LABOR AND EMPLOYMENT LAW

Tyler T. Hendry & Allison Zullo Gottlieb†

CONTENTS

INTRODUCTION

The *Survey* year saw several significant wage and hour developments in New York, including two incremental increases to the state's minimum wage and long-awaited final regulations from the New York Department of Labor ("NYDOL") for employers seeking to lawfully deduct wage overpayments and/or advances from an employee's wages.

The *Survey* year also saw increased efforts to prevent the misclassification of workers as independent contractors in the transportation industry along with a broader shared initiative amongst the New York State Attorney General, the NYDOL, and the United States Department of Labor ("USDOL") to combat such misclassification across all industries, which will likely result in both increased scrutiny and potential liability for employers with misclassified employees.

The Court of Appeals weighed in on the limits of free speech for public employees, finding that the safety of students outweighed the picketing rights of teachers involved in stalled contract negotiations at a

public school. The Court of Appeals also decided two significant cases involving disability discrimination, first, clarifying that indefinite leave is never considered a reasonable accommodation under the New York State Human Rights Law, and second, finding that an employer's failure to engage in a good faith interactive process in response to an accommodation request precluded an employer from obtaining summary judgment. Beyond the Court of Appeals, in a case of first impression, the Second Circuit ruled that the filing of an U.S. Equal Employment Opportunity Commission ("EEOC") charge does not toll statute of limitations on state-law tort claims.

Two upstate cities made significant moves to address discrimination by joining a number of cities across the country by passing "Ban the Box" legislation limiting employers' inquiries into an applicant's criminal convictions during the application process. Not to be outdone, downstate New York City also saw a number of significant developments during the Survey year, including the enactment of the paid sick leave law, expanding reasonable accommodation protections to pregnant employees, and expanding the scope of the New York City Human Rights Law protection to unpaid interns.

Finally, a number of developments at the federal level will also impact New York employers, including the U.S. Supreme Court's clarification on the often litigated subject of the definition of "changing clothes" under the Fair Labor Standards Act, and the Second Circuit's holdings that the FLSA does not preclude the enforcement of a class action waiver in an arbitration agreement; that certain individuals may be held personally liable under the FLSA; and its clarification of the definition of "employer" under the Worker Adjustment Retraining and Notification Act.

I. NEW YORK WAGE AND HOUR DEVELOPMENTS

A. Increases to the Minimum Wage

The first of three incremental boosts to the New York Minimum Wage law took effect on December 31, 2013, increasing the state's general minimum wage rate from $7.15 per hour to $8.00 per hour.[1]

† Tyler Hendry, associate at Bond, Schoeneck & King, PLLC; J.D., *magna cum laude*, 2010, University at Buffalo Law School; B.A., *summa cum laude*, 2007, Le Moyne College. Allison Zullo Gottlieb, associate at Bond, Schoeneck & King, PLLC; J.D., *summa cum laude*, 2011, Albany Law School; B.A., *summa cum laude*, 2008, St. John Fisher College. The authors would like to thank Alyssa N. Campbell, Scott F. Regan, and Jennifer B. Scheu for their assistance in preparing this article.

This rate was again increased to $8.75 per hour on December 31, 2014, and will be raised another 25 cents to $9.00 per hour on December 31, 2015.[2]

This legislation attempts to offset the impact of these staggered increases by providing tax subsidies, referred to as a "minimum wage reimbursement credit," to employers that employ students who are sixteen to nineteen years old.[3] On December 30, 2013, the New York State Department of Taxation and Finance issued a Technical Memorandum to provide guidance on this minimum wage reimbursement credit.[4] Under this Technical Memorandum, eligible employers, defined as a corporation, a sole proprietorship, a limited liability company or a partnership,[5] may claim the credit for employees meeting the following conditions: (1) the worker must be 16-19 years old, (2) be employed in New York, (3) be paid at the New York minimum wage rate during some part of the tax year, and (4) be enrolled full-time or part-time in an eligible educational institution during the period he or she is paid the New York minimum wage rate.[6] An employer is required to obtain documentation to verify the individual is currently enrolled as a student at an eligible educational institution and must make such records available to the Tax Department upon request.[7]

1 Act of March 29, 2013, ch. 57, 2013 McKinney's Sess. Laws of N.Y. 2607-D (codified at N.Y. LAB. LAW § 652(1) (McKinney 2014)).

2. *Id.*

3. Act of March 28, 2013, ch. 59, 2013 McKinney's Sess. Laws of N.Y. 2609-D (codified at N.Y. TAX LAW § 38(b)-(c) (McKinney 2014). Effective January 1, 2014, New York State taxpayers will pay the $.75 per hour for each eligible teenaged employee; taxpayers will pay $1.31 per hour effective January 1, 2015, and $1.35 per hour effective January 1, 2016, through 2018. *Id.*

4. *See generally Minimum Wage Reimbusement Credit*, N.Y. ST. DEP'T OF TAX. & FIN.: TAXPAYER GUIDANCE DIV. (2013), http://www.tax.ny.gov/pdf/memos/multitax/m13_8c_7i.pdf (New York State Department of Taxation & Finance Technical Memorandum on Act of March 28, 2013, ch. 59, 2013 McKinney's Sess. Laws of N.Y. 2609-D providing guidance on minimum wage requirement credit).

5. *Id.* The credit may be claimed by an eligible employer or an owner of an eligible employer.

6. *Id.*

7. *Id.*

B. New York State Department of Labor Adopts Final Regulations Governing Certain Wage Deductions

As reported in this *Survey* Article last year, in 2012, the New York Labor Law ("NYLL") was amended to significantly expand the list of permissible deductions that employers may deduct from the wages of New York employees (the "2012 Amendments").[8] Section 193 of the NYLL generally prohibits deductions from employee wages except for: (1) those made in accordance with law (e.g., taxes, social security, etc.); or (2) those authorized by the employee in writing, which are for the benefit of the employee and fall under a list of payments enumerated in the statute.[9] Prior to the 2012 Amendments, deductions under this latter category were limited to payments for insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for U.S. bonds, payments for dues to a labor organization, and "'other similar payments.'"[10] The NYDOL had narrowly interpreted the "similar payments" provision, and the 2012 Amendments allowed New York employers to make a wider scope of payroll deductions than previously permitted under section 193 while imposing new deduction-related requirements.[11]

Significantly, the 2012 Amendments allowed for employers to recover accidental wage overpayments due to a mathematical or clerical error and deductions to repay wage advances given to employees.[12] The 2012 Amendments required that the NYDOL create regulations to govern these deductions, including the size of overpayments that may be deducted, the timing, frequency, duration, and method of the deductions, a requirement that employers implement a procedure to dispute the amount of a deduction, and a requirement that employers notify employees of this procedure prior to making a deduction for an overpayment, and for an advance, at the time the advance is made.[13]

Pursuant to this mandate, NYDOL published these Final Regulations, effective October 9, 2013.[14] The Final Regulations provide detailed procedures and responsibilities that employers must complete in order to lawfully deduct for wage overpayments and advances.[15] For

8. Tyler T. Hendry & Anas Saleh, *Labor & Employment Law, 2012-2013 Survey of New York Law*, 64 SYRACUSE L. REV. 827, 831 (2014).

9. *See generally* N.Y. LAB. LAW § 193(1)(a)-(b) (McKinney 2014).

10. Hendry & Saleh, *supra* note 8, at 831.

11. *Id.*

12. N.Y. LAB. LAW § 193(1)(c).

13. *Id.*

14. N.Y. COMP. CODES R. & REGS. tit. 12, § 195 (2014).

15. *See id.*

overpayments, the Final Regulations allow the employer to recover the entire overpayment when it is less than or equal to the net wages in the employee's next wage payment (otherwise deductions for overpayments would be limited to 12.5% of the gross wages).[16] The Final Regulations also provide the specific content of the notice to be provided to the employee and guidance on approved dispute resolution procedures, including the timing requirements for responses.[17] For advances, the employer must have an agreement in place with the employee before making the advance that includes the amount to be advanced, the amount to be deducted (total and per wage payment), the date of the deduction(s), notice that the employee can contest any deduction, notice that the employee can revoke authorization only before the money is advanced, and guidance on approved dispute resolution procedures.[18]

In addition to providing detailed guidance on wage overpayments and advances, the Final Regulations explicitly list payments that may be allowed under the "catch-all" provision of section 193 for "similar payments for the benefit of the employee."[19] The Final Regulations clarify that permissible deductions must benefit the employee by providing financial or other support to the employee, his or her family, or a charitable organization designated by the employee.[20] Examples listed in the Final Regulations include benefits such as gym memberships and day care expenses, pension and savings benefits, charitable benefits, labor organization dues, transportation benefits, and food and lodging benefits such as purchases made in a company cafeteria.[21] Finally, under the Final Regulations, employers are specifically prohibited from making deductions for repayments of loans, advances, and overpayments that are not in accordance with subpart 195-5; employee purchases of tools, equipment and attire required for work; recoupment of authorized expenses; repayment of employer losses such as spoilage, breakage, or cash shortages; contributions to political action committees, campaigns, and similar payments; and fees, interest, or the employer's administrative costs.[22]

16. 12 NYCRR 195-5.1(d).
17. *Id.* § 195-5.1(e)-(f).
18. *Id.* § 195-5.2(a), (e)-(f).
19. *Id.* § 195-4.4.
20. *Id.* § 195-4.3(a).
21. 12 NYCRR 195-4.4.
22. *Id.* § 195-4.5.

II. OTHER NEW YORK LEGISLATIVE AND REGULATORY DEVELOPMENTS

A. Reforms to New York's Unemployment Insurance Law Go Into Effect

Several reforms to the unemployment insurance law, aimed largely at restoring the State's insolvent Unemployment Insurance Trust Fund went into effect during the *Survey* Year.[23] For example, on October 1, 2013, employers who respond to NYDOL inquiries in an untimely or insufficient manner will not be relieved of charges to their unemployment insurance account even if there is found to be an overpayment to a claimant.[24] Also, effective that same date, claimants became subject to a 15% or $100 penalty for fraudulently collecting unemployment benefits.[25]

Several other changes went into effect on January 1, 2014, including an increase in the wage base from $8,500 to $10,300 for 2014, eliminating the six lowest contribution rates for employers, and requiring claimants who exhaust benefits, who are disqualified for misconduct, or who voluntarily quit their employment without good cause or decline a job offer to earn ten times their weekly benefit rate before being able to requalify for benefits.[26] Additionally, under the reforms, the payment of severance to an employee in an amount exceeding the maximum weekly benefit rate will preclude an employee from receiving benefits unless the severance is not paid out until thirty days after the employees' last day of employment.[27]

Looking ahead, in October 2014, the maximum weekly benefit was increased from $405 to $4

23. Hendry & Saleh, *supra* note 8, at 834-36.

24. *See* Act of March 29, 2013, ch. 57, 2013 McKinney's Sess. Laws of N.Y. 2067-D (codified at N.Y. LAB. LAW § 597(d) (McKinney 2014)). There is an exception, however, for failure to respond for NYDOL errors, as well as federal and state declared disaster emergencies. *Id.*

25. *See* N.Y. LAB. LAW § 594(1), (4).

26. *See Fact Sheet on Unemployment Insurance Reform for Employers*, N.Y. ST. DEP'T OF LABOR (2014), http://labor.ny.gov/formsdocs/ui/p822-english.pdf. *See* also N.Y. LAB. LAW § 593(1)-(3). Previously, claimants only had to earn five times their benefit rate to requalify. N.Y.S. 2607D, 236th Sess. (2013).

27. N.Y. LAB. LAW § 591(6)(a), (d).

B. New York Enacts the Commercial Goods Transportation Industry Fair Play Act

The Commercial Goods Transportation Industry Fair Play Act ("Fair Play Act") went into effect on April 10, 2014.[28] The Fair Play Act is aimed at preventing the "misclassification" of drivers of commercial vehicles who transport goods as independent contractors as opposed to treating these individuals as employees. New York previously enacted similar legislation to address the same issue in the construction industry.[29]

The Fair Play Act presumes an employment relationship for certain drivers who provide "commercial goods transportation services for a commercial goods transportation contractor."[30] A "commercial goods transportation contractor" is defined as any sole proprietor, partnership, firm, corporation, limited liability company, association or other legal entity that compensates a driver who possesses a state drivers license and transports goods in New York using a commercial motor vehicle as defined in subdivision 4-a of section 2 of the Transportation Law.[31]

This presumption may only be rebutted if the driver's services are reported on a federal income tax form 1099 *and* the driver meets at least one of the following multi-factor tests.[32] First, the business may show the driver is a bona fide independent contractor under the law's so-called "A-B-C test."[33] Under this test, a driver must be: (a) free from control and direction in performing the job, both under contract and in fact; (b) performing services outside of the usual course of business for the employer; and (c) engaged in an independently-established trade, occupation, profession, or business that is similar to the service at issue.[34]

In the alternative, a business/driver can show that it constitutes a "separate business entity."[35] To establish this status, the business must specifically show that each and every part of a detailed, eleven-factor test is met.[36] Such factors include, among others, that the driver: (i) has invested substantial capital in its business entity; (ii) has the right to perform similar services for others on whatever basis and whenever it

28. *Id.* § 862.
29. *Id.* § 861.
30. *Id.* § 862-b.
31. N.Y. LAB. LAW § 862-a(1).
32. *Id.* § 862-b(1).
33. *Id.* § 862-b(1)(a)-(c).
34. *Id.*
35. *Id.* § 862-b(2).
36. N.Y. LAB. LAW § 862-b(2)(a)-(k).

chooses; and (iii) not be subject to cancellation or destruction when its work with the contractor ends.[37]

The Act imposes new, significant penalties for businesses failing to properly treat covered drivers as employees.[38] Violations deemed to be "willful" are punishable by substantial civil and criminal penalties.[39] Willful violations are violations where a party "knew or should have known that his or her conduct was prohibited."[40] Civil remedies include a penalty of $2,500 per misclassified worker for a first violation, and a penalty of $5,000 per misclassified worker for subsequent violations.[41] Criminal penalties include up to 30 days imprisonment or a fine not to exceed $25,000 for the first violation, and up to 60 days imprisonment or a fine not to exceed $50,000 for subsequent violations.[42]

C. NYDOL's Additional Efforts to Curb Misclassification of Employees as Independent Contractors

During the *Survey* year, the NYDOL also became part of an initiative to curb the misclassification of employees as independent contractors that will impact employers beyond just the trucking industry. On November 18, 2013, New York became the fifteenth state to agree to share information and to coordinate enforcement efforts with the USDOL regarding the misclassification of employees as independent contractors.[43] The NYDOL and the New York State Attorney General signed a partnership agreement with the USDOL agreeing to exchange information and to coordinate enforcement efforts against employers who misclassify employees.[44] The NYDOL's new agreement with the USDOL increases the likelihood that an employer under investigation by a federal or state agency for an alleged misclassification will also find the subject employee(s)' classification analyzed and examined by another agency, leading to potential penalties under a variety of state and federal laws.

An example of a similar information sharing arrangement between various New York agencies shows how high the stakes can be. The

37. *Id.* § 862-b(2).
38. *Id.* § 862-d.
39. *Id.* § 862-d
40. *Id.* § 862-d(2).
41. N.Y. LAB. LAW § 862-d(3).
42. *Id.* § 862-d(4).
43. *Partnership Agreement Between the U.S. Department of Labor, Wage and Hour Division and Labor Bureau of New York State Office of Attorney General*, U.S. DEP'T OF LABOR (Nov. 18, 2013), http://www.dol.gov/whd/workers/MOU/ny.pdf.
44. *Id.*

NYDOL is currently part of the New York Joint Enforcement Task Force. In addition to the NYDOL, this Task Force includes the New York State Workers' Compensation Board, the New York State Workers' Compensation Fraud Inspector General, the New York State Department of Taxation and Finance, the New York State Attorney General's Office, and the Comptroller of the City of New York.[45] The Task Force was created in 2007, and was intended to increase the communication among agencies with respect to misclassification investigations and determinations among these state agencies.[46] In its February 2014 Report, the Task Force indicated that since its inception, enforcement and data sharing activities have identified over 114,000 instances of employee misclassification and discovered nearly $1.8 billion in unreported wages.[47] It can be expected that this new coalition between the USDOL and the NYDOL will yield similar consequences and results.

D. New York Bans Smoking on Hospital and Residential Health Care Facility Grounds

On October 29, 2013, smoking became generally prohibited on the grounds of a general hospital or residential health care facility.[48] The amendment to New York State's smoking law prohibits smoking in areas within fifteen feet of any building entrance or exit and within fifteen feet of any entrance to or exit from the grounds of a general hospital or residential health care facility.[49] There is a narrow exception for patients of residential health care facilities and their visitors or guests, but there are no exceptions for employees of general hospitals or residential health care facilities.[50] The narrow exception permits individuals to smoke in a designated smoking area that is at least thirty feet away from any building structure.[51] This exception does not apply to patients of general hospitals and their visitors or guests.[52]

45. N.Y. COMP. CODES R. & REGS. tit. 9, § 6.17(2) (2014).
46. *Id.*
47. PETER M. RIVERA, ANNUAL REPORT OF THE JOINT ENFORCEMENT TASK FORCE ON EMPLOYEE MISCLASSIFICATION, 2-3 (2014), *available at* http://www.labor.ny.gov/agencyinfo/PDFs/Misclassification-Task-Force-Report-2-1-2014.pdf.
48. N.Y. PUB. HEALTH LAW § 1399-o(2) (McKinney 2014).
49. *Id.*
50. *Id.*
51. *Id.*
52. *See id.*

Prior to this amendment, the only outdoor areas subject to the smoking law were areas outside of schools and railroad stations.[53]

E. Proposed Elimination of the Annual Wage Notice Requirement under the Wage Theft Prevention Act

On June 19, 2014, the New York Senate and Assembly passed a bill that would remove the annual wage notice requirement imposed on employers under the Wage Theft Prevention Act ("WTPA").[54] The WTPA requires that employers distribute to every employee, upon hire, and to every employee by February 1 of each year, written notice of wage information (e.g., rate or rates of pay, how the employee is paid, regular payday, official name of the employer and any other DBAs).[55] The proposed bill would eliminate the requirement that this notice be sent before February 1 of each year.[56]

However, in addition to removing the annual wage notice requirement, the bill, if signed, would also increase penalties for employers who fail to provide the notice to employees upon hire.[57] The bill also contains further amendments aimed at penalizing repeat labor law offenders.[58]

III. DEVELOPMENT IMPACTING PUBLIC SECTOR EMPLOYMENT IN NEW YORK

In a case highlighting the limits of free speech in public employment, the New York Court of Appeals held that a school district did not violate the First Amendment by disciplining certain teachers who participated in a picketing demonstration.[59] Specifically, the Court of Appeals held that the teachers' right to engage in constitutionally protected speech was outweighed by the school district's legitimate interests in protecting the health and safety of students and in maintaining effective operations of the school.[60]

53. *See* Act of July 31, 2013, ch. 179, 2013 McKinney's Sess. Laws of N.Y. A. 1115-A (codified at N.Y. PUB. HEALTH LAW § 1399-o); *see also* Act of September 5, 2012, ch. 449, 2012 McKinney's Sess. Laws of N.Y. A. 10141-B (codified at N.Y. PUB. HEALTH LAW § 1399-o).

54. N.Y.S. 05885, 237th Sess. (2014); N.Y.A. 08106, 237th Sess. (2014).

55. N.Y. LAB. LAW § 195(1)(a) (McKinney 2014).

56. N.Y.S. 05885, 237th Sess. (2014); N.Y.A. 08106, 237th Sess. (2014).

57. *Id.*

58. *Id.*

59. Santer v. Bd. of Educ. of E. Meadow Union Free Sch. Dist., 23 N.Y.3d 251, 255, 13 N.E.3d 1028, 1031-32, 990 N.Y.S.2d 442, 445-46 (2014).

60. *Id.* at 267, 13 N.E.3d at 1040, 990 N.Y.S.2d at 454.

In *Santer*, a number of teachers were involved in extended picketing activity over stalled contract negotiations.[61] The picketers had been involved in nearly weekly protests for over two years prior to the date of the picketing activity that resulted in their discipline.[62] On this particular date, due to rainy weather, the teachers decided to park their cars on a two-way street in front of the middle school and place the picketing signs in their car windows, as opposed to walking along the sidewalk holding their signs.[63] This caused congestion, and parents dropping off their children for school were unable to pull directly up to the curb and instead had to stop their cars in the middle of the street to drop off their children.[64] Students were therefore forced to cross through traffic in the rain in order to reach the school.[65]

Thereafter, the school district commenced disciplinary proceedings against the teachers who participated in the picketing activity, alleging that the teachers created a health and safety risk.[66] The teachers were ultimately found guilty of the alleged misconduct and were assessed fines as disciplinary penalties.[67] The teachers filed petitions to vacate the disciplinary decisions, which were denied at the Supreme Court level.[68] The appellate division reversed the lower court's decision and vacated the disciplinary decisions on the ground that the school district failed to meet its burden of showing that the teachers' exercise of their First Amendment free speech rights constituted such a threat to the school's operations that the imposition of discipline was justified.[69] The appellate division also held that the discipline would likely have a chilling effect on the teachers' speech regarding an important matter of public concern.[70]

However, the Court of Appeals reversed this decision and reinstated the discipline.[71] In so ruling, the Court of Appeals recognized that the teachers' picketing activity was a form of protected speech related to a public concern, but found that the district had met its burden

61. *Id.* at 255, 13 N.E.3d at 1031-32, 990 N.Y.S.2d at 445-46.
62. *Id.*
63. *Id.* at 256, 13 N.E.3d at 1032, 990 N.Y.S.2d at 446.
64. *Santer*, 23 N.Y.3d at 257, 13 N.E.3d at 1033, 990 N.Y.S.2d at 447.
65. *Id.*
66. *Id.* at 258-59, 13 N.E.3d at 1034, 990 N.Y.S.2d at 448.
67. *Id.* at 259, 13 N.E.3d at 1034, 990 N.Y.S.2d at 448.
68. *Id.*
69. *Santer*, 23 N.Y.3d at260, 13 N.E.3d at 1034-35, 990 N.Y.S.2d at 448-49.
70. *Id.* at 260, 13 N.E.3d at 1035, 990 N.Y.S.2d at 449.
71. *Id.* at 269, 13 N.E.3d at 1042, 990 N.Y.S.2d at 456.

of showing that the teachers' conduct posed a significant risk to the health and safety of students.[72] Additionally, the Court of Appeals found it significant that the teachers had engaged in picketing activity prior to the date in question and after the date in question without any disciplinary measures taken, which demonstrated that the district's disciplinary actions were not motivated by the content of the teachers' speech but rather the safety of its students.

IV. DISCRIMINATION DEVELOPMENTS IMPACTING NEW YORK EMPLOYERS

A. Title VII and New York: Second Circuit Rules Filing EEOC Charge Does Not Toll Statute of Limitations on State-Law Tort Claims

In a case of first impression, the Second Circuit ruled, in *Castagna v. Luceno*, that filing a charge with the United States Equal Employment Opportunity Commission ("EEOC") does not toll the statute of limitations on state-law tort claims arising from the "same nucleus of facts as underlie the EEOC charge."[73]

In *Castagna*, the plaintiff filed a charge with the EEOC alleging employment discrimination on the basis of sex.[74] Castagna's charge specifically described the conduct of her alleged harasser, defendant Luceno's, including an incident that led to Castagna's resignation on July 9, 2008, where Luceno screamed and yelled at her and shoved her computer monitor at her.[75] Castagna received a right-to-sue letter from the EEOC on August 14, 2009 pursuant to 42 U.S.C. § 2000e-5(f)(1) and commenced a lawsuit in the United States District Court for the Southern District of New York on November 9, 2009.[76]

Castagna's federal complaint alleged that defendants subjected her to a hostile work environment and constructively discharged her in violation of Title VII of the Civil Rights Act of 1964[77] and the New York State Human Rights Law,[78] and that defendants were liable for the torts of intentional infliction of emotional distress ("IIED"), assault, and battery, in violation of New York tort law.[79] The IIED claim was based on Luceno's ongoing course of harassment, and the assault and battery

72. *Id.* at 269, 13 N.E.3d at 1041, 990 N.Y.S.2d at 455.
73. 744 F.3d 254, 255 (2d Cir. 2014).
74. *Id.* at 256.
75. *Id.*
76. *Id.*
77. *Id.*; *see* 42 U.S.C. § 2000e-2000e-17 (2014).
78. *See* N.Y. EXEC. LAW §§ 290-296-c (McKinney 2014); *Castagna*, 744 F.3d at 256.
79. *Castagna*, 744 F.3d at 256.

claims were premised specifically on the incident involving the computer monitor, both of which were described in Castagna's EEOC charge.[80] Defendants moved to dismiss the three New York tort claims as barred by the one-year New York state statute of limitations.[81] Castagna argued that the statute of limitations for the state-law claims were tolled by her EEOC filing, because they arose from the same set of facts as her discrimination claims.[82]

It was undisputed that absent the tolling of the statute of limitations, Castagna's New York tort claims, which were filed in federal court more than one year after her last date of employment, were untimely.[83] Thus, the only question for the Second Circuit was, as a matter of either federal or New York law, whether those claims were tolled by her filing of an EEOC charge.[84]

Castagna argued that without tolling for state tort claims pending the EEOC's consideration of a charge of discrimination, a litigant would be forced to first bring a tort case in state court "and later bring a federal, discrimination related claim in federal court . . . with an identical set of facts," thereby "thwart[ing] . . . the judicial efficiency encouraged by the grant of supplemental jurisdiction . . . in 28 U.S.C. § 1367."[85] Relying upon the reasoning of the Seventh[86] and Ninth Circuits,[87] and the U.S. Supreme Court's decision in *Johnson v. Railway Express Agency, Inc.*,[88] the Second Circuit rejected Castagna's argument, explaining that Congress did not intend for Title VII proceedings to "delay independent avenues of redress."[89] In addition, the Second Circuit explained that a plaintiff in Castagna's situation "may ask [a] court to stay proceedings in the initial action until the EEOC's administrative efforts . . . have been completed."[90] The Second Circuit further reasoned that "[a]lthough such a stay procedure is 'perhaps not a highly satisfactory' response to Castagna's plight, 'the fundamental answer to [her] argument lies in the fact' that she always

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Castagna*, 744 F.3d at 256.
85. *Id.* at 257 (quoting Forbes v. Merril Lynch, Fenner & Smith, Inc., 957 F. Supp. 450, 456 (S.D.N.Y. 1997)).
86. *Juarez v. Ameritech Mobile Commc'ns, Inc.*, 957 F.2d 317, 323 (7th Cir. 1992).
87. *Arnold v. United States*, 816 F.2d 1306, 1313 (9th Cir. 1987).
88. 421 U.S. 454, 457-67 (1975).
89. *Castagna*, 744 F.3d at 258 (quoting *Arnold*, 816 F.2d at 1313).
90. *Id.* (quoting *Johnson*, 421 U.S. at 465).

had 'an unfettered right' to pursue her tort claims."[91] The court also noted that Castagna did not allege any reason as to why she could not have brought her state claims within the applicable statute of limitations, but rather "simply failed to do so."[92]

In joining the Seventh and Ninth Circuits, the court held that "because Congress did not intend for the filing of a charge of discrimination with the EEOC to toll the statute of limitations applicable to state tort claims . . . lodging a charge of discrimination with the EEOC does not toll those state claims," even where those claims arise out of the same nucleus of facts alleged in the charge of discrimination with the EEOC.[93] For that reason, and because Castagna failed to preserve for appeal any argument in favor of state-law tolling, the court affirmed the district court's order dismissing Castagna's tort claims as time barred.[94]

B. Indefinite Leave is Never Considered a Reasonable Accommodation Under the NYHRL

In *Romanello v. Intesa Sanpaolo, S.P.A.*, New York's highest court held that indefinite leave is never considered a reasonable accommodation under the New York State Human Rights Law ("NYSHRL").[95] In so holding, the Court of Appeals highlighted the distinctions between the NYSHRL and the New York City Human Rights Law ("NYCHRL"), the latter of which does not define "disability" to include reasonable accommodations.[96] Rather, the NYCHRL couches its definition solely in terms of "impairments" and places a key pleading burden on the employer.[97]

The case arose when an executive of the defendant-employer was terminated after having been absent from work for five months, due to a series of incapacitating illnesses, and reporting that his return date was indeterminate.[98] In response, the executive sued, alleging the defendant

91. *Id.* (quoting *Johnson*, 421 U.S. at 466).

92. *Id.* On appeal, Castagna argued that New York law mandated tolling of the time in which to file her state tort claims because of the pendency of her EEOC charge. *Id.* However, because she failed to bring her state-law tolling arguments before the district court, the Second Circuit considered those arguments forfeited and did not decide whether, pursuant to New York law, there would be some ground for tolling of state tort claims during the pendency of an EEOC charge. *Castagna*, 744 F.3d at 258-59.

93. *Id.* at 259.

94. *Id.*

95. 22 N.Y.3d 881, 884, 998 N.E.2d 1050, 1052, 976 N.Y.S.2d 426, 428 (2013).

96. *Id.* at 885, 998 N.E.2d at 1053, 976 N.Y.S.2d at 429.

97. *Id.*

98. *Id.* at 882-83, 998 N.E.2d at 1051, 976 N.Y.S.2d at 427.

had discriminated against him on the basis of his disability in violation of both the NYSHRL and NYCHRL.[99]

The Court of Appeals began its analysis by noting that, in the context of employment discrimination, the term "disability" as defined in the NYSHRL is "limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held."[100] Thus, to state a claim under the NYSHRL, the complaint and supporting documentation must set forth factual allegations sufficient to show that, "upon the provision of reasonable accommodations, [the employee] could perform the essential functions of [his or] her job."[101] The NYCHRL, on the other hand, affords protections broader than the NYSHRL, without including the restraining requirements of reasonable accommodation and the ability to perform in a reasonable manner.[102] Importantly, the Court of Appeals noted that, under the NYCHRL, the pleading obligation to prove the employee "cannot, with reasonable accommodation, 'satisfy the essential requisites of the job'" is on the employer, not the employee.[103]

Therefore, because the executive had only indicated that his return date was indeterminate—which the Court of Appeals interpreted to be a request for an indefinite leave of absence and not a reasonable accommodation under the NYSHRL—his NYSHRL cause of action was properly dismissed.[104] The NYCHRL cause of action, however, was permitted to go forward because the defendant had failed to meet its obligation to prove the executive could not perform his essential job functions with a reasonable accommodation.[105]

C. Court of Appeals Rules an Employer Must Engage in an Individualized, Interactive Process with a Worker Who Proposes a Disability Accommodation to Avoid Trial

In *Jacobson v. New York City Health & Hospitals Corp.*, the New York Court Appeals held that on a motion for summary judgment to dismiss an employee's disability discrimination claims under the NYSHRL and NYCHRL, an employer's failure to consider the

99. *Id.* at 883, 998 N.E.2d at 1051, 976 N.Y.S.2d at 427.

100. *Romanello*, 22 N.Y.3d at 883-84, 998 N.E.2d at 1052, 976 N.Y.S.2d at 428 (quoting N.Y. EXEC. LAW § 292(21) (McKinney 2014)).

101. *Id.* at 884, 998 N.E.2d at 1052, 976 N.Y.S.2d at 428.

102. *Id.* at 885, 998 N.E.2d at 1053, 976 N.Y.S.2d at 429.

103. *Id.*

104. *Id.* at 884, 998 N.E.2d at 1052, 976 N.Y.S.2d at 428.

105. *Romanello*, 22 N.Y.3d at 885, 998 N.E.2d at 1053, 976 N.Y.S.2d at 428.

reasonableness of a proposed accommodation for a generally qualified employee's disability via a good faith interactive process precludes the employer from obtaining summary judgment.[106] Despite the differing legal standards of the two statutes, the Court of Appeals ruled that both generally preclude granting summary judgment to an employer in the absence of a demonstrated individualized, interactive process.[107]

The plaintiff was employed as a "health facilities planner" for the New York City Health and Hospital Corporation ("HHC"), a position that required frequent visits to construction sites.[108] After being diagnosed with an occupational lung disease, the plaintiff requested a number of accommodations, including assignments where he would avoid regular duties at construction sites.[109] The HHC determined that, given the nature of the plaintiff's duties, no position was available for his title that would not require working in conditions potentially hazardous to his health.[110] Therefore, at the end of plaintiff's medical leave, HHC terminated him, which prompted the disability discrimination suit under both the NYSHRL and NYCRHL.[111]

In determining whether the HHC had been properly granted summary judgment, the Court of Appeals reasoned that, by defining a "reasonable accommodation" in terms of an employee's request for accommodation and the employer's ability to conduct its operations within the limits of the employee's proposed arrangement, the NYSHRL indicates that an employee's suggestion of a specific accommodation must prompt the employer to consider whether the burden thus imposed upon the employer's business would be reasonable.[112] In this way, the employer's response to the employee's request and any ensuing dialogue about the impact of the proposed accommodation on the employer's business inform the determination of whether a reasonable accommodation exists.[113] After consideration of the legislative history and purpose of the NYSHRL, the Court of Appeals determined that "where the employee seeks a specific accommodation for his or her disability, the employer must give individualized consideration to that request and may not arbitrarily

106. 22 N.Y.3d 824, 827, 11 N.E.3d 159, 161-62, 988 N.Y.S.2d 86, 88-89 (2014).
107. *Id.* at 829, 11 N.E.3d at 161-62, 988 N.Y.S.2d at 88-89.
108. *Id.* at 827-28, 11 N.E.3d at 162, 988 N.Y.S.2d at 89.
109. *Id.* at 828-30, 11 N.E.3d at 162-63, 988 N.Y.S.2d at 89-90.
110. *Id.* at 830, 11 N.E.3d at 163, 988 N.Y.S.2d at 90.
111. *Jacobson*, 22 N.Y.3d at 830, 11 N.E.3d at 164, 988 N.Y.S.2d at 91.
112. *Id.* at 835, 11 N.E.3d at 167, 988 N.Y.S.2d at 94.
113. *Id.*

reject the employee's proposal without further inquiry."[114] As the more liberal statute, the Court of Appeals held that the same instruction unquestionably applied to the NYCHRL analysis.[115]

Therefore, absent evidence the employer duly considered the requested accommodation, including interactions evidencing "some deliberation" over the viability of such a request, the Court held that an award of summary judgment to the employer was inappropriate under both the NYSHRL and NYCHRL.[116] The Court also held, however, that its ruling did not mean an employee could obtain a favorable jury verdict or summary judgment award based solely on the employer's failure to engage in an interactive process.[117] Such a failure is but one factor to be considered in making that determination.[118]

D. Cities of Buffalo & Rochester Pass "Ban the Box" Legislation

The cities of Buffalo and Rochester joined a growing number of cities across the United States that have passed "Ban the Box" legislation, which places limitations on employers' inquiries into an applicant's prior criminal conviction(s) during the employment application process.[119]

The City of Buffalo recently enacted an ordinance amending Chapter 154 of the Code of the City of Buffalo, which prohibits employers from inquiring about an applicant's criminal convictions during the application process.[120] Specifically, covered employers are prohibited from including inquiries on employment applications, or asking questions about an applicant's criminal convictions at any time prior to an employee's first interview.[121] The ordinance went into effect on January 1, 2014, and applies to both public and private employers located within the City of Buffalo with fifteen or more employees as well as any vendors of the City of Buffalo, regardless of their location.[122]

The Buffalo ordinance does allow an exception for inquiries into convictions that would bar employment in the position for which the

114. *Id.* at 836, 11 N.E.3d at 95, 988 N.Y.S.2d at 168.
115. *Id.* at 837-38, 11 N.E.3d at 96, 988 N.Y.S.2d at 169.
116. *Jacobson*, 22 N.Y.3d at 837, 11 N.E.3d at 95-96, 988 N.Y.S.2d at 168-69.
117. *Id.* at 838, 11 N.E.3d at 96, 988 N.Y.S.2d at 169.
118. *Id.*
119. BUFFALO, N.Y., CODE § 154-25 (2014); ROCHESTER, N.Y., CODE § 63-12 (2014).
120. BUFFALO, N.Y., CODE § 154-25.
121. *Id.*
122. *Id.* §§ 154-25, 154-26.

applicant applies.[123] Further, the ordinance does not apply to public or private schools or to public or private service providers that provide care to children, young adults, senior citizens, or the physically or mentally disabled.[124] The ordinance also does not apply to any Fire or Police Departments.[125]

The Buffalo ordinance provides for a private right of action for an aggrieved party to seek injunctive relief, damages, and attorneys' fees.[126] Additionally, any individual, regardless of whether he or she is the aggrieved party, may file a complaint with the Commission on Citizens' Rights and Community Relations.[127] Upon a finding of probable cause, the Director of the Commission on Citizens' Rights and Community Relations may request that the Buffalo Corporation Counsel pursue an action against the accused employer seeking penalties of $500 for the first violation of the ordinance and $1,000 for each subsequent violation.[128]

The City of Rochester passed a similar "Ban the Box" ordinance, which prohibits employers from asking applicants about criminal convictions at any time before the employer has conducted an initial employment interview or made a conditional offer of employment.[129] The ordinance went into effect on November 18, 2014, and applies to all public and private employers and employment agencies with at least four employees within the City of Rochester, which has a much broader application than the Buffalo legislation.[130] The ordinance also applies to any vendors, contractors, or supplier of goods or services to the City of Rochester without regard to their location, consistent with the Buffalo legislation.[131]

The Rochester ordinance also provides for some exceptions to this general prohibition on inquiries about criminal convictions. For example, the ordinance allows employers to make inquiries into an applicant's conviction where such a conviction would legally bar employment in that position, or where inquiries into convictions are specifically authorized by another applicable law or by a licensing

123. *Id.* § 154-28(A).
124. *Id.* § 154-28(B).
125. BUFFALO, N.Y., CODE § 154-28(B).
126. *Id.* § 154-29(A).
127. *Id.* § 154-29(B).
128. *Id.* § 154-29(C).
129. ROCHESTER, N.Y., CODE § 63-12 (2014).
130. *Id.* § 63-13.
131. *Id.*

authority for licensed trades or professions.[132] The ordinance also does not apply to applicants for positions in the City of Rochester Police Department, the Fire Department, or any other positions as "police officers" or "peace officers."[133]

The ordinance provides for a private right of action for an aggrieved party to seek injunctive relief, damages, costs, and reasonable attorneys' fees.[134] The City of Rochester's Corporation Counsel may also initiate a court action seeking penalties of $500 for the first violation of the ordinance and $1,000 for each subsequent violation.[135]

V. OTHER FEDERAL LEGISLATIVE, REGULATORY, AND JUDICIAL DEVELOPMENTS

A. Supreme Court Decides the Meaning of Changing Clothes under the FLSA

In *Sandifer v. United States Steel Corp.*, the U.S. Supreme Court adopted a fairly broad definition of the phrase "changing clothes" that should allow employers to seek comfort that provisions of a collective bargaining agreement excluding changing clothes from compensable hours worked will likely be applied to time spent by employees "donning" and "doffing" most forms of protective gear.[136] By way of background, the Fair Labor Standards Act ("FLSA") generally requires employers to pay employees for time spent donning and doffing protective clothing and equipment if the employer requires employees to wear such protective clothing and equipment and the employee must change in and out of the protective clothing and equipment at the job site.[137] However, section 203(o) of the FLSA provides that this time will not be deemed compensable if the employer and the employee's representative have agreed to a provision in a collective bargaining agreement to exclude from hours worked "time spent changing clothes or washing at the beginning or end of each workday."[138]

In *Sandifer*, a group of employees contended that even though their collective bargaining agreement contained such a changing clothes provision, they should nevertheless be compensated because many of

132. *Id.* § 63-15(A).
133. *Id.* § 63-15(B).
134. ROCHESTER, N.Y., CODE § 63-16(A).
135. *Id.* § 63-15(D).
136. 134 S. Ct. 870, 879 (2014).
137. *Id.* at 877-78.
138. Fair Labor Standards Act, 29 U.S.C. § 203(o) (2014).

the "clothing" items they were required to wear were protective in nature.[139] The Supreme Court refused to interpret the phrase "changing clothes" as narrowly as the employees urged and instead held that the term included all items that are designed to cover the body and are commonly regarded as articles of dress.[140] The Supreme Court further held that the definition of "clothes" does not necessarily exclude items that are worn exclusively for protection, as long as those items are designed to cover the body and are regarded as articles of dress.[141]

Applying these definitions, the Supreme Court considered twelve items of protective gear: a flame-retardant jacket, a pair of pants, and a hood; a hardhat; a snood (which is a hood that covers the neck and upper shoulder area); wristlets; work gloves; leggings; metatarsal boots; safety glasses; earplugs; and a respirator.[142] The Supreme Court found that the first nine items qualified as "clothes," but the last three did not.[143]

Perhaps more significant than this broad definition, the Supreme Court went on to consider whether courts should tally the minutes spent donning and doffing each item in order to deduct the time spent donning and doffing the non-clothing items from non-compensable time.[144] Instead of engaging in such a detailed analysis, the Court articulated the following "vast majority" standard:

> If an employee devotes the vast majority of the time in question to putting on and off equipment or other non-clothes items (perhaps a diver's suit and tank) the entire period would not qualify as "time spent in changing clothes" under [section] 203(o), even if some clothes items were donned and doffed as well. But if the vast majority of the time is spent in donning and doffing "clothes" as we have defined that term, the entire period qualifies, and the time spent putting on and off other items need not be subtracted.[145]

The Supreme Court concluded that the employees in this case spent a vast majority of the time in question donning and doffing items that fell within the definition of "clothes," and that their time was non-compensable under the terms of the collective bargaining agreement.[146]

139. *See Sandifer*, 134 S. Ct. at 874.
140. *See id.* at 878.
141. *Id.* at 877-78.
142. *Id.* at 874.
143. *Id.* at 879-80.
144. *Sandifer*, 134 S. Ct. at 880.
145. *Id.* at 881.
146. *Id.* at 881.

This decision is significant for union employers, as prior to this clarification, the courts and the USDOL had issued and applied differing and inconsistent constructions of the changing clothes definition set forth in section 203(o).

B. Second Circuit Rules FLSA Does Not Preclude Enforcement of Class-Action Waiver

In *Sutherland v. Ernst & Young LLP*, the Second Circuit ruled that the FLSA does not prohibit enforcement of a class-action waiver in an arbitration agreement.[147] The Second Circuit determined that nothing in the FLSA could be construed to override the liberal policy favoring the enforceability of arbitration agreements established by the Federal Arbitration Act ("FAA").[148] The Second Circuit further held that an arbitration agreement's class-action waiver was not rendered invalid simply because the waiver obviated the financial incentive for the employee to pursue a claim under the FLSA.[149]

In the case before the court, a former employee sued her former employer in a putative class-action to recover overtime wages under the FLSA.[150] The former employee had, prior to accepting employment with her former employer, entered into an arbitration agreement with the employer that barred civil lawsuits and any class arbitration proceedings.[151] Upon filing her putative class-action in federal court, the former employer filed a motion to dismiss or stay the proceedings, and to compel arbitration on an individual basis.[152] The U.S. District Court for the Southern District of New York denied the motion, and the former employer appealed.[153] The Second Circuit reversed the District Court's order.[154]

The Second Circuit noted that the FAA establishes a "liberal federal policy favoring arbitration agreements" and that federal courts should enforce arbitration agreements according to their terms unless there is a "contrary congressional command" superseding the FAA's pro-arbitration mandate.[155] In accordance with the consensus of its sister circuits, the Second Circuit held that the FLSA contains no contrary

147. 726 F.3d 290, 299 (2d Cir. 2013).
148. *Id.* at 297.
149. *Id.* at 298.
150. *Id.* at 294.
151. *Id.*
152. *Sutherland*, 726 F.3d at 294.
153. *Id.* at 295.
154. *Id.* at 299.
155. *Id.* at 295.

congressional command against waiving class actions.[156] The court reasoned that because section 16(b) of the FLSA requires an employee to affirmatively opt into any collective action brought under the statute, the employee has the power to waive participation in class proceedings as well.[157] The Second Circuit thus expressly declined to follow the National Labor Relations Board's ("NLRB") decision in *D. R. Horton, Inc.*,[158] which held that a waiver of the right to pursue a claim under the FLSA collectively in any forum violates the National Labor Relations Act.[159]

The Second Circuit also directly addressed the "effective vindication doctrine" asserted by the former employee, who argued she had no financial incentive to pursue her claim individually in arbitration because of the prohibitive cost and marginal potential recovery.[160] Thus, the arbitration agreement, the former employee argued, operated as a prospective waiver of her "right to pursue" statutory remedies.[161] Following the reasoning of the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*,[162] the Second Circuit held that a high expense of proving a statutory remedy, even when prohibitive, does not constitute the elimination of the right to pursue that remedy.[163]

C. Second Circuit Rules CEO Can Be Held Personally Liable for FLSA Violations

In *Irizarry v. Catsimatidis*, the Second Circuit ruled that the chairman and chief executive officer ("CEO") of a corporation could be held personally liable for damages arising from FLSA claims brought by employees.[164] Specifically, the Second Circuit ruled that the Chairman and CEO of Gristede's supermarket chain—John Catsimatidis—was an "employer" within the meaning of the FLSA, and could, therefore, be held jointly and severally liable for such damages.[165]

156. *Id.* at 296.
157. *Sutherland*, 726 F.3d at 297.
158. D.R. Horton, Inc., 357 N.L.R.B 184 (2012).
159. *Sutherland*, 726 F.3d at 297 n.8.
160. *Id.* at 298.
161. *Id.*
162. 133 S. Ct. 2304, 2311 (2013).
163. *Sutherland*, 726 F.3d at 298-99.
164. 722 F.3d 99, 117 (2d Cir. 2013).
165. *Id.*

In 2004, a group of Gristede's employees filed a class/collective action lawsuit against the corporation for unpaid overtime under the FLSA.[166] The employees prevailed on their claims, and the parties subsequently entered into a settlement agreement.[167] Soon after, however, Gristede's defaulted on its payment obligations under the agreement, and the employees thereafter moved to hold Catsimatidis personally liable for the FLSA damages in question.[168] The federal district court granted the motion, ruling that Catsimatidis could be held personally liable.[169] Catsimatidis then appealed to the Second Circuit.[170]

The Second Circuit affirmed the district court's decision, holding that, in certain circumstances, an individual may be considered an "employer" under the FLSA's "economic reality" test and, consequently, held personally liable for violations of the statute.[171] The court found those circumstances existed with respect to Catsimatidis because, among other things, he: (i) "was active in running Gristede's, including contact with individual stores, employees, vendors, and customers"; (ii) was ultimately responsible for the employees' wages and signed their paychecks; and (iii) supervised other managerial personnel, such as the Chief Financial Officer and Chief Operating Officer of Gristede's.[172] Therefore, despite evidence that Catsimatidis did not hire or fire rank-in-file employees, did not fix their specific wages or schedules, and had only limited interaction with his subordinate mangers who handled such matters, Catsimatidis's overall authority was sufficient to hold him personally liable.[173] According to the court, the most "important and telling factor" under the "economic reality" test is whether there is a clear delineation of an individual's power over employees—a factor that weighed against Catsimatidis in this case because of his occasionally-exercised operational control over the plaintiff's employment.[174]

Furthermore, the Second Circuit found that it was irrelevant that Catsimatidis was not alleged to have been personally complicit in the FLSA violations at issue and that the FLSA would carry an "empty guarantee" to remediate employees for violations if it did not hold an

166. *Id.* at 102.
167. *Id.*
168. *Id.*
169. *Irizarry*, 722 F.3d at 101.
170. *Id.* at 102.
171. *Id.* at 117.
172. *Id.* at 114-16.
173. *Id.* at 116.
174. *Irizarry*, 722 F.3d at 116.

employer's controlling individuals accountable to the law.[175] Thus, the analysis ends once the defendant is found to be an "employer" under the statute.[176]

D. Second Circuit Adopts Five-Factor Department of Labor Test to Apply When Determining Single-Employer Status Under WARN Act

In *Guippone v. BH S&B Holdings LLC*, the Second Circuit held that the five-factor test set forth in the DOL regulations should be applied when analyzing whether nominally separate entities should be considered a single employer under the Worker Adjustment and Retraining Notification Act ("WARN Act").[177]

The question arose when one of the defendant entities, a parent company of the employees' immediate employer, argued that the appropriate test for determining WARN Act liability for related entities was the Second Circuit's test for determining whether a creditor was an "employer" within the meaning of the WARN Act.[178] Recognizing that, by its plain language, this test only applied to lenders, the court was left to answer the open question as to what test governs whether a related or parent entity—including an equity investor—can be considered an employer under the WARN Act.[179]

The Second Circuit adopted the five-factor test delineated in the DOL regulations because, agreeing with the Third Circuit Court of Appeals that, "they were created with WARN Act policies in mind" and "focus particularly on circumstances relevant to labor relations."[180] This test requires consideration of "(i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations."[181] The test is, in essence, a totality of the circumstances test, with no one factor controlling and no requirement that all factors be present for liability to attach.[182]

Applying this test to the particular facts of the case, the Second Circuit affirmed the lower court's dismissal of causes of action against two of the related entities but held that a question of fact existed with regard to the de facto exercise of control as applied to the third related

175. *Id.* at 110.
176. *Id.* at 117.
177. 737 F.3d 221, 226 (2d Cir. 2013).
178. *Id.*
179. *Id.*
180. *Id.* (internal quotation marks omitted).
181. *Id.*
182. *Guippone*, 737 F.3d at 226.

entity.[183] In so holding, the court clarified that the de facto control factor is not intended to support liability on the basis of ordinary ownership but is interested, rather, in whether the related entity "was the decisionmaker responsible for the employment practice giving rise to the litigation."[184] Thus, where a jury could conclude that the parent entity directed layoffs without regard to separate corporate forms, a question of fact existed, and an award of summary judgment could not be granted.[185]

E. Southern District of New York Rules Undocumented Workers are Entitled to Recover Unpaid Wages under the FLSA

In *Colon v. Major Perry Street Corp.*, the U.S. District Court for the Southern District of New York held that undocumented workers are covered under the FLSA's definition of "employee," and are consequently entitled to unpaid minimum wage and overtime pay for work they have performed.[186] There, the plaintiffs, some of whom were undocumented aliens, were all superintendents of buildings owned by the defendants who collectively sued to recover wages the defendants had refused to pay.[187]

While the plaintiffs were drafting a Notice of Pendency, the Second Circuit issued a decision limiting the discretion of the NLRB to award certain damages to undocumented workers under the National Labor Relations Act ("NLRA").[188] This decision put into question what language the Notice of Pendency should contain about the participation of undocumented workers and what discovery should be allowed into the citizenship status of potential plaintiffs.[189] Thus, the District Court was tasked with determining what impact, if any, the Second Circuit's decision had on a case brought under the FLSA.[190]

The court began by noting the uniform reluctance among federal courts to import the NLRA's limitations into FLSA cases, in the wake the Second Circuit's decision.[191] Critically, the court observed that the two statutes provided distinctive rights and remedies that need not and

183. *Id.* at 226-27.
184. *Id.* at 227.
185. *Id.* at 227-28.
186. 987 F. Supp. 2d 451, 453 (S.D.N.Y. 2013).
187. *Id.* at 452, n.1.
188. Palma v. N.L.R.B., 723 F.3d 176, 177 (2d Cir. 2013); *see Colon*, 987 F. Supp. 2d at 452.
189. *Colon*, 987 F. Supp. 2d at 453.
190. *Id.*
191. *Id.*

should not be synthesized.[192] In ruling that the Second Circuit's decision did not affect the FLSA's coverage of undocumented workers, the court explained that the text of the FLSA, by broadly defining "employee" as "any individual employed by the employer," unambiguously applied to undocumented workers.[193] The court further noted that the FLSA focuses on back-pay as a remedy to ensure that employers do not gain an advantage by violating immigration laws.[194] If this were not the case, employers would be exempt from wage and hour standards for undocumented employees.[195] Therefore, applying the FLSA to undocumented workers, the court held, furthers the purpose of the Immigration and Reform Control Act: to punish employers for employing undocumented workers.[196] All of this, together with the DOL's own understanding that the FLSA applies to undocumented workers, led the court to conclude that NLRA doctrine does not alter the expansive application of the FLSA.[197]

F. The U.S. Supreme Court Invalidates Hundreds of National Labor Relations Board Decisions and the National Labor Relations Board Continues Down Its Pro-Union Path

Over the *Survey* year, the NLRB continued its aggressive pro-union agenda, but this agenda was slightly derailed by the U.S. Supreme Court in *NLRB v. Noel Canning*.[198] The decision found that President Obama's three recess appointments to the NLRB, made on January 4, 2014, were unconstitutional.[199] At the time the appointments in question were made, the Senate was operating pursuant to a consent agreement that provided the Senate would meet in pro forma sessions every three business days from December 20, 2011 through January 23, 2012.[200] The U.S. Constitution permits the president to "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[201] The Supreme Court ultimately determined that President Obama's recess appointments during a three-day intra-session recess of the Senate were

192. *Id.*
193. *Id.*
194. *Colon*, 987 F. Supp. 2d at 462.
195. *Id*.
196. *Id.* at 463.
197. *Id.*
198. 134 S. Ct. 2550, 2556 (2014).
199. *Id.* at 2557.
200. *Id.*
201. U.S. CONST. art. II, § 2, cl. 3.

unconstitutional because the three-day "recess" was not of substantial length.[202] Specifically, the Court held that a recess of fewer than ten days is presumptively too short to permit the president to make recess appointments, but it did leave open the possibility that extraordinary or unusual circumstances may otherwise permit the president to exercise such authority during a recess of fewer than ten days.[203]

The decision is significant because it means that the NLRB did not have a valid quorum of three members from the date of the recess appointments through August 2013, when four new members were sworn in. Accordingly, every decision issued by the NLRB during that approximately nineteen-month period without a valid quorum was rendered invalid.

Some of the controversial NLRB decisions rendered invalid include: (1) the NLRB's holding (and reversal of 50 years of precedent) in *WKYC-TV, Inc.* that an employer's obligation to check off union dues continues after the expiration of a collective bargaining agreement;[204] (2) the NLRB's holding (and reversal of thirty-five years of precedent) in *American Baptist Homes of the West d/b/a Piedmont Gardens* that witness statements related to employee discipline are not necessarily shielded from disclosure to the union;[205] and (3) the *Banner Health System* decision holding that an employer violated section 8(a)(1) of the National Labor Relations Act by asking employees not to discuss ongoing investigations with their co-workers.[206]

The NLRB will now be forced to reconsider and issue new decisions in every case that was decided without a valid quorum in place; however, as the makeup of the Board remains pro-union, it is unlikely that any of these cases will arrive at significantly different outcomes upon review.

As noted, it is unlikely this will curb the aggressive acts of the pro-union NLRB. In perhaps the most shocking example from the *Survey* Year, the NLRB found that an employee was protected under the National Labor Relations Act and could not be disciplined despite engaging in the following behavior: calling his boss a "fucking mother fucker," "a fucking crook," an "asshole"; proceeding to tell his boss that "he was stupid, nobody liked him, and everyone talked about him

202. *Noel Canning*, 134 S. Ct. at 2557.

203. *Id.* at 2567.

204. WKYC-TV, Inc., 359 N.L.R.B. No. 30 (2012).

205. Am. Baptist Homes of the West d/b/a Piedmont Gardens, 359 N.L.R.B. No. 46 (2012).

206. Banner Health Sys., 358 N.L.R.B. No. 93 (2012).

behind his back"; and then standing up in the boss's office, pushing his chair aside, and threatening that "he would regret it" if he fired him.[207]

This case perhaps best captures the current perspective of the NLRB, and when combined with its lack of reticence in overturning longstanding Board precedent, it highlights the difficulties employers face in disciplining employees and drafting lawful policies under what were once considered well-established standards.

VI. NEW YORK CITY DEVELOPMENTS

A. Earned Sick Time Act

Following the lead of several major cities across the United States, the New York City Council passed the Earned Sick Time Act (the "Act") on June 27, 2013, overriding Mayor Bloomberg's veto.[208] The Act was significantly expanded in early 2014 when the City Council amended the law to expand coverage of its paid sick leave requirements from employers with fifteen or more employees to employers with five or more employees and employers with one or more domestic worker(s).[209] The amended Act also includes certain manufacturing employers who were exempt from coverage under the original Act.[210]

The Act went into effect on April 1, 2014, and as stated, requires private sector employers that employ five or more employees in New York City to offer at least forty hours of paid sick leave per year to each employee.[211] Private sector employers with fewer than five employees who work in New York City are required to offer at least forty hours of unpaid sick leave per year to each employee.[212] The Act applies to all employees (both full- and part-time employees) who work in New York City and work a minimum of eighty hours in a calendar year.[213] The Act also covers managers, supervisors, and other salaried employees, as well as non-exempt employees.[214]

Independent contractors are excluded from coverage.[215] The Act also does not apply to any employee covered by a valid collective bargaining agreement, as long as the provisions of the Act are expressly

207. Plaza Auto Ctr., Inc., 360 N.L.R.B. 117 (2014).
208. N.Y.C., N.Y. Local Law No. 46 (June 26, 2013).
209. N.Y.C., N.Y. Local Law No. 7 (Mar. 20, 2014).
210. *See id.*
211. N.Y.C., N.Y. Local Law No. 46 (June 26, 2013).
212. N.Y.C., N.Y. Local Law No. 7 (Mar. 20, 2014).
213. N.Y.C., N.Y. Local Law No. 46 (June 26, 2013).
214. *See id.*
215. *Id.*

waived in the collective bargaining agreement and the agreement provides for a comparable benefit to covered employees in the form of paid days off.[216]

The Act provides that accrued paid sick leave may be used for absences due to: (1) the employee's own health condition; (2) the employee's need to care for a spouse, domestic partner, child, parent, grandparent, grandchild, sibling, or the child or parent of a spouse or domestic partner; or (3) the closure of the employee's place of business due to a public health emergency or the employee's need to care for a child whose school or child care provider has been closed due to a public health emergency.[217] All covered employees must receive notice of their rights under the New York City Earned Sick Time Act, which must be distributed to all existing employees as well as new employees.[218] The individual notice must be provided in the employee's primary language in addition to English and must disclose that an employer may not retaliate against an employee for using the leave and that the employee has a right to file a complaint with the New York City Department of Consumer Affairs ("DCA"), which is the primary agency tasked with the enforcement of the statute. [219] The notice also must include information regarding accrual, use of sick leave, and the applicable benefit year as determined by the employer.[220] The DCA has promulgated a sample notice that can be found on its website.[221]

As stated, the City Council has already passed an amendment that was signed into law by the Mayor in early 2014 that significantly expanded coverage of the Act. It is possible the Act may be expanded even further in the future.

216. N.Y.C., N.Y. Local Law No. 46 (June 26, 2013). For employees in the construction or grocery industry who are covered by a valid collective bargaining agreement, there is no requirement that the agreement provide for a comparable benefit to covered employees in order for such employees to be exempt from the provisions of the Act—it is sufficient that the collective bargaining agreement expressly waive the provisions of the Act, regardless of whether a comparable benefit is provided. *Id.*

217. N.Y.C., N.Y. Local Law No. 46 (June 26, 2013). "Public health emergency" has not yet been defined to include business or school closures or delays due to inclement weather.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Notice of Employee Rights*, CITY OF N.Y.: DEP'T OF CONSUMER AFFAIRS (2014), http://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeave-MandatoryNotice-English.pdf.

B. Pregnancy Discrimination

Employers with employees working in New York City are now required to provide reasonable accommodations for pregnant employees as a result of a recent amendment to the New York City Human Rights Law that went into effect on January 30, 2014.[222] This new law applies to New York City employers with four or more employees.[223] Covered employers are required to provide reasonable accommodations needed due to pregnancy, childbirth, or related medical conditions so long as the pregnancy or related condition "is known or should have been known" to the employer.[224] Some examples of "reasonable accommodations" that are listed in the law include "bathroom breaks, leave for a period of disability arising from childbirth, breaks to facilitate increased water intake, periodic rest for those who stand for long periods of time, and assistance with manual labor."[225]

Accommodations that would impose an "undue hardship" on the employer are not required.[226] To determine whether an accommodation would result in "undue hardship," an employer may consider factors such as the nature and cost of the accommodation, the nature of the facility, and the financial status of the business.[227] Further, pregnant employees requesting accommodations must still be able to satisfy the essential requisites of their jobs.[228]

Covered employers must notify employees of their right to be free from pregnancy discrimination.[229] Such notice should be distributed to all new employees and existing employees.[230] The notice must also be posted "conspicuously" in an employer's place of business in an employee-accessible location.[231]

The New York City Human Rights Law expands protections for pregnant workers beyond the scope of the Pregnancy Discrimination Act, the Americans with Disabilities Act, and the New York Human Rights Law, which generally do not require employers to accommodate individuals by reason of pregnancy alone, unless a pregnancy-related

222. N.Y.C., N.Y. Local Law No. 974-A (Jan. 30, 2014).
223. *Id.*
224. *Id*
225. *Id.*
226. *Id.*
227. N.Y.C., N.Y. Local Law No. 974-A (Jan. 30, 2014).
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*

condition qualifies as a "disability" under any of those laws.[232] The New York City Human Rights Law, however, provides for reasonable accommodations for pregnant employees without first having to show they otherwise suffer from "qualifying disabilities."[233]

C. Unpaid Interns

In *Wang v. Phoenix Satellite Television U.S., Inc.*, the U.S. District Court for the Southern District of New York dismissed an unpaid college intern's sexual harassment claims, despite compelling evidence of physical and verbal harassment, on the grounds that she was not an "employee" as defined under either the New York State or New York City Human Rights laws.[234] Specifically, as a matter of first impression, the court found that Wang was not an "employee" of Phoenix Satellite because "remuneration is a threshold [issue] in establishing the existence of an employment relationship" and "unpaid interns are not employees within the ambit of" the NYCHRL.[235] As a result, the court held that an unpaid intern cannot bring a claim against an employer under the NYCHRL for taking an adverse action or otherwise discriminating against the intern's terms and conditions of employment on the basis of his/her actual or perceived protected characteristics.[236]

In direct response to the harsh result in *Wang* caused by the NYCHRL's enigmatic gap in coverage, the New York City Council passed an amendment to the NYCHRL to expand its coverage to protect unpaid interns from unlawful workplace discrimination and harassment to the same extent it protects employees.[237] The amendment took effect on June 14, 2014.[238] The law explicitly prohibits employers from discriminating against unpaid interns on the basis of their actual or perceived age, race, creed, color, national origin, sex, disability, marital status, sexual orientation, citizenship status or status as a victim of domestic violence, sex offenses or stalking.[239] Closely tracking the language of the Fair Labor Standards Act's definition of "intern or

232. N.Y.C., N.Y. Local Law No. 974-A (Jan. 30, 2014).
233. *Id.*
234. 976 F. Supp. 2d 527, 537 (S.D.N.Y. 2013).
235. *Id.* at 534, 536.
236. *See id.* at 536.
237. N.Y.C., N.Y. ADMIN. CODE §§ 8-102, 8-107(23) (2014). New York State soon followed and amended the New York Human Rights Law to expand protection from unlawful discrimination and retaliation to unpaid interns and prospective interns. *See* N.Y. EXEC. LAW § 296-c (McKinney 2014).
238. N.Y.C., N.Y. Local Law No. 173-A (June 14, 2014).
239. N.Y.C., N.Y. ADMIN. CODE § 8-107(1)(a).

trainee,"[240] the amended law defines "intern" as an individual who performs work without pay for an employer on a temporary basis whose work:

> (a) provides training or supplements training given in an educational environment such that the employability of the individual performing the work may be enhanced; (b) provides experience for the benefit of the individual performing the work; and (c) is performed under the close supervision of existing staff.[241]

This amendment thus closes the gap in protection for unpaid interns under the former NYCHRL as highlighted by the *Wang* court and permits unpaid interns who are subject to unlawful discriminatory or retaliatory treatment by their employers to seek redress through the courts, or the New York City Commission on Human Rights.[242]

240. *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, U.S. DEP'T OF LABOR (Apr. 2010), http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.

241. N.Y.C., N.Y. ADMIN. CODE § 8-102(28).

242. *Id.* § 8-109.