining work from a franchisor's competitors, or from obtaining their own customers without the assistance of the defendants or any of the defendants' competitors.[52]

The Second Circuit applied various factors under the judicially-developed "economic realities" test to determine whether the drivers were employees.[53] The economic realities test, which was also used by the Obama Administration in Administrative Interpretation No. 2015-1, examines the "totality of the circumstances" to determine whether the worker in question is or is not engaged in a business enterprise that is independent from the business of the alleged employer.[54] The court explained that the economic realities test was consistent with the "circularity" of the FLSA's definition of employment (i.e., one is employed if he or she is "suffer[ed] or "permit[ted] to work"):

In light of the [FLSA's employment] definition's circularity, courts have endeavored to distinguish between employees and independent contractors based on factors crafted to shed light on the underlying economic reality of the relationship. As the district court recognized, this [c]ourt has focused on "the totality of the circumstances" in addressing our "ultimate concern . . . whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves."[55]

The Second Circuit found it particularly significant that the franchise agreements did not prohibit the drivers from working for the competitors of the defendants from whom the drivers obtained work.[56] The court also observed that the drivers were free to accept or reject customers from the defendant, and that they could make their own work schedules.[57] Finally, the court found that the substantial initial investments made by the drivers, and their ongoing material operational expenses, were indicative of the obligations one incurs as an independent businessperson.[58]

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51. *Id.*

52. *Id.* at 136.

53. *Id.* at 139, 139 n.4 (citing Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534–38 (2d Cir. 2016)).

54. *Saleem*, 854 F.3d at 139 (citing Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988)); Administrator's Interpretation No. 2015-1, *supra* note 24.

55. *Id.* at 139 (citing *Brock*, 840 F.2d at 1059).

56. *Id.* at 141.

57. *Id.* at 146–47.

58. *Id.* at 144–45.

B. New York State Cases

1. Unemployment Insurance Decisions

The Unemployment Appeals Board ("Appeal Board") utilizes the common law "control test" to distinguish between employees and nonemployees.[59] The common law "control test" is used in these cases to determine employee status.[60] The principal focus of the test is the extent to which there is "evidence of the purported employer's control over the means used to achieve the results produced."[61]

The New York Court of Appeals was asked to construe the "common law" control test in *Yoga Vida NYC, Inc. v. Commissioner of Labor*.[62] There the Court, by a vote of 4-2, reversed the Third Department's determination that the plaintiff yoga instructors were employees and not independent contractors.[63] The appellant yoga studio utilized employees and those it called "non-staff instructors" to conduct classes.[64] The non-staff instructors were treated as independent contractors.[65]

The Court majority held that the decision of the Appeal Board that the non-staff instructors were employees was unsupported by substantial evidence in the record.[66] Quoting one of its earlier decisions, the Court explained that "substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise,

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59. *See, e.g.*, Empire State Towing & Recovery Ass'n v. Comm'r of Labor, 15 N.Y.3d 433, 436–37, 938 N.E.2d 984, 986, 912 N.Y.S.2d 551, 553 (2010) ("The Appeal Board found that there was 'credible evidence' that the employer 'exercised or reserved the right to exercise sufficient supervision, direction, and/or control to establish' an employer-employee relationship.").

60. *See* Mitchell v. Comm'r of Labor, 145 A.D.3d 1404, 1405–06, 44 N.Y.S.3d 567, 569 (3d Dep't 2016) (first citing *Empire State Towing & Recovery Ass'n*, 15 N.Y.3d at 437–38, 938 N.E.2d at 987, 912 N.Y.S.2d at 554; and then citing Columbia Artist Mgmt., LLC, v. Comm'r of Labor, 109 A.D.3d 1055, 1056–57, 972 N.Y.S.2d 343, 346 (3d Dep't 2013)).

61. *Id.* at 1405, 44 N.Y.S.3d 569 (first citing *Empire State Towing & Recovery Ass'n*, 15 N.Y.3d at 437, 938 N.E.2d at 986, 912 N.Y.S.2d at 553; then citing Greystoke Indus. LLC v. Comm'r of Labor, 142 A.D.3d 746, 746–47, 36 N.Y.S.3d 760, 761 (3d Dep't 2016); and then citing Eckert v. Comm'r of Labor, 133 A.D.3d 1075, 1076, 20 N.Y.S.3d 225, 226 (3d Dep't 2015)).

62. 28 N.Y.3d 1013, 1015, 64 N.E.3d 276, 278, 41 N.Y.S.3d 456, 458 (2016) (citing Yoga Vida NYC, Inc. v. Comm'r of Labor (*Yoga Vida I*), 119 A.D.3d 1314, 1315, 989 N.Y.S.2d 710, 712 (3d Dep't 2014)).

63. *Id.* at 1013–14, 64 N.E.3d at 276–78, 41 N.Y.S.3d at 456–58 (citing *Yoga Vida NYC, Inc.*, 119 A.D.3d at 1315, 989 N.Y.S.2d at 712).

64. *Id.* at 1014, 64 N.E.3d at 277, 41 N.Y.S.3d at 457.

65. *Id.*

66. *Id.* at 1015, 64 N.E.3d at 278, 41 N.Y.S.3d at 458 (quoting Hertz Corp. v. Comm'r of Labor, 2 N.Y.3d 733, 735, 811 N.E.2d 5, 6, 778 N.Y.S.2d 743, 744 (2004)).

a conclusion or ultimate fact may be extracted reasonably—probatively and logically."[67] In this case, the majority found that the evidence of "incidental control" relied upon by the Appeal Board did not satisfy the substantial evidence threshold.[68] The Appeal Board relied on evidence that non-staff instructors were required to be licensed; that they were included on a "master" class schedule on the studio's website; that the employer provided space for classes; and that the fees paid by students were fixed and collected by the studio.[69] The majority found it more significant that the non-staff instructors, unlike staff-instructors, did not get paid when an insufficient number of students showed up for a class, were free to work for the studio's competitors, could advertise their work at other studios during classes, and were not required to attend staff meetings.[70]

The two dissenting judges would have deferred to the Appeal Board, and criticized the majority for "interposing its own judgment for that of the Board, [and] disregard[ing] the substantial evidence standard of review."[71]

Yoga Vida NYC, Inc., appears to have already had an influence in cases reviewing Appeal Board determinations. For example, in *Mitchell v. Commissioner of Labor*, the Third Department interpreted *Yoga Vida NYC, Inc.* to at least implicitly require a more rigorous review of unemployment determinations concerning alleged employee misclassification.[72] There, the Third Department, in reversing the Appeal Board's determination that certain writers were employees and not independent contractors, specifically addressed the implications of Yoga Vida,[73] stating:

While the Court of Appeals' recitation of the law [in *Yoga Vida*] may have simply restated a well-settled legal principle, its application of the substantial evidence standard to the record before it suggests that the Court, in reversing the Board and finding that the yoga instructors at issue constituted independent contractors, engaged in a more detailed, qualitative and arguably less deferential analysis of the various

67. *Yoga Vida NYC, Inc*., 28 N.Y.3d at 1015, 64 N.E.3d at 278, 41 N.Y.S.3d at 458 (quoting 300 Gramatan Ave. Assocs. v. State Div. of Human Rights, 45 N.Y.2d 176, 181, 379 N.E.2d 1183, 1187, 408 N.Y.S.2d 54, 57 (1978)).

68. *Id.* at 1015–16, 64 N.E.3d at 278, 41 N.Y.S.3d at 458 (quoting *Hertz Corp*., 2 N.Y.3d at 735, 811 N.E.2d at 6, 778 N.Y.S.2d at 744).

69. *Id.* at 1016, 64 N.E.3d at 278, 41 N.Y.S.3d at 458.

70. *Id.* at 1015, 65 N.E.3d at 278, 41 N.Y.3d at 458.

71. *Id.* at 1018, 65 N.E.3d at 280, 41 N.Y.3d at 460 (Fahey, J., dissenting).

72. 145 A.D.3d 1404, 1406–07, 44 N.Y.S.3d 567, 570 (3d Dep't 2016) (citing *Yoga Vida NYC, Inc.*, 28 N.Y.3d at 1015, 64 N.E.3d at 278, 41 N.Y.S.3d at 458).

73. *Id.* at 1405, 1410, 44 N.Y.S.3d at 568, 572.

employment factors. Following the Court of Appeals' lead in this regard, we find that, regardless of the analysis employed, the Board's decision here is not supported by substantial evidence.[74]

2. Workers' Compensation

In *Saratoga Skydiving Adventures v. Workers' Compensation Board*, the Third Department affirmed the Workers' Compensation Board's determination that jump instructors and pilots were employees and not independent contractors of the appellant employer.[75] The employer operated a skydiving company and utilized skydiving instructors and pilots.[76] Both groups of workers were treated as independent contractors by the employers.[77] The Board issued a stop-work order pursuant to Workers' Compensation Law § 141-a after conducting a post-accident investigation of the company in which it determined that the instructors and pilots were employees.[78] The employer appealed from the decision of an administrative law judge affirming the "stop-work" order.[79]

The Third Department affirmed the Board's decision to issue the stop-work order after finding that it was supported by substantial evidence in the record.[80] The court observed that "[f]oremost, considering the relative nature of their work, the pilots and jump instructors are indispensable and integral to [the employer's] business of offering skydiving experiences to clients."[81] In addition, the court also noted that the planes and equipment were owned by the employer, and that the

74. *Id.* at 1406–07, 44 N.Y.S.3d at 570; *see* TMR Sec. Consultants, Inc. v. Comm'r of Labor, 145 A.D.3d 1402, 1403–04, 45 N.Y.S.3d 240, 242 (3d Dep't 2016) (explaining its reversal of an Appeal Board determination that certain security guards were employees, and that evidence of "incidental control" was insufficient to support the determination of employee status) (first citing *Yoga Vida NYC, Inc.*, 28 N.Y.3d at 1016, 64 N.E.3d at 278, 41 N.Y.S.3d at 458; then citing Chan v. Comm'r of Labor, 128 A.D.3d 1146, 1146–47, 8 N.Y.S.3d 489, 490 (3d Dep't 2015); then citing Lee v. Comm'r of Labor, 127 A.D.3d 1399, 1399–1400, 4 N.Y.S.3d 778, 779 (3d Dep't 2015); then citing Jennings v. Comm'r of Labor, 125 A.D.3d 1152, 1153, 3 N.Y.S.3d 209, 210 (3d Dep't 2015); then citing John Lack Assocs. v. Comm'r of Labor, 112 A.D.3d 1042, 1043–44, 977 N.Y.S.2d 760, 762 (3d Dep't 2013); and then citing Best v. Comm'r of Labor, 95 A.D.3d 1536, 1537–38, 944 N.Y.S.2d 783, 784–85 (3d Dep't 2012)).

75. 145 A.D.3d 1333, 1334, 42 N.Y.S.3d 696, 698 (3d Dep't 2016).

76. *Id.* at 1335, 42 N.Y.S.3d at 699.

77. *Id.* at 1333, 42 N.Y.S.3d at 697–98.

78. *Id.* at 1333–34, 42 N.Y.S.3d at 697–98 (citing N.Y. WORKERS' COMP. LAW § 141-a (McKinney 2016 & Supp. 2018)).

79. *Id.* at 1334, 42 N.Y.S.3d at 698.

80. *Saratoga Skydiving Adventures*, 145 A.D.3d at 1335, 42 N.Y.S.3d at 699.

81. *Id.* at 1336, 42 N.Y.S.3d at 699 (first citing Schwenger v. N.Y. Univ. Sch. of Med., 126 A.D.3d 1056, 1058–59, 3 N.Y.S.3d 465, 468–69 (3d Dep't 2015); and then citing Sikes v. Chevron Cos., 173 A.D.2d 810, 812, 571 N.Y.S.2d 43, 45 (2d Dep't 1991)).

employer "exercised sufficient control over the work, scheduling and services provided on behalf of [the employer], selected who to hire for each jump and determined whether they were sufficiently efficient to be paid or should be discharged."[82] The Third Department emphasized that the mere presence of conflicting evidence that could be used to make an alternative determination was immaterial.[83] In particular, the Third Department observed that testimony that the pilots and instructors could decline offers to work specific assignments, that most of them held second jobs, and that they were issued 1099 tax forms by the employer, did not preclude the Board from basing its decision on other conflicting evidence in the record, provided that such evidence was substantial.[84]

III. WAGE AND HOUR LAW

A. New York State

1. Minimum Wage

Last year's *Survey* reported on legislation signed by Governor Cuomo that will increase the minimum hour wage for every worker in the state to fifteen dollars.[85] The path to the fifteen-dollar rate is incremental over time and varies by region and the number of employees employed by an employer.[86]

Effective December 31, 2016, the minimum wage for employers with more than eleven employees in New York City was increased to eleven dollars and, effective December 31, 2017, to thirteen dollars.[87] For New York City employers with less than eleven employees, the minimum wage increased to ten dollars and fifty cents on December 31, 2016, and to twelve dollars on December 31, 2017.[88]

Effective December 31, 2016, the minimum wage for employees on Long Island and in Westchester County was increased to ten dollars and, effective December 31, 2017, to eleven dollars.[89] For employees in the rest of New York State, the respective increases for year-ends 2017 and

82. *Id.* at 1336, 42 N.Y.S.3d at 699–700 (first citing Richter v. Buffalo Air Park, Inc., 125 A.D.2d 809, 810, 509 N.Y.S.2d 914, 915 (3d Dep't 1986); and then citing Jennings v. Avanti Express, Inc., 91 A.D.3d 999, 999–1000, 936 N.Y.S.2d 718, 719 (3d Dep't 2012)).

83. *Id.* at 1336, 42 N.Y.S.3d at 700 (citing *Jennings*, 91 A.D.3d at 1000, 936 N.Y.S.2d at 719).

84. *Id.* at 1335, 42 N.Y.S.3d at 699.

85. Levine, *supra* note 1, at 1073.

86. N.Y. LAB. LAW § 652 (McKinney Supp. 2018).

87. *Id.* § 652(a)(i).

88. *Id.* § 652(a)(ii).

89. *Id.* § 652(b).

2018 were nine dollars and seventy cents and ten dollars and forty cents.[90]

2. Paid Family Leave

Last year's *Survey* also reported on new legislation that will eventually provide up to twelve weeks of paid family leave for workers in New York State.[91] Regulations pertaining to the new law were adopted on July 19, 2017.[92]

The new law became effective on January 1, 2018, and will provide up to eight weeks in the first year.[93] The number of weeks available for paid leave is scheduled to increase to twelve in 2021.[94] Under the law, employees can take paid leave during the first year after a birth, adoption, or commencement of a foster child relationship, or by an employee who is caring for a close family relative with a serious health condition, or by an employee who has assumed additional responsibilities due to an active military deployment abroad by a close relative.[95]

The new law permits employers to pay for paid leave insurance premiums through employee payroll deductions.[96] Benefits beginning in 2018 are capped at one-half of the State's average weekly wage, and are scheduled to increase to two-thirds in 2021.[97]

3. Wage Gap Study

On April 4, 2017, Governor Cuomo directed the Department of Labor to commence a wage gap study by gender and to propose recommendations to reduce the gap.[98] Hearings were scheduled to be held in New York City, Buffalo, and Syracuse in the early summer of 2017.[99] The Governor's office reported that female workers in New York earn eighty-nine cents for every dollar earned by a male worker in the State, and that this is the lowest statewide gender gap in the nation.[100]

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90. *Id.* § 652(c).

91. Levine, *supra* note 1, at 1075.

92. 29 N.Y. Reg. 22 (July 19, 2017) (codified in and amending scattered sections of 12 N.Y.C.R.R.)

93. N.Y. WORKERS' COMP. LAW § 204(2)(a) (McKinney Supp. 2018).

94. *Id.* § 204(2)(a)(iv).

95. 12 N.Y.C.R.R. § 380-2.1–2.3 (2017).

96. N.Y. WORKERS' COMP. LAW § 209(4) (McKinney Supp. 2018).

97. 12 N.Y.C.R.R. § 358-3.1(b)(3) (2017).

98. *Governor Cuomo Directs State Labor Department to Launch Wage Gap Study and Proclaims April 4, 2017 as Equal Pay Day in New York*, NEW YORK ST. (Apr. 4, 2014), https://www.governor.ny.gov/news/governor-cuomo-directs-state-labor-department-launch-wage-gap-study-and-proclaims-april-4-2017.

99. *Governor Cuomo Announces Pay Equity Hearings*, NEW YORK ST. (June 23, 2017), https://www.governor.ny.gov/news/governor-cuomo-announces-pay-equity-hearings.

100. *Id.*

4. Task Force to Combat Worker Exploitation

On July 20, 2016, Governor Cuomo issued an executive order creating a permanent Joint Task Force on Employee Misclassification and Worker Exploitation ("Task Force").[101] The Task Force consists of multiple state agencies with criminal and/or civil authority that are directed to work in collaboration to undertake investigations and to otherwise enforce wage and hour protections.[102] The Task Force assumes the duties previously performed by temporary task forces addressing rampant labor violations in the nail salon industry and the issue of employee misclassification across all industries.[103]

5. Wage Theft

On January 8, 2017, Governor Cuomo proposed amendments to the Wage Theft Protection Act that would permit the State to enforce judgments against the top ten individual members of an out-of-state limited liability company.[104]

6. Union Dues

On May 5, 2017, Governor Cuomo signed a new law that will permit union members to fully deduct union dues for state income tax purposes.[105] The Governor's office estimated that more than 500,000 workers will receive an average reduction in state taxes of approximately seventy dollars.[106]

B. New York State Wage and Hour Cases

1. Home Health Aides

New York Department of Labor regulations require residential home health care attendants be paid the minimum wage for every hour they are "required to be available for work at a place prescribed by the

101. 9 N.Y.C.R.R. § 8.159(1) (2016).

102. *Id.*

103. *Id.*; *see* Levine, *supra* note 1, at 1066; Bruce Levine, *2014–15 Survey of New York Law: Labor & Employment*, 66 SYRACUSE L. REV. 1027, 1031 (2016).

104. *Governor Cuomo Announces 7th Proposal of the 2017 State of the State: Further Strengthening New York's Efforts to Crack Down on Wage Theft*, NEW YORK ST. (Jan. 8, 2017), https://www.governor.ny.gov/news/governor-cuomo-announces-7th-proposal-2017-state-state-further-strengthening-new-yorks-efforts.

105. Act of Apr. 10, 2017, 2015 McKinney's Sess. Laws of N.Y., ch. 59, at 253 (codified at N.Y. TAX LAW § 615(d)(5) (McKinney Supp. 2018)).

106. *Governor Cuomo Signs Legislation Allowing Full Union Dues to be Deducted from New York State Taxes*, NEW YORK ST. (May 5, 2017), https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-allowing-full-union-dues-be-deducted-new-york-state-taxes.

employer," unless they "live[] on the premises of the employer," in which case they need not be paid during "normal sleeping hours solely because [they are] required to be on call . . . or at any other time when he or she is free to leave the place of employment."[107] In *Tokhtaman v. Human Care, LLC*, the First Department affirmed the supreme court's denial of the defendant-employer's motion to dismiss the complaint by a residential care attendant ("attendant") alleging minimum wage and overtime violations, and the failure to pay wages under the New York State Labor Law (NYLL).[108] The employee alleged that she did not live at the at the employer's place of business, but that generally she worked 168 hours per week, which is the total number of hours in a week.[109] The employer asserted that based on the residential home care rule the employer was only entitled to receive thirteen hours of pay each day.[110] The thirteen hours was based on a Department of Labor (DOL) opinion letter stating that "live-in" employees must be paid not less than thirteen hours, excluding eight of the remaining hours as sleep-time, and three hours for meals.[111]

The First Department faulted the DOL opinion letter for failing to distinguish between residential and nonresidential workers.[112] Such a rule, the court found, bore no rational relation to the special rule that applied only to "live-in" residential workers.[113] Here, although the employee claimed she was entitled to be paid for every hour of the week, she also alleged that she did not reside at the employer's premises.[114] The First Department explained, "it cannot be said at this early stage, prior to any discovery, that she lived on her employers' premises as a matter of

107. 12 N.Y.C.R.R. 142-2.1(b)(1)–(2) (2017).

108. No. 151268/2016, 2016 N.Y. Slip Op. 31606(U), at 8 (Sup. Ct. N.Y. Cty. Aug. 22, 2016), *aff'd*, 149 A.D.3d 476, 476, 52 N.Y.S.3d 89, 90 (1st Dep't 2017).

109. *Tokhtaman*, 149 A.D.3d at 477, 52 N.Y.S.3d at 91.

110. *See id.* at 476, 52 N.Y.S.3d at 90.

111. *Id.* at 477, 52 N.Y.S.3d at 91 (citing N.Y. State Dep't of Labor, Opinion Letter on Live-In Companions at 4 (Mar 11, 2010) [hereinafter Live-In Companion Letter], https://www.labor.ny.gov/legal/counsel/pdf/Other/RO-09-0169%20-%20Live-In%20Companions.pdf)).

112. *Id.* at 477, 52 N.Y.S.3d at 91 (first citing Live-In Companion Letter, *supra* note 111; then citing 12 N.Y.C.R.R. 142-2.1(b); then citing Lai Chan v. Chinese-Am. Planning Council Home Attendant Program, Inc., 50 Misc. 3d 201, 213–16, 21 N.Y.S.3d 814, 827–28 (Sup. Ct. N.Y. Cty. Sept. 9, 2015); then citing Andryeyeva v. N.Y. Health Care, Inc., 45 Misc. 3d 820, 826–33, 994 N.Y.S.2d 278, 286–87 (Sup. Ct. Kings Cty. Sept. 16, 2014); and then citing Kodirov v. Cmty. Home Care Referral Serv., Inc., No. 6870/11, 2012 N.Y. Slip Op. 50808(U), at 2 (Sup. Ct. Kings Cty. May 8, 2012)).

113. *Id.* at 477, 52 N.Y.S.3d at 91 (first citing Visiting Nurse Serv. of N.Y. Home Care v. N.Y. State Dep't of Health, 5 N.Y.3d 499, 506, 840 N.E.2d 577, 580, 806 N.Y.S.2d 465, 468 (2005); and then citing Samiento v. World Yacht Inc., 10 N.Y.3d 70, 79, 883 N.E.2d 990, 995, 854 N.Y.S.2d 83, 88 (2008)).

114. *Tokhtaman*, 149 A.D.3d at 477, 52 N.Y.S.3d at 91.

law."[115]

C. Federal Court Decisions

1. Donning and Doffing

The FLSA requires that employees be compensated for the time they spend on the "principal activity or activities [they are] employed to perform," but does not require payment for time spent on "activities which are preliminary to or postliminary to said principal activity or activities."[116] The U.S. Supreme Court has held that certain time before or after work is compensable under the FLSA, if it is used to perform tasks that are an "integral and indispensable part of the principal activities" that employees were hired to perform.[117] Whether such tasks are "integral and indispensable" is determined on a case-by-case inquiry into the relationship between the disputed tasks and the principal activities of the employees who performed them.[118]

In *Perez v. City of New York*, a group of assistant urban park rangers employed by the New York City Parks Department ("employer") filed an FLSA lawsuit seeking overtime compensation for the time they spent donning and doffing their uniforms before and after work.[119] The park rangers appealed from the district court's award of summary judgment in favor of the employer.[120] The Second Circuit vacated that decision after finding disputed issues of fact concerning the material issue of whether the donning and doffing of uniforms was integral and indispensable.[121] The court found evidence that the uniforms were a vital part of the job because, *inter alia*, they conveyed the authority of the park rangers and made them recognizable members of the public in emergency situations.[122] Indeed, the court noted that park rangers could be disciplined if their uniform failed to comply with the employer's detailed

115. *Id.* The First Department also affirmed the supreme court's denial of the employer's motion to dismiss the employee's claim under New York's Public Health Law that the employer failed to pay her as required by various state contracts, even though those contracts were not identified in the complaint. *Id.* at 478, 52 N.Y.S.3d at 91–92 (first citing N.Y. PUB. HEALTH LAW § 3614-c (McKinney 2012 & Supp. 2018); and then citing Concerned Home Care Providers, Inc., v. New York, 108 A.D.3d 151, 153–54, 969 N.Y.S.2d 210, 212–13 (3d Dep't 2013)).

116. 29 U.S.C. § 254(a)(1)–(2) (2012).

117. Perez v. City of New York, 832 F.3d 120, 123 (2d Cir. 2016) (first quoting 29 U.S.C. § 254(a)(1); and then quoting IBP, Inc. v. Alvarez, 546 U.S. 21, 30, (2005)).

118. *Id.* at 127 (citing Gorman v. Consol. Edison Corp., 488 F.3d 586, 593 (2d Cir. 2007)).

119. *Id.* at 122.

120. *Id.* at 123.

121. *Id.*

122. *Perez*, 832 F.3d at 126.

written specifications for a proper uniform.[123]

In addition, the court found that uniform accessories that were not always required, such as bulletproof vests, were directly related to one of the principal duties of a park ranger, i.e., to maintain law and order in emergency situations.[124] The court distinguished such emergency equipment from safety equipment that is more readily available to the public, such as construction helmets, which are used to protect against ordinary course workplace hazards.[125]

Finally, the court rejected the employer's contentions that the time spent donning and doffing uniforms was di minimis, and therefore not compensable, and that language in the collective bargaining agreement supported their position that donning and doffing was noncompensable.[126] Both contentions were deemed to be disputed issues of material fact that could not be resolved on summary judgment.[127]

2. Exemption for "Amusement or Recreational Establishments"

The FLSA exempts seasonal "concessionaires" who work for "amusement or recreational establishments" from the statute's minimum wage and overtime requirements ("exemption").[128] Last year's *Survey* reported on the Second Circuit's decision in *Chen v. Major League Baseball Properties, Inc.*, where "establishment" as used in the exemption was construed to "mean a distinct, physical place of business as opposed to an integrated multiunit business or enterprise."[129]

Chen was the Second Circuit's first opportunity to construe the exemption, which was first added to the FLSA in 1961.[130] It had a second opportunity in *Hill v. Delaware North Companies Sportservice, Inc.*, where it was asked to interpret "amusement or recreational" establishments as used in the exemption.[131] The plaintiff-appellants ("employees") were employed by the defendant-appellee ("employer") to work at the concession stands at Camden Yards in Baltimore, where the Baltimore Orioles home games are played.[132] They filed an FLSA putative class action for overtime and appealed from the district court's

123. *Id.* at 125.
124. *Id.* at 126.
125. *Id.*
126. *Id.* at 127.
127. *Perez*, 832 F.3d at 127.
128. 29 U.S.C. § 213(a)(3) (2012).
129. Levine, *supra* note 1, at 1080 (citing 798 F.3d 72, 79 (2d Cir. 2015)).
130. Act of May 5, 1961, Pub. L. No. 87-30, 75 Stat. 71 (1961) (codified at 29 U.S.C. § 213 (a)).
131. 838 F.3d 281, 288 (2d Cir. 2016).
132. *Id.* at 286.

dismissal of their claims on summary judgment.[133]

The employees contended that the employer was not exempt because, standing alone and without consideration of the "host" of the customers who came to see the Orioles play, the employer was not an "amusement or recreational establishment."[134] The Second Circuit found the language of the statue to be ambiguous and sought guidance from the legislative history of the amendment.[135] The court found no basis to exclude seasonal concessionaires at a baseball stadium from the exemption.[136]

The exemption established two tests that can be used to establish seasonality under the exemption.[137] The district court relied on the first test, under which a seasonal employer is one that that operates less than seven months in a year.[138] The Second Circuit declined to resolve this dispute over the first test, and instead held that the employer was seasonal under the exemption's second test.[139] That test provides that an employer is seasonal if "during the preceding calendar year, its average receipts for any six months of such year were not more than 33 ⅓ per centum of its average receipts for the other six months of such year."[140] Such a determination could be and was readily ascertainable by reviewing the employer's receipts over the relevant time period.[141]

3. Special Test for Teaching Professionals Exemption

The FLSA minimum wage and overtime requirements do not apply to employees working in a bona fide professional capacity for an employer.[142] The ordinary test utilized by the DOL to determine whether an employee is an exempt professional includes a minimum salary requirement that an alleged professional must satisfy in order to be considered a professional employee.[143] The DOL regulations include a special test for "teaching professionals" employed as teachers at an "educational" institution, which focuses on job duties and does not

133. *Id.* at 287.

134. *Id.* at 289.

135. *Id.* at 288 (citing Chen v. Major League Baseball Props., Inc., 798 F.3d 72, 76–79 (2d Cir. 2015)).

136. *Hill*, 838 F.3d at 290 (citing 29 C.F.R. §§ 779.338, 779.381 (2017)).

137. 29 U.S.C. § 213(a)(3) (2012).

138. *Hill*, 838 F.3d at 293.

139. *Id.*

140. *Id.* at 293 (citing 29 U.S.C. § 213(a)(3)).

141. *Id.* at 294.

142. 29 U.S.C. § 213(a)(1).

143. Fernandez v. Zoni Language Ctrs., Inc., 858 F.3d 45, 49 (2d Cir. 2017) (citing Anani v. CVS RX Servs., 730 F.3d 146, 147 (2d Cir. 2013)).

include a minimum salary threshold.[144]

In *Fernandez v. Zoni Language Centers, Inc.*, the Second Circuit affirmed the district court's dismissal of a putative FLSA class action lawsuit brought by teachers employed by a state-licensed, for-profit provider of English language instruction.[145] The teachers did not contest that they were teaching professionals within the meaning of the FLSA, but instead contended that the employer was not an "educational establishment" covered by the special test for teaching professionals.[146]

The issue on appeal was whether the employer was an "other educational institution" within the meaning of the regulations.[147] An educational establishment is defined in the regulations as "an elementary or secondary school system, an institution of higher education or other educational institution."[148] The regulations include an eight-part test to assist in making this determination.[149] The Second Circuit looked to the plain language of the regulation and also various DOL opinion letters construing the term and concluded that "other educational institution" should be broadly construed to encompass entities that "impart knowledge" generally.[150] The court rejected the teachers' contention that the employer was not an educational institution because the students received no license or other accreditation when they complete their instruction.[151] No such requirement, the court observed, could be found in the statute or applicable regulations.[152]

The Second Circuit also rejected the employees' contentions that the district court failed to apply each of the eight factors in the DOL test, and that the district court erred by considering factors not included in the DOL test.[153] The Second Circuit explained:

We hold only that consideration of all eight factors identified by the district court is not compelled in every case by the plain language of the relevant regulations. Where, as here, there is no dispute that the plaintiffs are teachers employed by [the] defendants with a primary duty of teaching in order to impart [ ] knowledge, the pleadings themselves established that [the] plaintiffs engaged in this activity as . . . teacher[s]

144. 29 U.S.C. § 213(a)(1).

145. Fernandez v. Zoni Language Ctrs., Inc., No. 15-cv-6066, 2016 U.S. Dist. LEXIS 65310, at *2 (S.D.N.Y. 2016), *aff'd*, 858 F.3d at 55.

146. *Fernandez*, 858 F.3d at 47.

147. *Id.* at 50.

148. 29 C.F.R. § 541.204(b) (2017).

149. *Id.*

150. *Fernandez*, 858 F.3d at 50–53.

151. *Id.* at 53 (citing 29 C.F.R. § 541.303(b) (2017)).

152. *Id.* at 53 (citing 29 C.F.R. § 541.303(b)).

153. *Id.* at 54.

in an educational establishment, i.e., an establishment whose primary purpose was to convey knowledge. Other evidence, subject to judicial notice in this case, such as [the] defendants' state licensure and national accreditation, and state requirements for professionals teaching English as a second language, only reinforces that conclusion.[154]

IV. WORKPLACE DISCRIMINATION

A. Federal Law Cases

1. U.S. Supreme Court

Title VII of the Civil Rights Act of 1964 ("Title VII") authorizes the EEOC to issue investigative subpoenas to obtain information that "is relevant to the charge under investigation."[155] In *McLane Company Inc. v. EEOC*, the Supreme Court held that the "abuse of discretion" standard of review should be used to review challenges to investigative subpoenas, rather than the more rigorous de novo standard applied by the Ninth Circuit in the decision below.[156]

The Court applied a two-part test used in an earlier case to determine the appropriate standard of review.[157] The first part of the test examines the "history of appellate practice" with respect to the subject matter on appeal.[158] The Court observed that only the Ninth Circuit required de novo review of EEOC subpoenas.[159] All other circuits applied the less rigorous abuse of discretion standard when reviewing decisions to enforce or quash EEOC subpoenas, and also used this standard to review administrative subpoenas issued by other administrative agencies even before Title VII became law.[160]

The Court next considered whether the district courts were better positioned than the circuit courts to resolve disputes over administrative subpoenas.[161] The Court found that the district courts could more efficiently resolve "case specific" disputes into whether the EEOC was requesting relevant information and, if so, whether the request was overly

154. *Id.* (second and fourth alterations in original) (omission in original) (internal quotations omitted) (quoting 29 C.F.R. § 541.303(a)).

155. Title VII of the Civil Rights Act of 1967, 42 U.S.C. § 2000e et seq. (2012).

156. EEOC v. McLane Co. (*EEOC I*), 804 F.3d 1051, 1057 (9th Cir. 2015), *vac'd*, (*EEOC II*), 137 S. Ct. 1159, 1164 (2017).

157. *EEOC II*, 137 S. Ct. at 1166 (quoting Pierce v. Underwood, 487 U.S. 552, 558 (1988)).

158. *Id.* at 1166 (quoting *Pierce*, 487 U.S. at 558).

159. *Id.* at 1167 (citing *EEOC I*, 804 F.3d at 1056, n.3).

160. *Id.* (citing EEOC v. Kronos, Inc., 620 F.3d 287, 295 (3d Cir. 2010)).

161. *Id.*

burdensome.[162] The Court also observed that the district courts had the experience and expertise to resolve these decisions without strict de novo oversight on appeal.[163]

2. Second Circuit Decisions

A. "Cat's Paw" Liability under Title VII

In *Vasquez v. Express Ambulance Service, Inc.*, the Second Circuit held that the "cat's paw theory" of liability could be used to find an employer liable for unlawful retaliation in a Title VII case.[164] The cat's paw theory, a term first coined by retired Justice Posner of the Seventh Circuit, recognizes that an employer can be liable for an employment decision if the employer negligently relies on information received from an employee who was has provided such information with discriminatory intent.[165]

The plaintiff-appellant in *Vasquez* was fired on the day after she reported to her employer that she had received unwelcome sexual advances from a coworker.[166] That coworker learned of the plaintiff-appellant's complaint and, in response, created false information that he was involved in a consensual relationship with the employee and presented that information to the employer.[167] The employer fired the plaintiff-appellant without permitting her an opportunity to challenge the false information provided by the coworker.[168]

Plaintiff-appellant commenced an action under Title VII alleging that she was unlawfully terminated in retaliation for her claim of

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162. *EEOC II*, 137 S. Ct. at 1167 (citing Illinois v. Gates, 462 U.S. 213, 232 (1983)).

163. *Id.* at 1168 (citing Buford v. United States, 532 U.S. 59, 66 (2001)). Justice Ginsburg wrote a brief, separate dissenting opinion, stating that she would have affirmed the Ninth Circuit's decision to conduct "de novo" review in this particular case. *Id.* at 1170 (Ginsburg, J., dissenting). Justice Ginsburg found that the principal dispute over the subpoena was over whether the EEOC was entitled to the personal information of an employer's employees ("pedigree information"). *Id.* She contended that this was a dispute over a question of law that should be subjected to more rigorous appellate review than a dispute involving case-specific facts and circumstances. *Id.*

164. 835 F.3d 267, 272–73 (2d Cir. 2016). Justice Posner adopted the term from an Aesop Fable, where a cat is tricked by a monkey into grabbing chestnuts from a fire, however, the monkey eats all the chestnuts leaving the cat with burnt paws and no chestnuts. *Id.* at 271–72 (citing Staub v. Proctor Hosp., 562 U.S. 411, 415 n.1 (2011)).

165. *Id.* at 272 (citing Cook v. IPC Int'l Corp., 673 F.3d 625, 628 (7th Cir. 2012)); Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html.

166. *Vasquez*, 835 F.3d at 270–71.

167. *Id.* at 270.

168. *Id.* at 271.

harassment.[169] The district court dismissed the complaint based on the failure of the employee to allege that the employer acted with discriminatory intent.[170] The court rejected plaintiff-appellant's contention that her allegation concerning the discriminatory intent of her coworker could not be used to establish that the employer's decision was motivated by discrimination.[171]

The Second Circuit reversed the district court based on traditional principals of agency under the common law, and noting that cat's paw liability had been used to hold an employer liable for the hostile acts of a supervisor in Title VII hostile environment cases.[172] Although the coworker with discriminatory intent in this case was nonsupervisory, the Second Circuit held his discriminatory intent could be used to hold the employer liable, if it negligently relied on information provided by a nonsupervisor who played a "meaningful" role in the decision being challenged.[173]

B. Gender Identification and Sexual Orientation under Title VII

The Second Circuit does not recognize sexual orientation as a protected class under Title VII, or as a component of the class of workers covered by the statue's prohibition of sex discrimination.[174] The court distinguishes sexual orientation from actionable sex discrimination prompted by an employee's failure to conform to certain gender "stereotypes."[175]

The Second Circuit signaled in two separate decisions made during the *Survey* year that it was prepared to revisit its exclusion of sexual orientation from Title VII protection.[176] In both cases, three-judge panels declined to address the issue because to overturn the current position required a ruling by a full complement of Second Circuit justices sitting *en banc*.[177] In *Anonymous v. Omnicorn Business Group, Inc.*, the plaintiff-appellant ("employee") was an HIV-positive, openly gay man,

169. *Id.*

170. *Id.* (citing FED. R. CIV. P. 12(b)(6)).

171. *Vasquez*, 835 F.3d at 271.

172. *Id.* at 273 (first citing 42 U.S.C. § 2000e (2012); and then citing Burlington Indus. v. Ellerth, 542 U.S. 742, 754 (1998)).

173. *Id.* at 275.

174. *See, e.g.*, Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000) (citing 42 U.S.C. § 2000e(k)).

175. *Id.* at 37 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989)).

176. *See* Anonymous v. Omnicom Grp., Inc., 852 F.3d 195, 199–200 (2d Cir. 2017) (citing United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004)); Zarda v. Altitude Express, 855 F.3d 76, 82 (2d Cir. 2017).

177. *Anonymous*, 852 F.3d at 199 (citing *Wilkerson*, 361 F.3d at 732); *Zarda*, 855 F.3d at 82 (citing *Wilkerson*, 361 F.3d at 732).

who sued his employer under Title VII based on an ongoing pattern of harassment from his immediate supervisor.[178] The employee claimed that the supervisor had engaged in a pattern repeatedly referring to his "effeminacy and sexual orientation."[179] The employee appealed from the district court's dismissal of his complaint.[180]

The Second Circuit three-judge panel explained that it could not overturn existing circuit precedent unless the court was sitting *en banc*, and that it was bound to affirm the dismissal of the employee's Title VII claims based on sexual orientation.[181] The Second Circuit distinguished nonactionable Title VII claims based on sexual orientation from actionable claims based on gender stereotyping, and held that the district court erred in failing to consider whether the complaint properly stated a gender stereotyping claim.[182] The court acknowledged the confusion caused when attempting to distinguish sexual orientation and gender stereotyping.[183] Nevertheless, it found that that Title VII should be construed to protect any person, gay or straight, who is discriminated against because of stereotypical presumptions about alleged male or female traits.[184] The alleged pattern of harassment in this case was held by the court to sufficiently state a Title VII sex discrimination claim based on gender stereotyping.[185]

Shortly after deciding *Omnicom*, the Second Circuit stated that it was prepared to reconsider whether Title VII protected against discrimination based on sexual orientation.[186] In *Zarda v. Altitude Express Inc.*, the court granted a motion for *en banc* reconsideration of this question.[187] The three-judge panel, as in *Omnicom*, explained that it lacked authority to overturn existing circuit precedent holding that such claims could not be made under Title VII.[188]

C. Reasonable Accommodation and Related Evidentiary Issues under

178. *Anonymous*, 852 F.3d at 197–98 (citing 42 U.S.C. § 2000e).
179. *Id.* at 198.
180. *Id.*
181. *Id.* at 199 (citing *Wilkerson*, 361 F.3d at 732).
182. *Id.* at 201 (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).
183. *Anonymous*, 852 F.3d at 200.
184. *Id.* at 200–01.
185. *Id.* at 201.
186. Zarda v. Altitude Express, Inc., No. 15-3775, 2017 U.S. App. LEXIS 13127, at *6 (2d Cir. May 25, 2017).
187. *Id.*
188. *Anonymous*, 852 F.3d at 200 (citing United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004)). The Second Circuit mandated the district court reopen the case, however, the district court has issued a stay in the matter pending the Second Circuit's resolution of the *en banc* proceeding in *Zarda*. Christiansen v. Omnicom Grp. Inc., No. 15 Civ. 3440, 2017 U.S. Dist. LEXIS 112627, at *1 (S.D.N.Y. July 18, 2017).

the ADA

The Americans with Disabilities Act (ADA) protects employees who allege disability discrimination if, with or without reasonable accommodation, they are qualified to perform the essential elements of the position they seek.[189] In *Stevens v. Rite Aid Corp.*, the Second Circuit affirmed the district court holding that the plaintiff-appellant employee failed to allege facts that could be used to establish that he could perform the job of pharmacist with a reasonable accommodation.[190] The plaintiff-appellant was a licensed pharmacist who suffered from trypanophobia, which caused him to have a fear of needles that prevented him from administering injections to customers.[191] The plaintiff-appellant was terminated and filed an ADA lawsuit based on the employer's alleged failure to accommodate him.[192] He appealed from the district court's dismissal of this claim.[193]

The Second Circuit, in affirming the decision of the district court, found that the administration of needles was an essential function of the job performed by pharmacists employed by the employer.[194] It also found that the pharmacist failed to present any evidence that he could perform this essential function, with or without a reasonable accommodation.[195] The court rejected the pharmacist's contention that the employer should have provided him with therapy, because the duty to reasonably accommodate did not obligate an employer to pay for therapy, particularly where, as in this case, the employee fails to present any evidence that therapy would be effective.[196]

The Second Circuit also rejected the pharmacist's contention that the employer could have hired a nurse to administer injections.[197] The court explained that the duty to reasonably accommodate does not require an employer to hire a second employee to perform the essential tasks required of an incumbent disabled employee.[198]

D. Proof of Pretext

In *Walsh v. New York City Housing Authority*, the Second Circuit

189. 42 U.S.C. § 12112(a) (2012).
190. 851 F.3d 224, 230 (2d Cir. 2017).
191. *Id.* at 226.
192. *Id.* (citing Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq.)
193. *Id.* at 228.
194. *Id.* at 229.
195. *Stevens*, 851 F.3d at 231.
196. *Id.* at 230 (citing Emerllahu v. Pactiv, LLC, No. 11-cv-6197, 2013 U.S. Dist. LEXIS 155380, at *9 n.2 (W.D.N.Y. Oct. 30, 2013)).
197. *Id.* at 231.
198. *Id.* (citing Shannon v. N.Y.C. Transit Auth., 332 F.3d 95, 100 (2d Cir. 2003)).

addressed the level of proof required of a plaintiff to prove that an employer's asserted nondiscriminatory reasons for a challenged employment decision were pretext for the real discriminatory motives underlying the decision.[199] The district court found that the employer met its burden of demonstrating that it had legitimate, nondiscriminatory reasons for its decision to not hire the plaintiff-appellant as a bricklayer.[200] It also found that the plaintiff-appellant failed to present sufficient evidence to meet her burden of showing the proffered reasons were a pretext for the employer's refusal to hire the employee on account of sex discrimination.[201]

The Second Circuit found that the district court failed to consider the evidence presented as a whole by the employee, and instead sought to determine whether each separate piece of evidence could by itself demonstrate that there was a genuine factual dispute over whether the employer's justification was pretext for discrimination.[202] Such evidence should have been considered in its entirety to determine whether there were disputed issues of fact with respect to an employee's burden to show pretext.[203] Upon its own review of the record, the Second Circuit determined that the record in its entirety demonstrated the existence of material factual disputes over whether the employer was motivated at least in part by sex discrimination.[204] Such disputed facts included the allegation that the employer had never before hired any female bricklayers.[205] The court also found evidence to support the employee's claim that she was better qualified than male employees who had been hired to work as bricklayers, and that the interview she was given was perfunctory and not given for the purpose of genuinely considering the employee for hire.[206]

Finally, the court held that the district court also erred by excluding evidence presented by the plaintiff-appellant that she was told by a human resources representative that the reason she was not hired was because she was not strong enough to do the job.[207] Such evidence, the court explained, was not hearsay under the "party-opponent" exception to the

199. 828 F.3d 70, 76 (2d Cir. 2016) (quoting Aulicino v. N.Y.C. Dep't of Homeless Servs., 580 F.3d 73, 80 (2d Cir. 2009)).

200. Walsh v. N.Y.C. Housing Auth., No. 11 Civ. 6342, 2013 U.S. Dist. LEXIS 178514, at *26 (S.D.N.Y. Dec. 16, 2013).

201. *Id.* at *30.

202. *Walsh*, 828 F.3d at 76.

203. *Id.*

204. *Id.* at 80.

205. *Id.* at 77.

206. *Id.* at 78–79.

207. *Walsh*, 828 F.3d at 79 (citing United States v. Gupta, 747 F.3d 111, 128 (2d Cir. 2014)).

hearsay rule, because of the human resources director's sufficient connection to the hiring process.[208]

E. Admissibility of Reinstatement Offer

In *Sheng v. M & T Bank Corporation*, the Second Circuit reaffirmed the test it announced in *Pierce v. F.R. Tripler & Company*,[209] to determine whether an employer's reinstatement offer can be used as evidence in a subsequent case alleging discrimination, or whether such an offer constitutes an inadmissible settlement offer under Rule 408 of the Federal Rules of Evidence.[210] In *Pierce*, the court held that "where a party is represented by counsel, threatens litigation and has initiated the first administrative steps in that litigation, any offer made between attorneys will be presumed to be an offer within the scope of Rule 408."[211] That presumption may only be overcome with convincing evidence "that the offer was not an attempt to compromise the claim.'"[212]

In *Sheng*, the plaintiff-appellant ("employee") appealed from a jury verdict in favor of the employer, and the resulting dismissal of her remaining claims alleging pregnancy discrimination stemming from the employer's denial of her request for permission to work remotely while she was pregnant.[213] The district court denied the employee's pre-trial motion in limine to preclude the employer's use of a reinstatement offer made by the employer during discussions between the attorneys for the respective parties.[214] Those discussions followed the employer's receipt of a letter from the employee's attorney indicating that the employee was prepared to commence a lawsuit.[215] The employer's attorney, in a statement he gave to the EEOC, appeared to concede that the reinstatement offer was made, at least in part, to avoid the time and expense of litigation.[216]

The employee rejected the offer and filed a lawsuit alleging pregnancy discrimination in violation of, inter alia, the ADA, and the New York State Human Rights Law (NYSHRL).[217] The district court

208. *Id.* (citing FED. R. EVID. 801(d)(2)(D)).

209. 955 F.2d 820, 827 (2d Cir. 1992) (citing FED. R. EVID. 408).

210. (*Sheng II*), 848 F.3d 78, 85 (2d Cir. 2017) (citing Sheng v. M&T Bank Corp. (*Sheng I*), No. 12-cv-1103, 2014 U.S. Dist. LEXIS 154240, at *9 (W.D.N.Y. Oct. 30, 2014)).

211. *Pierce*, 955 F.2d at 827.

212. *Id.*

213. *Sheng II*, 848 F.3d at 81. The Second Circuit held that the employee's notice of appeal was defective and deprived it of jurisdiction to consider her appeal of the district court's dismissal of her failure-to-accommodate claim under the NYSHRL. *Id.* at 87–88.

214. *Sheng I*, 2014 U.S. Dist. LEXIS 154240, at *12.

215. *Id.* at *5–*6.

216. *See id.* at *5.

217. *Sheng II*, 848 F.3d at 83 (first citing 42 U.S.C. § 2000e-2(a)(1) (2012); and then citing

then denied the employee's in limine motion to exclude the offer after determining that: (1) the offer was unconditional and did not require the employee to issue a release to the employer in exchange; and (2) the offer was relevant could be considered by the jury in deliberations the employer's defense that the employee failed to satisfy her obligation to mitigate damages.[218] The district court also suggested that the presumption announced in *Pierce* had been superseded by subsequent case law.[219] In addition, the district court, acting sua sponte, disqualified both attorneys under the "witness-advocate" rule, after finding that they were the only witnesses present when the reinstatement offer was made.[220]

The Second Circuit held that the district court abused its discretion by admitting the reinstatement offer as evidence for the jury to consider.[221] The court was persuaded by, inter alia, the employer's attorney's concession to the EEOC that the settlement offer was made, at least in part, to avoid litigation.[222] The court rejected the district court's disregard of the presumption announced in *Pierce*, and observed that at most, the cases relied upon by the district court simply restated the truism that unconditional reinstatement offers are not inadmissible under Rule 408.[223]

The employer argued that the offer was unconditional because the offer was unaccompanied by an express demand for a release from the employee as consideration.[224] The court held that the *Pierce* presumption could not be overcome on this basis alone:

[Pierce] simply recognized the self-evident inference that, even when a lawyer informs counsel for a (potential) plaintiff that the (potential) defendant agrees to all relief believed to be demanded, some sort of release, at the very least, is expected in return. This expectation, which is almost universal, absent express reservations to the contrary, renders the offer conditional and subject to exclusion under Rule 408.[225]

The court next determined that the admission of the reinstatement order could not be excused as harmless error.[226] The court observed that

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N.Y EXEC. LAW § 296(a) (McKinney 2010)).

218. *Sheng I*, 2014 U.S. Dist. LEXIS 154240, at *10.

219. *Id.* at *9 (citing Lightfoot v. Union Carbide Corp., 110 F.3d 898, 909 (2d Cir. 1997)).

220. *Id.* at *11–*12.

221. *Sheng II*, 848 F.3d at 84.

222. *Id.* at 85.

223. *See id.*

224. *Id.* at 83 (citing FED. R. EVID. 408).

225. *Id.* at 85 (citing FED. R. EVID. 408).

226. *Sheng II*, 848 F.3d at 85 (citing United States v. Mercado, 573 F.3d 138, 141 (2d Cir. 2009)).

the employer made liberal use of the reinstatement offer at trial and noted that the offer was focused on during both the opening and closing statements of its attorney, such that it could "have substantially affected the jury's verdict."[227]

F. Judicial Estoppel

The judicial estoppel doctrine "prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by that party in a prior legal proceeding."[228] The doctrine applies to prior contradictory statements made by a plaintiff to an administrative agency.[229] The party asserting judicial estoppel "must show that (1) the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding and (2) that position was adopted by the first tribunal in some manner, such as by rendering a favorable judgment."[230]

In *Kovaco v. Rockbestos-Surprenant Cable Corporation*, the Second Circuit held that the plaintiff-appellant ("employee") was judicially estopped from asserting that he was qualified for the position from which he had been terminated.[231] The employee had previously represented in his application to the Social Security Administration (SSA) that he was totally disabled and unable to work.[232] Thereafter, the employee commenced an action claiming that he was terminated on account of national origin, age, and disability discrimination in violation of Title VII, the Age Discrimination in Employment Act (ADEA), the ADA, and Connecticut state law.[233] He appealed from the district court's award of summary judgment dismissing his claims.[234]

The district court held that plaintiff was estopped from asserting that he was qualified for the job he was terminated from, which was an essential element of his claims under Title VII, the ADEA and the

227. *Id.* at 86. The court also vacated the *sua sponte* disqualification order. *Id.*

228. Kovaco v. Rockbestos-Surprenant Cable Corp. (*Kovaco II*), 834 F.3d 128, 137 (2d Cir. 2016) (quoting Robinson v. Concentra Health Servs., Inc., 781 F.3d 42, 45 (2d Cir. 2015)).

229. *Id.* at 137.

230. *Id.* (quoting *Robinson*, 781 F.3d at 45).

231. *Id.* at 140.

232. *Id.* at 133.

233. Kovaco v. Rockbestos-Surprenant Cable Corp. (*Kovaco I*), 979 F. Supp. 2d 252, 255 (D. Conn. 2013) (first citing Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (2012); then citing 29 U.S.C. §§ 621–34 (2012); then citing Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. (2012); then citing Family Medical Leave Act, 29 U.S.C. § 2601 et seq. (2012); and then citing CONN. GEN. STAT. §§ 46(a)–60(a)(1), (a)(4) (2017)).

234. *Kovaco II*, 834 F.3d at 133.

ADA.[235] The district court found estoppel based on the employee's SSA disability application, as well as on SSA findings and conclusions indicating that the employee could work if he were accommodated with weight and movement restrictions.[236]

The Second Circuit affirmed the district court's determination that the employee was estopped by his SSA application from asserting that he was qualified to perform his job.[237] However, it also held that the district court erred in finding that the SSA's findings and conclusions could be used to estop the plaintiff from asserting that he was qualified.[238] The court observed that the employee's claim of total disability in his SSA application was inconsistent with SSA's finding that the employee could work subject to certain weight and movement limitations.[239] The court emphasized that the employee's inability to rely on the SSA's findings would not prevent him from using other evidence to establish that he was qualified to perform his job with reasonable accommodation.[240]

G. Mandatory Arbitration

In *Lawrence v. Sol G. Atlas Realty Co.*, the Second Circuit held that the plaintiff-employee was not required by the applicable collective bargaining agreement to arbitrate his state and federal claims of discrimination.[241] The employee commenced an action against his employer for national origin and race discrimination in violation of Title VII and the NYHRL and retaliation in violation of Title VII, the NYHRL, the FLSA, and § 1981 of the Civil Rights Act.[242] He appealed from the district court's dismissal of his claims, based on its determination that the employee was required by the collective bargaining agreement to arbitrate his claims.[243]

The Second Circuit vacated the district court's decision after finding that the collective bargaining agreement contained no "clear and unmistakable waiver" of the employee's right to pursue statutory remedies in court.[244] The court rejected the employer's contention that

235. *Kovaco I*, 979 F. Supp. 2d at 259 (citing Nieman v. Syracuse Univ. Office of Human Res, No. 5:12-CV-732, 2013 U.S. Dist. LEXIS 78811, at *17 (N.D.N.Y. June 5, 2013)).

236. *Id.*

237. *Kovaco II*, 834 F.3d at 142.

238. *Id.* at 140.

239. *Id.* at 140–41.

240. *Id.* at 139.

241. 841 F.3d 81, 82 (2d Cir. 2016).

242. *Id.* (first citing 42 U.S.C. § 1981 (2012); then citing Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. (2012); and then citing N.Y. EXEC. LAW § 290 et seq. (McKinney 2010)).

243. *Id.* at 83.

244. *Id.* at 85.

the agreement's general prohibition against discrimination did not clearly and unmistakably waive the employee's right to seek a judicial remedy.[245] A contract dispute, the court explained, was not the same as a statutory dispute, "even if the issues involved are coextensive."[246]

3. State Law Cases

A. Certified Questions from the Second Circuit

Second Circuit Local Rule 27.2[247] and New York Court of Appeals Rule 500.27[248] combine to establish a process for referring unresolved state law questions to the New York Court of Appeals. Rule 500.27(a) permits the Second Circuit and other appellate courts to certify (submit) unresolved questions of state law to the Court of Appeals' consideration.[249] The Court of Appeals may then choose to accept or reject a given certification request.[250]

In *Griffin v. Sirva Inc.*, the Second Circuit certified three questions concerning § 296(15) of the NYSHRL, which protects against discrimination based on the criminal record of an applicant or employee.[251] Section 296(15) specifically prohibits the denial of employment to an applicant with a criminal conviction "when such denial is in violation of the provisions of article twenty-three-A of the correction law."[252]

In *Griffin*, the plaintiffs were two former employees of a local moving company who were terminated after the local company entered

245. *Id.* at 85–86.

246. *Lawrence*, 841 F.3d at 85 (citing Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 76 (1998)).

247. 2D CIR. R. 27.2(a). This rule states: "If state law permits, the court may certify a question of state law to that state's highest court. When the court certifies a question, the court retains jurisdiction pending the state court's response to the certified question." *Id.*

248. 22 N.Y.C.R.R. § 500.27(a) (2017). This rule states:

Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists, the court may certify the dispositive questions of law to the Court of Appeals.

22 N.Y.C.R.R. § 500.27(d) states: "The court, on its own motion, shall examine the merits presented by the certified question, to determine, first, whether to accept the certification, and, second, the review procedure to be followed in determining the merits."

249. 22 N.Y.C.R.R. § 500.27(a).

250. 22 N.Y.C.R.R. § 500.27(d).

251. (*Griffin I*), 835 F.3d 283, 285 (2d Cir. 2016) (citing N.Y. EXEC. LAW § 296(15) (McKinney 2010 & Supp. 2018)). Section 296(15) of the HRL makes it unlawful to "deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses . . . ." EXEC. § 296(15).

252. EXEC. § 296(15).

into an agreement to perform work on behalf of a nationwide moving company.[253] That agreement led to the discovery that both employees had been convicted of child sex-related offenses which, under the rules of the nationwide company, prevented the employees from working for the nationwide company (which had become most of the employer's workload).[254] Both employees were terminated and, thereafter, sued both the local and national moving companies, as well as the parent of the national company, for violations of the FLSA and § 296(15) of the NYHRL.[255]

The district court dismissed plaintiffs' claims against the nationwide company and its parent because it determined that they were not the employer of the employees and could not be held liable under § 296(15).[256] On appeal, the Second Circuit determined that it was unclear whether liability could extend to these defendants and certified the following three questions to the Court of Appeals:

1.Whether § 296(15) limits liability for discrimination based on a criminal conviction by one's employer;

2.Whether, if liability is limited to one's employer, the definition of "employer" extends beyond one's "direct employer" to include those entities that exercise a significant level of control over the discrimination policies of the "direct employer"; and

3.Whether liability could be extended to an out-of-state company that requires its New York "agent" to discriminate on the basis of a criminal conviction.[257]

The New York Court of Appeals accepted certification of these questions and issued a decision in response to each of them.[258] First, the Court of Appeals held that only an "employer" can be liable for discrimination under § 296(15).[259] The Court of Appeals relied on the section's express reference to Article 23-A of New York's Corrections Law, and the fact that Article 23-A limited liability to the employers of an aggrieved person.[260]

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253. *Griffin I*, 835 F.3d at 284–85.

254. Griffin v. Sirva, Inc. (*Griffin II*), No. 11-CV-1844, 2014 U.S. Dist. LEXIS 73306, at *16 (E.D.N.Y. May 29, 2014).

255. *Griffin I*, 835 F.3d at 285 (first citing EXEC. § 296(15); then citing 42 U.S.C. § 1981 (2012); and then citing Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. (2012)).

256. *Griffin II*, 2014 U.S. Dist. LEXIS 73306, at *37.

257. *Griffin I*, 835 F.3d at 294 (first citing 22 N.Y.C.R.R. § 500.27 (2017); then citing 2D CIR. R. 27.2(a); and then citing EXEC. § 296(6), (15)).

258. Griffin v. Sirva, Inc. (*Griffin III*), 29 N.Y.3d 174, 188, 76 N.E.3d 1063, 1070, 54 N.Y.S.3d 360, 367 (2017).

259. *Id.* at 181, 76 N.E.3d at 1065, 54 N.Y.S.3d at 362 (first citing EXEC. § 296(15); and then citing *Griffin I*, 835 F.3d at 294).

260. *Id.* at 182, 76 N.E.3d at 1066, 54 N.Y.S.3d at 363 (citing N.Y. CORRECT. LAW § 750

The Court of Appeals next determined that the definition of "employer" under § 296(15) was ambiguous and turned to common law principles to aid in its decision.[261] The Court noted that the most important consideration under New York common law was the extent to which an alleged employer has the power to "'order and control' the employee in his or her performance of work."[262]

Finally, the Court of Appeals addressed whether and under what circumstances an out-of-state entity was an "employer" within the meaning of § 296 under the appropriate circumstances.[263] The Court referred to § 296(6) of the NYHRL, pursuant to which it is unlawful for "any person" to aid or abet a violation of the NYHRL.[264] Such language expressly extended "liability to persons and entities beyond joint employers," and the Court of Appeals held that such persons and entities could include out-of-state entities that influence a worker's ability to obtain protections they would otherwise receive under § 296(6).[265]

The Second Circuit certified questions in two additional discrimination cases during the *Survey* year.[266] Both cases related to the scope of protection available under the NYCHRL.[267] In *Chauca v. Abraham*, the Second Circuit certified a question concerning the appropriate standard for awarding punitive damages under the NYCHRL.[268] The plaintiff-appellant ("employee") obtained a favorable jury verdict on her claims of pregnancy discrimination under the NYSHRL, NYCHRL, and Title VII.[269] She then appealed from the district court's denial of her request for a more lenient jury instruction

(McKinney 2014)). The Court of Appeals also found that such a limitation was consistent with the legislative history of Article 23-A. *Id.* at 184, 76 N.E.3d at 1067, 54 N.Y.S.3d at 364 (citing EXEC. § 296(15)).

261. *Id.* at 186, 76 N.E.3d at 1069, 54 N.Y.S.3d at 366.

262. *Griffin III*, 29 N.Y.3d at 186, 76 N.E.3d at 1069, 54 N.Y.S.3d at 366 (citing State Div. of Human Rights v. GTE Corp., 109 A.D.2d 1082, 1083, 487 N.Y.S.2d 234, 235 (4th Dep't 1985)). The Court observed that common law principles were relied upon to determine "employer" status under a similarly ambiguous definition of the term under Title VII of the federal Civil Rights Act. *Id.*

263. *Id.* at 187, 76 N.E.3d at 1069, 54 N.Y.S.3d at 366 (citing *Griffin I*, 835 F.3d at 284).

264. *Id.* at 187, 76 N.E.3d at 1069–70, 54 N.Y.S.3d at 366–67.

265. *Id.* at 187–88, 76 N.E.3d at 1070, 54 N.Y.S.3d at 367. Judge Rivera wrote separately in dissent that entities other than employers can be liable under § 296(16). *Id.* at 198, 76 N.E.3d at 1078, 54 N.Y.S.3d at 375 (Rivera, J., dissenting).

266. Chauca v. Abraham, 841 F.3d 86, 87 (2d Cir. 2016); Makinen v. City of New York (*Makinen I*), 857 F.3d 491, 493 (2d Cir. 2017).

267. *Chauca*, 841 F.3d at 87; *Makinen I*, 857 F.3d at 492 (citing N.Y.C. ADMIN. CODE § 8-102(16)(c) (2018)).

268. *Chauca*, 841 F.3d at 87.

269. Chauca v. Park Mgmt. Sys., LLC, No. 10-CV-05304, 2016 U.S. Dist. LEXIS 30526, at *1 (E.D.N.Y. Mar. 8, 2016).

concerning her entitlement to punitive damages under the NYCHRL.[270] The district court instructed the jury to use the test for punitive damages under Title VII to evaluate the employee's punitive damage claim under the NYCHRL.[271] The punitive damages standard in Title VII cases looks at whether the employer engaged in intentional discrimination and has done so maliciously or with reckless indifference to protected rights.[272]

The Second Circuit certified the question to the Court of Appeals after finding that it was unable to determine the appropriate standard on the basis of the language of the NYCHRL.[273] The Court of Appeals accepted certification and determined that the district court should have instructed the jury to use a more lenient standard to determine punitive damage awards under the NYCHRL.[274] The Court of Appeals referred first to the Restoration Act of 2005 enacted by the City Council, which states that the NYCHRL should be broadly construed, such that analogous state and federal provisions should be seen as providing the floor of the protection provided under the NYCHRL.[275] The Court looked to the common law and ultimately settled on the test it used in *Home Insurance Co. v. American Home Products Corp*.[276] Under that standard, punitive damages may be awarded where the wrongdoer's actions amount to "willful or wanton negligence, or recklessness, or is a 'conscious disregard of the rights of others or conduct so reckless as to amount to such regard.'"[277]

In *Makinen v. City of New Yo*rk, the Second Circuit certified the question of whether the NYCHRL protected perceived untreated alcoholics from discrimination.[278] Such protection is available under both the ADA and NYCHRL.[279] The Second Circuit noted that the NYCHRL narrowly defines alcoholism to be a disability only when the aggrieved person: "(1) [I]s recovering or has recovered and (2) currently is free of

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270. *Chauca*, 841 F.3d at 89.

271. *Id.* at 89.

272. *Id.* at 90–91 (citing Kolstad v. Am. Dental Assoc., 527 U.S. 526, 529–30 (1999)).

273. *Id.* at 93.

274. Chauca v. Abraham, 30 N.Y.3d 325, 328–29, 89 N.E.3d 475, 477, 67 N.Y.S.3d 85, 87 (2017) (citing Home Ins. Co. v. Am. Home Prod. Corp., 75 N.Y.2d 196, 203–04, 550 N.E.2d 930, 934, 551 N.Y.S.2d 481, 485 (1990)).

275. *Id.* at 332, 89 N.E.3d at 480, 67 N.Y.S.3d at 90 (citing N.Y.C. ADMIN. CODE § 8-130 (2018)).

276. *Id.* at 334, 89 N.E.3d at 481, 67 N.Y.S.3d at 91 (citing *Home Ins. Co.*, 75 N.Y.2d at 203–04, 550 N.E.2d at 934, 67 N.Y.S.3d at 485).

277. *Id.* at 329, 89 N.E.3d at 481, 67 N.Y.S.3d at 91 (quoting *Home Ins. Co.*, 75 N.Y.2d at 203–04, 550 N.E.3d at 934, 67 N.Y.S.3d at 485).

278. *Makinen I*, 857 F.3d 491, 493 (2d Cir. 2017).

279. *Id.* at 495 (citing McEniry v. Landi, 84 N.Y.2d 554, 558–59, 644 N.E.2d 1019, 1021, 620 N.Y.S.2d 328, 330 (1994)).

such abuse."[280] On its face, such language would seem to exclude those wrongly perceived to be alcoholics from protection under the NYCHRL. However, the Second Circuit noted that this narrow definition of alcoholism had been included in the statute before the adoption of the Restoration Act of 2005, in which the City Council expressed its intention that the NYCHRL should be broadly construed and not confined by precedent under analogous state and federal discrimination laws.[281] Accordingly, it certified this question to the Court of Appeals.[282]

The Court of Appeals accepted certification and issued a decision shortly after the end of the *Survey* year.[283] The Court of Appeals held that untreated alcoholics were not protected under the NYCHRL, despite the fact that such protection was available under state and federal law.[284] The Court acknowledged the tension between the statutory language at issue and the superseding adoption of the Restoration Act, but determined that ordinary rules of statutory construction required that it apply unambiguous language as written:

It is clear that the NYCHRL only treats recovering or recovered alcoholics as having a disability under the statute, while the NYSHRL and the ADA cover alcoholics presently abusing alcohol, as well as recovering and recovered alcoholics. While the plain mandate of the Restoration Act is for it to be read broadly, and it does refer to the state and federal human rights law as floors below which the NYCHRL should not fall, this is a rare case where through its express language, the City Council has mandated narrower coverage than the NYSHRL or the ADA.[285]

Judge Garcia, joined by Judge Stein, wrote in dissent that none of the protections under the NYCHRL should be less than what is provided under analogous state and federal law.[286] Judge Garcia acknowledged the "plausible argument" that the plain language of the statute was consistent with the majority's decision, but he still concluded that his position was

280. *Id.* at 494 (citing N.Y.C. ADMIN. CODE § 8-102(16)(c) (2018)).

281. *Id.* at 494–95 (citing Local Civil Rights Restoration Act of 2005, N.Y.C. LOCAL LAW NO. 85, at § 1 (Oct. 3, 2005)).

282. *Id.* at 497.

283. Makinen v. City of New York (*Makinen II*), 30 N.Y.3d 81, 83, 86 N.E.3d 514, 516, 64 N.Y.S.3d 622, 624 (2017) (citing *Makinen I*, 857 F.3d at 493).

284. *Id.* at 82, 86 N.E.3d at 516, 64 N.Y.S.3d at 624.

285. *Id.* at 88–89, 86 N.E.3d at 520, 64 N.Y.S.3d at 628 (first citing N.Y.C. ADMIN. CODE Title 8 (2018); then citing N.Y.C. LOCAL LAW No. 85; then citing N.Y. EXEC. LAW § 292 (McKinney 2010 & Supp. 2018); and then citing Americans with Disabilities Act, 42 U.S.C. § 12102 et seq. (2012)).

286. *Id.* at 94, 86 N.E.2d at 523–23, 64 N.Y.S.3d at 631–32 (Garcia, J., dissenting) (first citing N.Y.C. LOCAL LAW No. 85, § 1; and then citing Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 278 (2d Cir. 2009)).

supported by a "reasonable reading [of the NYCHRL] that is supported by the statute's legislative history and that better comports with the broad, remedial purpose of the Human Rights Law."[287]

B. Additional State Law Cases

1. Attorneys' Fees under the Equal Access to Justice Act

The NYSHRL was amended in 2015 to authorize awards of attorney fees to a prevailing plaintiff.[288] In *Kimmel v. State of New York*, the Court of Appeals held that pursuant to the Equal Access to Justice Act (EAJA), such awards could also be made to prevailing plaintiffs for fees incurred against a state agency in civil actions commenced before the 2015 amendment to the Human Rights Law became effective.[289]

The EAJA authorizes the award of attorney fees to prevailing plaintiffs for fees incurred in civil actions brought against the state, unless such awards are provided for or prohibited by another state law.[290] The EAJA authorizes a prevailing plaintiff to be reimbursed for attorney fees incurred in judicial actions only, and not for those incurred in related administrative proceedings.[291]

The prevailing plaintiff in *Kimmel* was a female state trooper who received a favorable jury verdict in a case brought against the state under the Human Rights Law for sex discrimination and harassment, hostile work environment, and retaliation.[292] After the jury verdict was affirmed on appeal, the plaintiff made an application for an award of attorney fees and costs under the EAJA.[293] The trial court held that the EAJA did not authorize such fees in cases where compensatory damages are recovered "for tortious acts of the State and its employees."[294] The appellate division, in a split decision, reversed the trial court, and held that such awards were authorized based on the EAJA's definition of "action, and

287. *Id.* at 97, 86 N.E.2d at 526, 64 N.Y.S.3d at 634.

288. Act of Oct. 21, 2015, 2015 McKinney's Sess. Laws of N.Y., ch. 364, at 951 (amending N.Y. EXEC. LAW § 297(10) (McKinney Supp. 2018)).

289. 29 N.Y.3d 386, 401, 80 N.E.3d 370, 380, 57 N.Y.S.3d 678, 687–88 (2017) (citing N.Y. C.P.L.R. 8600 (McKinney Supp. 2018)).

290. *Id.* at 392, 80 N.E.3d at 374, 57 N.Y.S.3d at 681–82 (first citing N.Y. C.P.L.R. 8601(a) (McKinney Supp. 2018); then citing N.Y. C.P.L.R. 8600; and then citing Beechwood Restorative Care Ctr. v. Signor, 5 N.Y.3d 435, 443, 842 N.E.2d 466, 471, 808 N.Y.S.2d 568, 573 (2005)).

291. *Id.* at 394, 80 N.E.3d at 375, 57 N.Y.S.3d at 683 (citing Greer v. Wing, 95 N.Y.2d 676, 680, 746 N.E.2d 178, 180, 723 N.Y.S.2d 123, 125 (2001)).

292. *Id.* at 390–91, 80 N.E.3d at 372–73, 57 N.Y.S.3d at 680–81.

293. *Id.* at 391, 80 N.E.3d at 373, 57 N.Y.S.3d at 681 (citing N.Y. C.P.L.R. 8600).

294. *Kimmel*, 29 N.Y.3d at 391, 80 N.E.3d at 373, 57 N.Y.S.3d at 681 (citing N.Y. C.P.L.R. 8600).

was consistent with the relevant legislative history."[295]

The Court of Appeals affirmed the appellate division in a three-judge plurality decision, the result of which was joined by a fourth judge who wrote a separate concurring opinion.[296] Two judges dissented.[297] The plurality decision, written by Chief Judge DeFiore, was based on the express language of the statute and also on pertinent legislative history.[298] The plurality noted that the EAJA authorizes awards of attorney fees in "*any civil action brought against the state*, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust."[299] The plurality found such language to unambiguously provide for attorney fees in cases where, as in this case, an award of attorney fees was not expressly excluded by the statute.[300] The plurality also found that statute was intended to provide relief comparable to that which is provided for under the federal EAJA, under which claims for fees incurred in administrative proceedings can be made.[301] Finally, the plurality observed that the legislative history confirmed that the EAJA should apply expansively to "any civil action," unless otherwise covered by express statutory exclusions.[302]

Judge Wilson filed a separate opinion concurring in the result reached by the plurality, but based solely on the legislative history of the statute.[303] Judge Garcia, joined by Judge Stein, wrote a lengthy dissenting opinion suggesting that the majority had opted to broadly construe the EAJA because of the "compelling" facts of the plaintiff's case.[304] They warned that "the plurality establishes a rule that will have repercussions well beyond awarding fees to this particular plaintiff's attorneys."[305]

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295. Kimmel v. State, 76 A.D.3d 188, 194, 906 N.Y.S.2d 403, 407–08 (4th Dep't 2010).

296. *Kimmel*, 29 N.Y.3d at 390, 402, 80 N.E.3d at 372, 401, 57 N.Y.S.3d at 679, 680.

297. *Id.* at 413, 80 N.E.3d at 389, 57 N.Y.S.3d at 696.

298. *Id.* at 390, 401, 80 N.E.3d at 372, 380, 57 N.Y.S.3d at 680, 688 (citing Equal Access to Justice Act, 1989 McKinney's Sess. Laws of N.Y., ch. 770, at 1559 (codified at N.Y. C.P.L.R. 8600)).

299. *Id.* at 392, 80 N.E.3d at 373, 57 N.Y.S.3d at 681 (quoting N.Y. C.P.L.R. 8601(a) (McKinney Supp. 2018)).

300. *Id.* at 392, 80 N.E.3d at 374, 57 N.Y.S.3d at 681–82 (first citing N.Y. C.P.L.R. 8601; then citing N.Y. EXEC. LAW § 297 (McKinney 2010 & Supp. 2018); then citing Beechwood Restorative Care Ctr. v. Signor, 5 N.Y.3d 435, 443, 842 N.E.2d 466, 471, 808 N.Y.S.2d 568, 573 (2005); and then citing N.Y. C.P.L.R. 8600)).

301. *Kimmel*, 29 N.Y.3d at 395, 80 N.E.3d at 376, 57 N.Y.S.3d at 684 (first citing 28 U.S.C. § 2412(d)(1)(A) (2012); and then citing N.Y. C.P.L.R. 8600).

302. *Id.* at 397, 80 N.E.3d at 377, 57 N.Y.S.3d at 685 (citing N.Y. C.P.L.R. 7801 (McKinney 2008)).

303. *Id.* at 401–02, 80 N.E.3d at 380, 57 N.Y.S.3d at 688 (Wilson, J., concurring) (first citing N.Y. C.P.L.R. 7801; and then citing N.Y. C.P.L.R. 8600).

304. *Id.* at 413, 80 N.E.3d at 388–89, 57 N.Y.S.3d at 696 (Garcia, J., dissenting).

305. *Id.*

2. Election of Remedies and Subject Matter Jurisdiction

In *Rodriguez v. Dickard Widder Industries*, the Second Department held that it retained subject matter jurisdiction over an employee's Title VII discrimination claim, even though it had dismissed the employee's city and state law claims of discrimination.[306] The employee's city and state discrimination claims were barred by the election of remedies doctrine, because the employee had previously filed an administrative complaint of discrimination with the New York State Division of Human Rights (NYSDHR).[307] In addition, the employee's common law claims alleging negligent hiring and retention and negligent infliction of emotional distress were barred by the exclusivity provision of New York's Workers' Compensation Law.[308]

The Second Department held that the dismissal of the state and city claims did not divest it of subject matter jurisdiction.[309] The court explained that "[t]he election of remedies doctrine and the exclusivity provisions of the Workers' Compensation Law do not implicate the subject matter jurisdiction of the court, but rather deprive a plaintiff of a cause of action."[310]

306. 150 A.D.3d 1171–72, 56 N.Y.S.3d 328, 331 (2d Dep't 2017) (citing 42 U.S.C. § 2000e-2(a)(1) (2012)).

307. *Id.* at 1170–71, 56 N.Y.S.3d at 330–31 (first citing N.Y. EXEC. LAW § 297(9) (McKinney 2010 & Supp. 2018); then citing N.Y. WORKERS' COMP. LAW § 11 (McKinney 2013 & Supp. 2018); then citing N.Y. WORKERS' COMP. § 29(6) (McKinney 2015); then citing Wrenn v. Verizon, 106 A.D.3d 995, 996, 965 N.Y.S.2d 362, 362–63 (2d Dep't 2013); then citing Hirsch v. Morgan Stanley & Co., 239 A.D.2d 466, 467, 657 N.Y.S.2d 448, 449 (2d Dep't 1997); then citing Lacks v. Lacks, 41 N.Y.2d 71, 74–75, 359 N.E.2d 384, 386–87, 390 N.Y.S.2d 875, 877–78 (1976); then citing Benjamin v. N.Y.C. Dep't. of Health, 57 A.D.3d 403, 404, 870 N.Y.S.2d 290, 291 (1st Dep't 2008); then citing Bhagalia v. State, 228 A.D.2d 882, 882–83, 644 N.Y.S.2d 398, 398 (3d Dep't 1996); 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)); *cf.* Barr v. BJ's Wholesale Club, Inc., 62 A.D.3d 820, 821, 879 N.Y.S.2d 558, 559 (2d Dep't 2009) (reversing a lower court order to dismiss case because there was no factual showing that the plaintiff chose a separate administrative remedy aside from filing with EEOC).

308. *Rodriguez*, 150 A.D.3d at 1171, 56 N.Y.S.3d at 331 (first citing WORKERS' COMP. § 11; then citing WORKERS' COMP. § 29(6); then citing Kruger v. EMFT, LCC, 87 A.D.3d 717, 719, 930 N.Y.S.2d 11, 14 (2d Dep't 2011); then citing Thomas v. Ne. Theatre Corp., 51 A.D.3d 588, 589, 859 N.Y.S.2d 415, 417 (1st Dep't 2008); then citing Martinez v. Canteen Vending Servs. Roux Fine Dining Chartwheel, 18 A.D.3d 274, 275, 795 N.Y.S.2d 16, 17 (1st Dep't 2005); and then citing Miller v. Huntington Hosp., 15 A.D.3d 548, 549, 792 N.Y.S.2d 88, 89 (2d Dep't 2005)).

309. *Id.* at 1171–72, 56 N.Y.S.3d at 331 (citing 42 U.S.C. § 2000e-2(a)(1)).

310. *Id.* at 1170–71, 56 N.Y.S.3d at 330–31 (first citing EXEC. § 297(9); then citing WORKERS' COMP. § 11; then citing WORKERS' COMP. § 29(6); then citing *Wrenn*, 106 A.D.3d at 996, 965 N.Y.S.2d at 362–63; then citing *Hirsch*, 239 A.D.2d at 467, 657 N.Y.S.2d at 449; and then citing *Lacks*, 41 N.Y.2d at 74–75, 359 N.E.2d at 386–87, 390 N.Y.S.2d at 877–78).

3. Administrative Due Process

In *MTA Bus Co. v. New York State Division of Human Right*s, the First Department annulled the determination of the NYSDHR that a public bus company maintained a discriminatory policy by preventing employees with bipolar disorder from working as public bus operators.[311] The NYSDHR made this determination based on evidence obtained in a hearing concerning an individual complaint of discrimination from an employee with bipolar disorder.[312] The employee did not allege that the bus company maintained a discriminatory policy, but claimed instead that he was qualified to operate a bus.[313] Nevertheless, the NYSDHR determined that the bus company's overall policy was discriminatory and ordered that it pay a civil fine in the amount of $30,000.[314]

The bus company argued on appeal that it was denied due process because the hearing was based solely on the individual complaint of discrimination, and that was the case that the company responded to in defending itself.[315] The First Department agreed with the bus company, and held the failure to give proper notice left the NYSDHR without authority to rule on the validity of the overall bipolar policy.[316] The Court explained that the NYSDHR did have the authority to expand its investigation of an employer beyond the allegations contained in an individual complaint, but that in such cases due process would have required supplemental notice of the expanded investigation to the bus company.[317]

4. Continuing Violations Doctrine

Claims under both the NYSHRL and NYCHRL are subject to a three-year statute of limitations.[318] In *Jeudy v. City of New York*, the First Department held that the plaintiff employee's claim under the NYCHRL—that his promotion requests were denied on account of

311. *MTA Bus*, 150 A.D.3d 512, 512, 55 N.Y.S.3d 171, 172 (1st Dep't 2017) (citing N.Y. EXEC. LAW § 298 (McKinney 2013)).

312. MTA Bus Co. v. New York State Div. of Human Rights, No. 160602/2015, 2016 N.Y. Slip Op. 30635(U), at 3–4 (Sup. Ct. N.Y. Cty. Apr. 8, 2016).

313. *MTA Bus*, 150 A.D.3d at 512–13, 55 N.Y.S.3d at 172 (first citing N.Y. EXEC. LAW § 295(6)(b) (McKinney 2010); then citing EXEC. § 297(1); and then citing Hillside Hous. Corp. v. State Div. of Human Rights, 44 A.D.2d 539, 539, 353 N.Y.S.2d 460, 461 (1st Dep't 1974)).

314. *Id.* at 512, 55 N.Y.S.3d at 172.

315. *Id.*

316. *Id.*

317. *Id.* (first citing EXEC. § 297(1); then citing EXEC. § 295(6)(b); and then citing *Hillside Hous. Corp.*, 44 A.D.2d at 539, 353 N.Y.S.2d at 461).

318. N.Y. C.P.L.R. 214(2) (McKinney 2003); N.Y.C. ADMIN. CODE § 8-502(d) (2018); N.Y. EXEC. LAW § 297.

discrimination—was timely under the continuing violations doctrine.[319] The plaintiff-appellant appealed from the lower court's dismissal of his complaint asserting claims under the NYSHRL and NYCHRL for national origin and race discrimination and unlawful retaliation.[320] The complaint alleged a pattern of discrimination, beginning with the denial of the plaintiff's promotion requests, followed by trumped up misconduct charges, a suspension, and ultimately termination.[321] The claims of discrimination were based on alleged facts that first took place more than three years before the complaint was filed.[322]

The First Department affirmed the dismissal of the plaintiff-appellant's claims based solely on alleged misconduct occurring outside of the three-year limitations period.[323] However, the First Department also found that the plaintiff-appellant had alleged "a single continuing pattern of unlawful conduct" beginning when he was first denied a promotion request more than three years before the complaint was filed, until he was allegedly terminated immediately before the complaint was filed in retaliation for his complaints of discrimination.[324] The court held that such a pattern established a continuing violation which could be used to state a claim under the NYCHRL.[325] The court noted that although the continuing violation doctrine did not apply under the NYSHRL, allegations falling outside of the limitations period can be used as evidence to support a discrimination claim occurring within the limitations period.[326]

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319. 142 A.D.3d 821, 822–23, 37 N.Y.S.3d at 500 (quoting Ferraro v. N.Y.C. Dep't of Educ., 115 A.D.3d 497, 497–98, 982 N.Y.S.2d 746, 746 (1st Dep't 2014)) (first citing Wisen v. New York Univ., 304 A.D.2d 459, 460, 758 N.Y.S.2d 51, 52 (1st Dep't 2003); then citing Williams v. N.Y. Hous. Auth., 61 A.D.3d 62, 72, 872 N.Y.S.2d 27, 35 (1st Dep't 2009); and then citing Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 713 (2d Cir. 1996)).

320. *Id.* at 822, 37 N.Y.S.3d at 500.

321. Jeudy v. City of New York, No. 155146/2014, 2015 N.Y. Slip Op. 31167(U), at 2–3 (Sup. Ct. N.Y. Cty. July 7, 2015).

322. *Id.* at 3.

323. *Jeudy*, 142 A.D.3d at 821, 37 N.Y.S.3d at 499.

324. *Id.* at 823, 37 N.Y.S.3d at 500 (quoting *Ferraro*, 115 A.D.3d at 497–98, 982 N.Y.S.2d at 746) (citing *Williams*, 61 A.D.3d at 72, 872 N.Y.S.2d at 35).

325. *Id.* (quoting *Ferraro*, 115 A.D.3d at 497–98, 982 N.Y.S.2d at 746) (first citing *Williams*, 61 A.D.3d at 72, 872 N.Y.S.2d at 35; and then citing Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 713 (2d Cir. 1996)).

326. *Id.* at 823–24, 37 N.Y.S.3d at 500–01 (quoting Baez v. New York, No. 110301/09, 2010 N.Y. Slip Op. 33177(U), at 23 (Sup. Ct. N.Y. Cty. Nov. 10, 2010)) (citing AMTRAK v. Morgan, 536 U.S. 101, 113–14 (2002)). The court also held that the plaintiff-appellant stated a cause of action for unlawful retaliation under both the NYCHRL and SHRL because: (1) allegations references to the plaintiff-appellant's accent were linked to his national origin claims; and (2) the allegations established a sufficient causal link between the pattern of ongoing promotion denials and related complaints and the suspension and ultimate termination of the plaintiff-appellant. *Id.* at 823–24, 37 N.Y.S.3d at 501.

V. WHISTLEBLOWER CLAIMS

A. Federal Whistleblower Protections under Dodd-Frank and Sarbanes-Oxley

In a case of first impression, the Ninth Circuit Court of Appeals in *Somers v. Digital Realty Trust Inc*. held that the Dodd-Frank Act (DFA),[327] like the Sarbanes-Oxley Act (SOX),[328] provides protection to employees who make internal disclosures, as well as disclosures to the SEC.[329] The Supreme Court subsequently reversed the Ninth Circuit after the close of the *Survey* year, and that decision will be addressed in next year's *Survey* report.

The plaintiff in *Somers* was a former employee of the defendant Digital Realty Trust, who made internal reports regarding suspected securities law violations by the company, and was terminated before he had an opportunity to report his concerns to the SEC.[330] Somers sued his former employer under the DFA, and the defendant-employer moved to dismiss, arguing that Somers was not a "whistleblower" under the meaning of the DFA, as he had only reported his concerns internally, not to the SEC.[331]

Under SOX, employees who report suspected financial compliance violations to federal agencies, Congress, or "a person with supervisory authority over the employee" are expressly protected from retaliation by their employer.[332] By contrast, the DFA, which added a new definition of "whistleblower" to the Securities Exchange Act (SEA) of 1934, described only those reporting information to the SEC as coming under its protections.[333] Another section of SOX, however, contains an anti-retaliation provision, which provides broad protections for whistleblowers who, among other things, make disclosures that are "protected under the Sarbanes-Oxley Act."[334] The Ninth Circuit held that, in order to give effect to all of the statutory language at issue and provide meaningful protection to employees engaged in internal whistleblowing

327. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 12 U.S.C and 15 U.S.C. (2012)).

328. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C. (2012)).

329. 850 F.3d 1045, 1046–47 (9th Cir. 2017), *rev'd*, 138 S. Ct. 767 (2018) (first citing 15 U.S.C. § 7201 et seq. (2012); and then citing the Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified in scattered sections of 15 U.S.C. (2012)).

330. *Id.* at 1047.

331. *Id.* (citing 15 U.S.C. § 78u-6 (2012)).

332. *Id.* at 1048 (quoting 18 U.S.C. § 1514A(a)(1)(C) (2012)).

333. 15 U.S.C. § 78u-6(a)(6).

334. 15 U.S.C. § 78u-6(h)(1)(A)(iii).

activities, the DFA should be read broadly to extend whistleblower protections to employees making internal reports as well as reporting to the SEC, even though employees making internal complaints are not explicitly covered by the definition section of the statute.[335]

The Ninth Circuit recognized a circuit split on this issue.[336] The Fifth Circuit in *Asadi v. G.E. Energy United States, LLC* "applied the formal definition of whistleblower to limit the scope of the anti-retaliation provision,"[337] while the Second Circuit in *Berman v. Neo@Ogilvy LLC* deferred to the SEC's regulation, interpreting the DFA to extend whistleblower protections to employees who make disclosures both internally and to the SEC.[338]

On June 26, 2017, the U.S. Supreme Court granted defendant Digital Realty Trust's petition for writ of certiorari in this case.[339] As stated, following the *Survey* year, the Supreme Court reversed the Ninth Circuit's decision, and endorsed a more limited interpretation of the whistleblower protection under SOX.

There have also been cases affecting whistleblower protections during the *Survey* period at the district court level. In *Murray v. UBS Securities, LLC*, the plaintiff, a financial analyst, claimed that he was unlawfully fired in violation of the SOX in retaliation for reporting to his supervisors that personnel of UBS's internal client were making illegal efforts to sway the results of his independent research and analysis.[340] The defendants maintained that, instead, the plaintiff was terminated as part of a reduction in the workforce and moved for summary judgment.[341] The court found that the defendant's argument contending that the plaintiff's claim was foreclosed because of the plaintiff's "failure to match the conduct he believes to be illegal with the precisely applicable securities law or regulatory provision."[342]

The district court denied the defendant's motion for summary judgment, holding that employees do not need to "definitively and specifically" name the securities violation at issue; rather the employees' "belief" that the employer has committed a securities violation is critical

335. *Somers*, 850 F.3d at 1050 (citing Duncan v. Walker, 533 U.S. 167, 174 (2001)).

336. *Id.* at 1050.

337. *Id.* (citing 720 F.3d 620, 630 (5th Cir. 2013)).

338. 801 F.3d 145, 151–52 (2d Cir. 2015).

339. Dig. Realty Trust, Inc. v. Somers, 137 S. Ct. 2300 (2017), *rev'd*, 138 S. Ct. 767 (2018).

340. No. 14 Civ. 927, 2017 U.S. Dist. LEXIS 62978, at *1, *15 (S.D.N.Y. Apr. 25, 2017) (citing Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 18 U.S.C. § 1514A (2012))).

341. *Id.* at *3, *18.

342. *Id.* at *26.

to the whistleblower analysis.[343] The court found that the defendants' argument incorrectly assumed "that the absence of a completed legal violation vitiates the reasonableness of [the] [p]laintiff's belief . . . ."[344] Instead of focusing on the defendant's conduct, the court focused its analysis on the plaintiff's state of mind.[345]

In *Feldman-Boland v. Stanley*, a husband and wife—both former employees of Morgan Stanley—sued their former employer and their former supervisor for terminating their employment in violation of the whistleblower protections of Sarbanes-Oxley and Dodd-Frank.[346] The defendants moved to dismiss and to strike the plaintiffs' claims for emotional distress and special damages.[347]

The district court granted the motion to dismiss against the individual supervisor under SOX.[348] SOX requires that, prior to filing suit, plaintiffs exhaust their administrative remedies by filing a claim with the Occupational Safety and Health Administration (OSHA).[349] While the plaintiffs both filed OSHA complaints, neither plaintiff named its supervisor as a defendant in the complaints.[350] The plaintiffs argued that OSHA was "put on notice that [the supervisor] was a subject of their claims";[351] however, because the plaintiffs failed to specifically list the supervisor as a named defendant in the complaint, the court dismissed the plaintiffs' claims against the supervisor.[352]

B. New York State Whistleblower Protections under Labor Law § 740

Labor Law § 740 protects employees from retaliation for: (a) disclosing or threatening to disclose to a supervisor or public body information concerning a legal violation "present[ing] a substantial and specific danger to the public health or safety, or which constitutes health care fraud;" (b) providing information to or testifying before a public investigatory body that is investigating the employer; or (c) objecting to

343. *Id.* at *26–*27 (first citing 18 U.S.C. § 1514A; then citing Nielson v. AECOM Tech. Corp., 762 F.3d 214, 221, 224 (2d Cir. 2014); and then citing Ashmore v. CGI Grp. Inc., 138 F. Supp. 3d 329, 343 (S.D.N.Y. 2015)) (*cf.* Sharkey v. JPMorgan Chase & Co., 660 F. App'x 65, 68 (2d Cir. 2016)).

344. *Id.* at *27 (citing 18 U.S.C. § 1514A).

345. *Murray*, 2017 U.S. Dist. LEXIS 62978, at *28 (quoting Guyden v. Aetna, Inc., 544 F.3d 376, 384 (2d Cir. 2008)).

346. No. 15cv6698, 2016 U.S. Dist. LEXIS 90994, at *1 (S.D.N.Y. July 13, 2016) (first citing 18 U.S.C. § 1514A(a); and then citing 15 U.S.C. § 78u-6(h)(1) (2012)).

347. *Id.* at *1 (citing FED. R. CIV. P. 12(b)(6)).

348. *Id.* at *17.

349. *See* 18 U.S.C. § 1514A(b)(1)(B).

350. *See Feldman-Boland*, 2016 U.S. Dist. LEXIS 90994, at *4–*5.

351. *Id.* at *15.

352. *Id.* at *15, *17.

or refusing to participate in a violation of law.[353] The appellate division issued several important decisions during the *Survey* year impacting the application of § 740.

1. Notice of Claim

In *Castro v. City of New York*, the First Department held, among other things, that a public-sector employee who invokes a private sector whistleblower law in his original complaint does not waive his right to later assert a claim under the public-sector whistleblower law.[354]

The plaintiff in *Castro* was a public sector employee—a manager and certified fire safety director with the New York City Department of Homeless Services—who alleged that he was improperly terminated for refusing to make false certifications.[355] The plaintiff dated his notice of claim November 17, 2012, and commenced an action under Labor Law § 740 seeking reinstatement and monetary damages.[356] The City moved to dismiss the complaint, arguing that § 740 is inapplicable to public employees, and that even if the plaintiff had originally asserted a public sector whistleblower claim under Civil Service Law § 75-b, he had not satisfied the § 75-b statutory prerequisites.[357] The supreme court granted the City's motion to dismiss based on the plaintiff's failure to cite § 75-b in his notice of claim, and found that the plaintiff waived his right to pursue a § 75-b claim because he originally commenced the action as a private sector claim under Labor Law § 740 and then withdrew.[358]

The appellate division reversed, holding that the supreme court erred in finding the plaintiff waived his right to assert a retaliatory discrimination claim under Civil Service Law § 75-b by originally commencing the action under Labor Law § 740.[359] The court found that the plaintiff was not required to file a notice of claim for his § 75-b claim, and that, in any event, "while the plaintiff did not specifically reference the 'whistleblower' claim," and did not cite the specific provision, the

353. N.Y. LAB. LAW § 740(2)(a)–(c) (McKinney 2015).

354. 141 A.D.3d 456, 457, 36 N.Y.S.3d 113, 115 (1st Dep't 2016) (first citing N.Y. CIV. SERV. LAW § 75-b (McKinney 2011 & Supp. 2018); and then citing Hanley v. N.Y. State Exec. Dept. Div. for Youth, 182 A.D.2d 317, 320–21, 589 N.Y.S.2d 336, 367 (3d Dep't 1992)).

355. *Id.* at 456, 36 N.Y.S.3d at 114.

356. *Id.* (citing LAB. § 740).

357. *Id.* (first citing LAB. § 740; and then citing CIV. SERV. § 75-b(2)(a)).

358. Castro v. City of New York, 45 Misc. 3d 805, 810–11, 994 N.Y.S.3d 798, 803 (Sup. Ct. Bronx Cty. 2014) (first citing CIV. SERV. § 75-b; then citing LAB. § 740; and then citing Thomas v. City of Oneonta, 90 A.D.3d 1135, 1135, 934 N.Y.S.3d 249, 250 (3d Dep't 2011)).

359. *Castro*, 141 A.D.3d at 457, 36 N.Y.S.3d at 115 (fist citing LAB. § 740; then citing CIV. SERV. § 75-b; and then citing Hanley v. N.Y. State Exec. Dept. Div. for Youth, 182 A.D.2d 317, 320–21, 589 N.Y.S.2d 336, 367 (3d Dep't 1992)).

notice of claim the plaintiff did file "included enough information for the City to investigate the claim."[360]

However, the Third Department reached a different result in *Sager v. County of Sullivan*.[361] In *Sager*, the plaintiff, a former public employee (former Deputy Commissioner of the Sullivan County Department of Social Services) alleged a claim of retaliatory termination in violation of Civil Service Law § 75-b.[362] The defendant moved to dismiss the complaint based upon the plaintiff's failure to file a notice of claim, which the supreme court granted.[363]

The Third Department held that the defendant was "entitled to dismissal of the complaint based upon [the] plaintiff's noncompliance with the notice of claim condition precedent of General Municipal Law § 50-e, as applicable to counties pursuant to County Law § 52."[364] The plaintiff relied on *Castro v. City of New York* to argue that the notice of claim was not required in this case.[365] However, the Third Department distinguished *Castro* from the instant case, holding that there was no notice of claim requirement in *Castro* as against a *city*, where County Law § 52 had a broader requirement for a notice of claim against the County of Sullivan.[366] The Third Department upheld the supreme court's denial of the plaintiff's cross-motion to file a late notice of claim, as the application was made more than one year and ninety days after the cause of action accrued, and the plaintiff failed to establish that the limitations period was tolled.[367]

2. Specificity of Pleadings

In *Ruiz v. Lenox Hill Hospital*, the Appellate Division, First

360. *Id.* at 459, 36 N.Y.S.3d at 116–17 (citing CIV. SERV. § 75-b).

361. 145 A.D.3d 1175, 1176, 41 N.Y.S.3d 443, 444 (3d Dep't 2016), *lv. denied*, 29 N.Y.3d 902, 80 N.E.3d 339, 57 N.Y.S.3d 706 (2017).

362. *Id.* at 1177, 36 N.Y.S.3d at 445 (first citing N.Y. GEN. MUN. LAW § 50-e (McKinney 2016); and then citing N.Y. COUNTY LAW § 52 (McKinney 2017)).

363. *Id.* at 1175–76, 36 N.Y.S.3d at 443–44.

364. *Id.* at 1176, 36 N.Y.S.2d at 444 (first citing GEN. MUN. § 50-e; and then citing COUNTY § 52).

365. *Id.* (first citing N.Y. CIV. SERV. LAW § 75-b (McKinney 2011 & Supp. 2018); then citing Margerum v. City of Buffalo, 24 N.Y.3d 721, 730, 28 N.E.3d 515, 518, 5 N.E.3d 515, 518 (2015); and then citing Castro v. City of New York, 141 A.D.3d 456, 458, 36 N.Y.S.3d 113, 116 (1st Dep't 2016)).

366. *Sager*, 145 A.D.3d at 1176–77, 41 N.Y.S.3d at 444 (first citing COUNTY § 52; and then citing *Castro*, 141 A.D.3d at 458, 36 N.Y.S.3d at 116).

367. *Id.* at 1177, 41 N.Y.S.3d at 445 (first citing GEN. MUN. § 50-e(5); then citing Pierson v. New York, 56 N.Y.2d 950, 954, 439 N.E.2d 331, 332, 453 N.Y.S.2d 615, 617 (1982); then citing Mindy O. v. Binghamton City Sch. Dist., 83 A.D.3d 1335, 1336, 921 N.Y.S.2d 696, 698 (3d Dep't 2011); and then citing Campbell v. City of New York, 4 N.Y.3d 200, 203, 825 N.E.2d 121, 122, 791 N.Y.S.2d 880, 881 (2005)).

Department found that the plaintiff had adequately pled a claim under Labor Law § 740 for retaliatory termination to survive a motion to dismiss.[368] The plaintiff, chair of the defendant hospital's Department of Cardiovascular and Thoracic Surgery, alleged that an individual defendant doctor had improperly signed medical procedure reports and improperly communicated with a patient's family, that the plaintiff had reported the doctor to human resources, and that the plaintiff was terminated in retaliation for his report.[369] The First Department held that the plaintiff had adequately pled a claim for retaliation under § 740 and, contrary to the defendants' contentions, "[f]alsification of medical records, including a physician's false claim to have performed a procedure," were sufficient evidence to establish a violation of § 740.[370] The court noted that the plaintiff did not need to specify in his pleadings the specific rule that had been violated which the plaintiff reported, nor does the plaintiff have to show that a rule was actually violated, just that he "reasonably believed that there had been such a violation."[371] The First Department also held that the supreme court should have dismissed the Labor Law § 740 claims against the individual defendant doctor, as the doctor was not an "employer" within the meaning of § 740.[372]

3. Filing Documents under Seal

In *Mehulic v. New York Downtown Hospital*, a former second-year resident at a hospital alleged that the defendant hospital, her former employer, terminated her employment in retaliation for the plaintiff making complaints regarding patient care.[373] The supreme court granted the Hospital's motion to file certain documents and deposition testimony

368. 146 A.D.3d 605, 605, 45 N.Y.S.3d 427, 429 (1st Dep't 2017) (first citing N.Y. C.P.L.R. 3211 (McKinney 2016); then citing N.Y. LAB. LAW § 740 (McKinney 2015); then citing Webb-Weber v. Cmty. Action for Human Servs. Inc., 23 N.Y.3d 448, 453, 15 N.E.3d 1172, 1175, 992 N.Y.S.2d 163, 165 (2014); then citing 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152, 773 N.E.2d 496, 499, 746 N.Y.S.2d 131, 134 (2002)).

369. *Id.*

370. *Id.* at 606, 45 N.Y.S.3d at 429 (first citing LAB. § 740; and then citing Kraus v. New Rochelle Hosp. Med. Ctr., 216 A.D.2d 360, 361–65, 628 N.Y.S.2d 360, 362–63 (2d Dep't 1995)).

371. *Id.* at 606, 45 N.Y.S.3d at 429–30 (first citing Blashka v. N.Y. Hotel Trades Council & Hotel Ass'n of N.Y. City Health Ctr., 126 A.D.3d 503, 503, 6 N.Y.S.3d 27, 28 (1st Dep't 2015); then citing LAB. § 740; and then citing Pipia v. Nassau Cty., 34 A.D.3d 664, 666, 826 N.Y.S.2d 318, 320 (2d Dep't 2006)).

372. *Id.* at 606, 45 N.Y.S.3d at 430 (first citing N.Y. LAB. LAW §§ 740–41 (McKinney 2015); then citing Ulysse v. AAR Aircraft Component Servs., 128 A.D.3d 1053, 1054, 10 N.Y.S.3d 309, 310 (2d Dep't 2015); and then citing Geldzahler v. N.Y. Med. Coll., 746 F. Supp. 2d 618, 632 (S.D.N.Y. 2010)).

373. (*Mehulic I*), 113 A.D.3d 567, 567, 979 N.Y.S.2d 320, 322 (1st Dep't 2014).

under seal in connection with its motion for summary judgment,[374] and the plaintiff appealed.[375] The First Department held that the supreme court properly granted the hospital's motion to file documents under seal, as the parties had executed a confidentiality agreement designating the documents at issue as confidential, and the documents "relate to 'performance of a medical or a quality assurance review function.'"[376]

4. Section 740's Waiver Provision

Finally, in *Sciddurlo v. Financial Industry Regulatory Authority*, the plaintiff alleged that his employer discriminated against him on the basis of his age in violation of Executive Law § 296 and Administrative Code of the City of New York § 8-107.[377] The defendant moved to dismiss the age discrimination action—on the basis that the defendant had commenced a prior action under Labor Law § 740 alleging retaliation by his employer, which the Southern District of New York had dismissed with prejudice—and that the instant age discrimination case was barred by the waiver provision in Labor Law § 740(7).[378]

The referenced waiver provision states:

Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract; except that the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law.[379]

The supreme court found that the plaintiff's prior whistleblower action barred the age discrimination action.[380] However, the Second Department reversed, citing several cases standing for the proposition that the waiver provision in Labor Law § 740 did not bar the plaintiff

374. Mehulic v. N.Y. Downtown Hosp. (*Mehulic II*), 143 A.D.3d 525, 525, 39 N.Y.S.3d 138, 139 (1st Dep't 2016).

375. *See id.*

376. *Id.* at 525–26, 39 N.Y.S.3d at 139 (quoting *Mehulic I*, 113 A.D.3d at 568, 979 N.Y.S.2d at 322) (first citing N.Y. EDUC. LAW § 6527(3) (McKinney 2016 & Supp. 2018); and then citing N.Y. PUB. HEALTH LAW § 2805-m (McKinney 2012 & Supp. 2018)).

377. (*Sciddurlo II*), 144 A.D.3d 1126, 1127, 42 N.Y.S.3d 321, 321 (2d Dep't 2016) (first citing N.Y. Exec. Law § 296 (McKinney 2010 & Supp. 2018); and then citing N.Y.C. ADMIN. CODE § 8-107 (2018)).

378. Sciddurlo v. Fin. Indus. Regulatory Auth. (*Sciddurlo I*), No. 100459/14, 2014 N.Y. Slip Op. 33400(U), at 3 (Sup. Ct. Richmond Cty. Dec. 16, 2014).

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

380. *Sciddurlo I*, 2014 N.Y. Slip Op. 33400(U), at 4 (first citing LAB. § 740; and then citing Charite v. Duane Reade, Inc., 120 A.D.3d 1378, 1378, 993 N.Y.S.2d 138, 139 (2d Dep't 2014)).

from bringing an age discrimination claim in a subsequent, separate cause of action.[381]

VI. PUBLIC SECTOR EMPLOYEES

A. Federal Employees

The Civil Service Reform Act (CSRA) of 1978 vests the Merit Systems Protection Board (MSPB) with the authority to review personnel decisions made by the federal government.[382] If a federal employee seeks to challenge a decision based exclusively on the CSRA, then the MSPB's decision on that challenge is appealable to the Court of Appeals for the Federal Circuit.[383] On the other hand, if the challenge is based on alleged violations of federal antidiscrimination law exclusively, the MSPB's decision is appealable to the federal district court.[384]

In "mixed cases" based on alleged violations of both the CSRA and antidiscrimination law, the Supreme Court held in *Kloeckner v. Solis* that the MSPB procedural decisions and those on the merits are also appealable to the federal district court.[385] In *Perry v. Merit Systems Protection Board*, the U.S. Supreme Court held that the federal district court is also responsible for appeals of "mixed cases" that are dismissed by the MSPB for lack of jurisdiction.[386]

The federal employee in *Perry* was terminated due to attendance issues.[387] He filed a discrimination complaint with the EEOC in response, and ultimately entered into a settlement agreement under which he agreed to a thirty-day suspension in lieu of termination, and to take early retirement.[388] The settlement also required him to dismiss his EEOC complaint.[389] Thereafter, the employee appealed his suspension and early retirement to the MSPB, claiming that the agreement was the product of

381. *Sciddurlo II*, 144 A.D.3d at 1127, 42 N.Y.S.3d at 321 (first citing Gregorian v. N.Y. Life Ins. Co., 90 A.D.3d 837, 838–39, 935 N.Y.S.2d 120, 121 (2d Dep't 2011); then citing Knighton v. Mun. Credit Union, 71 A.D.3d 604, 605, 898 N.Y.S.2d 117, 118 (1st Dep't 2010); then citing Kraus v. Brandstetter, 185 A.D.2d 302, 302–03, 586 N.Y.S.2d 269, 270 (2d Dep't 1992); and then citing Collette v. St. Luke's Roosevelt Hosp., 132 F. Supp. 2d 256, 260 (S.D.N.Y. 2001)).

382. 5 U.S.C. § 1204(f)(2)(B) (2012).

383. 5 U.S.C. § 7703(b)(1)(A) (2012).

384. *Id.* § 7703(b)(2); *see* Kloeckner v. Solis, 568 U.S. 41, 49 (2012) (citing Kloeckner v. Solis, 639 F.3d 834, 838 (8th Cir. 2011)).

385. *Kloeckner*, 568 U.S. at 56.

386. (*Perry IV*), 137 S. Ct. 1975, 1983 (2017) (citing Perry v. Merit Sys. Prot. Bd. (*Perry III*), 829 F.3d 760, 762 (D.C. Cir. 2016)).

387. *Id.* at 1982.

388. *Id.*

389. *Id.*

coercion.[390] An administrative law judge dismissed the challenge on the ground that it was a voluntary settlement over which the MSPB was without jurisdiction to review.[391] The MSPB adopted the ALJ's findings and advised the employee that any appeal should proceed to the Federal Circuit.[392] Instead, the employee appealed to the D.C. Circuit which, in turn, transferred his appeal to the Federal Circuit Court of Appeals.[393] The D.C. Circuit found that the Supreme Court's decision in *Kloeckner* did not apply to appeals of MSPB based on lack of jurisdiction.[394]

The Supreme Court, by a vote of 7-2, reversed the D.C. Circuit and held that appeals of MSPB dismissals for lack of jurisdiction in mixed cases should be made directly to the federal district court.[395] Writing for the majority, Justice Ginsburg found no genuine reason to distinguish between jurisdictional appeals and appeals from decisions on the merits or procedural grounds.[396] She observed, for example, that it is often difficult to distinguish a procedural appeal from one based on jurisdiction, and that bifurcating the proper venues on appeal would exacerbate such difficulties.[397]

B. New York State

1. A Union's Right to Information under New York City Collective Bargaining Law

In *New York City v. New York State Nurses Association*, the Court of Appeals held that a union representing employees covered by the New York City Collective Bargaining Law (NYCCBL) could request relevant information from the employer at any stage of the contractual grievance procedure.[398] The City took the position that the NYCCBL only permitted unions to obtain information that is necessary for collective bargaining.[399]

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390. *Id.*

391. *Perry IV*, 137 S. Ct. at 1982 (citing Perry v. Dep't of Commerce (*Perry I*), No. DC-0752-12-0486-B-1, 119 M.S.P.R. 490, 2013 MSPB LEXIS 6554, at *1 (Dec. 23, 2013)).

392. *Id.* (first citing 5 U.S.C. § 7702 (2012); and then citing Perry v. Dep't of Commerce (*Perry II*), 121 M.S.P.R. 439, 2014 WL 5358308, at *1, *4 (Aug. 6, 2014)).

393. *Id.* (citing *Perry III*, 829 F.3d 760, 763 (D.C. Cir. 2016)).

394. *Id.* at 1983 (first citing *Perry III*, 829 F.3d at 764–68; and then citing Kloeckner v. Solis, 568 U.S. 41, 46 (2012)).

395. *Id.* at 1988. Justice Gorsuch, joined by Justice Thomas, filed a dissenting opinion in which he claimed that the statute, as written, should be followed, regardless of the practical implications. *Perry IV*, 137 S. Ct. at 1988 (Gorsuch, J., dissenting).

396. *Perry IV*, 137 S. Ct. at 1985 (majority opinion).

397. *Id.* (citing *Kloeckner*, 568 U.S. at 52).

398. 29 N.Y.3d 546, 550, 82 N.E.3d 441, 442, 60 N.Y.S.3d 100, 101 (2017) (citing N.Y.C. COLLECTIVE BARGAINING LAW § 12-306(c)(4) (2012)).

399. *Id.* at 552–53, 82 N.E.3d at 443, 60 N.Y.S.3d at 102 (citing N.Y.C. COLLECTIVE BARGAINING LAW § 12-306(c)(4)).

The New York City Office of Collective Bargaining (OCB) determined that the City was required to provide information pursuant to a union's information request made during the first step of the grievance procedure in the parties' collective bargaining agreement.[400] New York City filed an Article 78 proceeding to overturn the determination by OCB, and the court ruled in favor of the City.[401] The First Department reversed the lower court, and the Court of Appeals affirmed that decision on appeal.[402]

The Court of Appeals noted that grievances are a product of collective bargaining and rejected the sharp distinction urged by the City between collective bargaining and grievance administration.[403] The Court observed that the parties' collective bargaining agreement contemplated that the union could request information at any stage of the grievance process.[404] It rejected the City's concern that permitting such information requests at the earliest stage of a grievance proceeding would be disruptive, observing that municipal agencies have provided such information at the early stages of a grievance for many years, and there was no evidence that such a practice created any "undesirable effects."[405]

2. Grievance/Arbitration Process

A. Public Policy Considerations

In *Enlarged City School District of Middletown New York v. Civil Service Employees Association, Inc.*, the Second Department relied on public policy considerations in reversing the supreme court's denial of the appellant school district's application to stay an arbitration demanded by the union representative of its police officers.[406] The union demanded arbitration over whether the school district's termination of a police officer violated the parties' collective bargaining agreement.[407] The school district commenced an action under Civil Practice Law and Rules (CPLR) 75 to stay the arbitration, claiming that its decision was not arbitrable because it was made pursuant to New York's Civil Service

400. *Id.* at 552, 82 N.E.3d at 443, 60 N.Y.S.3d at 102 (first citing N.Y.C. ADMIN. CODE § 12-306(c)(4) (2018); and then citing N.Y. State Nurses Ass'n, Inc. v. City of New York, No. BCB-2832-10, 4 O.C.B.2d 20, 9–10 (Apr. 28, 2011)).

401. *Id.* at 552, 82 N.E.3d at 442, 60 N.Y.S.3d at 101–02.

402. *Id.* (citing City of New York v. New York State Nurses Ass'n, 130 A.D.3d 28, 37, 10 N.Y.S.3d 78, 84 (1st Dep't 2015)).

403. *N.Y. State Nurses Assoc.*, 29 N.Y.3d at 553–54, 82 N.E.3d at 443–44, 60 N.Y.S.3d at 102–03.

404. *Id.*

405. *Id.*

406. 148 A.D.3d 1146, 1149, 49 N.Y.S.3d 560, 562–63 (2d Dep't 2017).

407. *Id.* at 1147, 49 N.Y.S.3d at 561.

Law.[408] The school district appealed from the dismissal of its petition under CPLR 75 to stay the arbitration.[409]

Section 71 of the Civil Service Law authorizes a public employer to terminate an employee who misses more than a cumulative total of one year of work on account of a work-related injury.[410] The police officer who was terminated fell within the section's criteria because he had missed more than one year of work due to injuries sustained in a work-related accident.[411] The Second Department, in reversing the supreme court, observed that "[d]espite the general policy favoring the resolution of disputes by arbitration, some matters, because of competing considerations of public policy, cannot be heard by an arbitrator."[412] The court found direct support for staying the arbitration in *Economico v. Village of Pelham*.[413] In that case, the Court of Appeals held that the termination of a public employee based on Civil Service Law § 73, which addresses terminations of employees for absenteeism due to injuries that are not work-related, did not violate the applicable collective bargaining agreement.[414] The Court of Appeals held that "public policy prohibits an employer from bargaining away its right to remove those employees satisfying the plain and clear statutory requisites for termination."[415] The Second Department found that the policy considerations in *Economico* were also present in the appeal before it, because

> both sections of the Civil Service Law establish "the point at which injured civil servants may be replaced," as they "strike a balance between the recognized substantial State interest in an efficient civil service and the interest of the civil servant in continued employment in the event of a disability.[416]

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408. *Id.* at 1147, 49 N.Y.S.3d at 561 (first citing N.Y. C.P.L.R. 7503(b) (McKinney 2013); and then citing N.Y. CIV. SERV. LAW § 71 (McKinney 2011)).

409. *See id.* at 1147, 1148, 49 N.Y.S.3d at 561, 562 (citing N.Y. C.P.L.R. 7503(b)).

410. *Id.* at 1148, 49 N.Y.S.3d at 562 (first citing CIV. SERV. § 71; then citing Allen v. Howe, 84 N.Y.2d 665, 669, 645 N.E.2d 720, 721, 621 N.Y.S.2d 287, 288 (1994); and then citing Molfino v. Town of Shelter Island, 234 A.D.2d 549, 549, 651 N.Y.S.2d 591, 592 (2d Dep't 1996)).

411. *Enlarged City Sch. Dist. of Middletown*, 148 A.D.3d at 1147, 49 N.Y.S.3d at 561 (citing CIV. SERV. § 71).

412. *Id.*

413. *Id.* at 1148, 49 N.Y.S.3d at 562 (citing Economico v. Vill. of Pelham, 50 N.Y.2d 120, 129, 405 N.E.2d 694, 699, 428 N.Y.S.2d 213, 218 (1980)).

414. *Economico*, 50 N.Y.2d at 128–29, 405 N.E.2d at 698–99, 428 N.Y.S.2d at 217–18 (first citing N.Y. CIV. SERV. LAW § 73 (McKinney 2011); and then citing Bd. of Educ. v. Yonkers Fed'n of Teachers, 40 N.Y.2d 268, 276, 353 N.E.2d 569, 573–74, 386 N.Y.S.2d 657, 661 (1976)).

415. *Id.* at 129, 405 N.E.2d at 699, 428 N.Y.S.2d at 218.

416. *Enlarged City Sch. Dist. of Middletown*, 148 A.D.3d at 1148, 49 N.Y.S.3d at 562 (quoting Allen v. Howe, 84 N.Y.2d 665, 672, 645 N.E.2d 720, 723, 621 N.Y.S.2d 287, 290

The Second Department also observed that if the arbitration were to proceed, it was unlikely that the arbitrator would be able to fashion an award that did not conflict with the employer's statutory authority under Civil Service Law § 71.[417]

B. Exhaustion of Remedies

In *Police Benevolent Association of New York State., Inc. v. State of New York*, the Third Department held that the appellant union was not required to exhaust the grievance procedure before attempting to obtain relief in court.[418] The Third Department departed from the general rule that the contractual grievance process must be exhausted before proceeding to court.[419] The Third Department found it dispositive that the union's petition was based on the public employer's alleged violation of Civil Service Law § 64, and did not rely on any provision of the contract or in response to any grievance determination made by the employer.[420] The exhaustion requirement did not to apply under these circumstances, because there was no applicable procedure to exhaust.[421]

3. Improper Practices

A. Mandatory Bargaining Subject

In *Lawrence Teachers Association v. New York State Public Relations Board*, the Third Department held that the implementation of a universal pre-kindergarten program was not a mandatory bargaining subject.[422] The appellant filed an improper practice charge against the school district for failing to bargain over its unilateral decision to use nonbargaining unit employees to work in the program.[423] The Public Employment Relations Board (PERB) determined that the challenged decision was governed by the state's education law and was not a mandatory bargaining subject.[424] The Union commenced an Article 78

(1994)).

417. *Id.* (citing *Economico*, 405 N.E.2d at 699, 428 N.Y.S.2d at 218, 50 N.Y.2d at 129).

418. 150 A.D.3d 1375, 1376, 55 N.Y.S.3d 457, 459 (3d Dep't 2017).

419. *Id.* (quoting Hudson River Valley, LLC v. Empire Zone Designation Bd., 115 A.D.3d 1035, 1037, 981 N.Y.S.2d 471, 474 (3d Dep't 2014)).

420. *Id.* (citing N.Y. CIV. SERV. LAW § 64 (McKinney 2011)).

421. *Id.* at 1377, 55 N.Y.S.3d at 459 (citing Moses v. Rensselaer Cty., 262 A.D.2d 697, 700, 690 N.Y.S.2d 769, 771 (3d Dep't 1999)).

422. 152 A.D.3d 171, 176, 57 N.Y.S.3d 551, 554 (3d Dep't 2017) (citing N.Y. EDUC. LAW § 3602(e) (McKinney 2015 & Supp. 2018)).

423. *Id.* at 172–73, 57 N.Y.S.3d at 552 (citing N.Y. CIV. SERV. LAW § 200 (McKinney 2011); then citing N.Y. CIV. SERV. LAW § 204(2) (McKinney 2011); and then citing N.Y. CIV. SERV. LAW § 209-a(1)(d) (McKinney 2011 & Supp. 2018)).

424. *Id.* at 173, 57 N.Y.S.3d at 552 (citing EDUC. § 3602(e)(5)(d)).

proceeding to vacate PERB's decision.[425] The school district appealed from the supreme court's reversal of the PERB's determination.[426]

The Third Department held that the PERB correctly determined that the school district acted pursuant to Education Law § 3602-e(5)(d), "which authorizes a school district 'to enter any contractual or other arrangements necessary to implement' a prekindergarten program plan '[n]otwithstanding any other provision of the law.'"[427] The Third Department acknowledged that outsourcing is ordinarily a mandatory bargaining subject, but that in this case a competing statute provided the employer with unambiguous express authority to act unilaterally.[428]

B. Past Practice

In *Albany Police Officers Union v. New York Public Employment Relations Board*, the Third Department held that the city employer committed an improper practice by unilaterally cancelling its past practice of reimbursing retired police officers for their Medicare Part B premiums.[429] The PERB found that the union failed to meet its burden of establishing the existence of a genuine past practice.[430]

The Third Department disagreed with the PERB, and found there was no rational basis to support its finding that there was no past practice.[431] The standard used to determine whether a past practice exists is whether it was "unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the practice would continue."[432] The Third Department found that the reimbursement practice had been continued unabated for more than twenty years.[433]

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425. *Id.*

426. *Id.*

427. *Lawrence Teachers' Ass'n*, 152 A.D.3d at 173, 57 N.Y.S.3d at 552 (alterations in original) (quoting EDUC. § 3602(e)(5)(d)).

428. *Id.* at 173, 57 N.Y.S.3d at 552–53 (first citing CIV. SERV. § 209-a(1)(d); then citing EDUC. § 3602(e)(5)(d); then citing Manhasset Union Free School Dist. v. N.Y. State Pub. Emp. Relations Bd., 61 A.D.3d 1231, 1232–33, 877 N.Y.S.2d 497, 499 (3d Dep't 2009); and then citing Romaine v. Cuevas, 305 A.D.2d 968, 969, 762 N.Y.S.2d 122, 124 (3d Dep't 2003)).

429. 149 A.D.3d 1236, 1239, 52 N.Y.S.3d 132, 135 (3d Dep't 2017).

430. *Id.* at 1237, 52 N.Y.S.3d at 134.

431. *Id.* at 1239, 52 N.Y.S.3d at 135.

432. *Id.* at 1238, 52 N.Y.S.3d at 134–35 (quoting *Manhasset Union Free Sch. Dist.*, 61 A.D.3d at 1233, 877 N.Y.S.2d at 499–500 (3d Dep't 2009)) (citing Unatego Non-Teaching Ass'n v. N.Y. State Pub. Emp. Relations Bd., 134 A.D.2d 62, 64–65, 522 N.Y.S.2d 995, 997 (3d Dep't 1987)).

433. *Id.* at 1239, 52 N.Y.S.3d at 135.