

LABOR AND EMPLOYMENT LAW: *SURVEY OF NEW YORK LAW*

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INTRODUCTION

The *Survey* year saw several significant wage and hour developments in New York, including the issuance of final regulations for New York’s sweeping Paid Family Leave Act, proposed call-in pay and scheduling requirements, and increases to the minimum wage and the salary level threshold for the administrative and executive exemptions under the Labor Law. Moreover, New York was at the forefront of legislation to further sexual harassment awareness and prevention by requiring a written policy and annual sexual harassment training, and prohibiting mandatory arbitration of sexual harassment claims.

Not to be outdone, New York City similarly implemented a number of significant reforms during the *Survey* year, including imposing a salary history ban and implementing legislation addressed at sexual harassment

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in the workplace, on-demand scheduling for fast food and retail workers, and expanding the protections of paid time off to cover leave related to domestic violence, unwanted sexual contact, stalking, and/or human trafficking.

At the court level, the Second Circuit clarified sexual orientation discrimination is actionable under Title VII of the Civil Rights Act, and in a case with facts worthy of a made-for-TV movie, the First Department found that spousal jealousy can support a viable gender discrimination claim. The New York courts and administrative agencies also grappled with the alleged independent contractor status of individuals providing services for web-based platforms such as Uber and Postmates, as well as the limits of employer liability for the unforeseeable actions of its employees.

In perhaps the most publicized case of the *Survey* year, the U.S. Supreme Court found that public sector unions cannot force non-union members to pay mandatory agency fees. The decision overturned nearly forty years of precedent, and the New York Legislature, predicting the ultimate outcome of the Supreme Court's ruling, passed pre-emptive legislation in an attempt to blunt the decision's impact on public sector unions in New York. As set forth in detail below, the long-term effects of the Supreme Court's decision, as well as the effectiveness of New York's attempt to soften the blow, remain to be seen.

I. NEW YORK STATE WAGE AND HOUR DEVELOPMENTS

A. *New York State Paid Family Leave Act*

As reported last year, Governor Andrew Cuomo signed into law, in April 2016, the Paid Family Leave Act (PFL or "the Act"), which provides paid family leave to New York employees and covers most private employers with one or more employees.¹ Employers covered by the New York State Disability and Workers' Compensation Laws are required to comply with the Act.² After two sets of proposed regulations were released and submitted for public comment, the Workers' Compensation Board issued final regulations for the PFL on July 19, 2017.³

1. Bruce S. Levine & Wendy M. Lamanque, *2016–17 Survey of New York Law: Labor & Employment*, 68 SYRACUSE L. REV. 955, 969–70 (2018); 12 N.Y.C.R.R. § 355.4 (2017).

2. See 12 N.Y.C.R.R. §§ 355.4, 380-7.1 (2017).

3. See 39 N.Y. Reg. 23 (proposed Feb. 22, 2017) (codified at scattered sections of 12 N.Y.C.R.R.); 39 N.Y. Reg. 40 (proposed May 24, 2017) (codified at scattered sections of 12 N.Y.C.R.R.); 39 N.Y. Reg. 22 (July 19, 2017) (codified at scattered sections of 12 N.Y.C.R.R.); Levine & Lamanque, *supra* note 1, at 969; *Laws, Regulations and Decisions*,

Under the final regulations, the PFL has two main facets: amount of leave and payment during that leave.⁴ Each will be implemented in a series of phases, gradually increasing from January 1, 2018 to January 1, 2021.⁵ Starting in 2018, an employee is eligible for up to eight weeks of PFL,⁶ which will be paid at fifty percent of the employee's average weekly wage⁷ or fifty percent of the statewide average weekly wage (SAWW).⁸ The New York Department of Labor adjusts the SAWW each year on March 31.⁹ The current SAWW is \$1,305.92.¹⁰ Using that number, the maximum weekly payment for an employee taking leave in 2018 was approximately \$650.¹¹ However, that amount will increase with each subsequent year.¹²

In 2019, an employee will be eligible for up to ten weeks of leave,¹³ paid at fifty-five percent of the employee's average weekly wage rate or the SAWW, whichever is less.¹⁴ For 2020, the ten weeks will remain constant,¹⁵ but the percentage of weekly wage will increase to sixty percent.¹⁶ Finally, in or after 2021, an employee will have twelve weeks¹⁷ available at sixty-seven percent of their average weekly wage or SAWW, whichever is less.¹⁸

Employees are able to use PFL in three situations: (1) to bond with a new child,¹⁹ (2) to care for a family member with a serious health

N.Y. WORKERS' COMP. BD., <http://www.wcb.ny.gov/content/main/wclaws/regs.jsp> (last visited Feb. 25, 2019).

4. See 39 N.Y. Reg. at 23; 39 N.Y. Reg. at 40.

5. See 12 N.Y.C.R.R. § 358-3.1(b)(3)(ii)–(iii) (2017); N.Y. WORKERS' COMP. LAW § 204(2)(a) (McKinney Supp. 2019).

6. WORKERS' COMP. § 204(2)(a)(i); 12 N.Y.C.R.R. § 358-3.1(b)(3)(iii)(a).

7. WORKERS' COMP. § 204(2)(a)(i); 12 N.Y.C.R.R. § 358-3.1(b)(2)(i). Average weekly wage is calculated by determining the average wage of the eight weeks of employment immediately preceding the first week of the leave. 12 N.Y.C.R.R. § 355.9(a)(2) (2017).

8. N.Y. WORKERS' COMP. LAW § 2(16) (McKinney 2013 & Supp. 2019).

9. *Id.*

10. Nancy Gunzenhauser Popper & Frances L. Kenajian, *New York Paid Family Leave Benefits Scheduled to Increase January 1, 2019*, EPSTEIN BECKER & GREEN: RETAIL LABOR AND EMPLOYMENT LAW (Sept. 25, 2018), <https://www.retailaborandemploymentlaw.com/employment-training-practices-and-procedures/new-york-paid-family-leave-benefits-scheduled-to-increase-january-1-2019/>.

11. *Id.*; see WORKERS' COMP. § 2(16).

12. WORKERS' COMP. § 204(2)(a)(i)–(iv).

13. 12 N.Y.C.R.R. § 358-3.1(b)(3)(iii)(b) (2017).

14. *Id.*

15. *Id.* § 358-3.1(b)(3)(iii)(b)–(c).

16. *Id.* § 358-3.1(b)(3)(ii)(c), (iii)(b)–(c).

17. *Id.* § 358-3.1(b)(3)(iii)(c).

18. 12 N.Y.C.R.R. § 358-3.1(b)(3)(ii)(d).

19. See 12 N.Y.C.R.R. § 380-2.1 (2017).

condition,²⁰ or (3) to address a military exigency.²¹ PFL can be taken after the birth, adoption, or foster placement of a child in the home.²² The purpose of the leave is to bond with the new child, and can be taken by any parent, regardless of gender. The leave can be taken up to one year after the child's birth or placement.²³ PFL also provides leave for employees to care for a family member with a serious health condition.²⁴ "Serious health condition" has the same definition under PFL as under the Family Medical Leave Act (FMLA),²⁵ but the definition of "family member" differs.²⁶ The FMLA defines "family member" as a parent, spouse or child, while PFL expands this to also include grandparents, grandchildren, and domestic partners.²⁷ However, mirroring the FMLA, an employee taking leave under PFL to care for a family member must do so within a reasonable geographical proximity to that family member.²⁸ Notably, there are no restrictions on employees travelling to the family member to fulfill this requirement.²⁹

As for eligibility requirements, PFL covers both full-time and part-time employees.³⁰ An employee is considered full-time when he or she works more than twenty hours a week, and part-time when he or she works less than twenty hours a week.³¹ Full-time employees become eligible for leave after twenty-six consecutive weeks of work.³² Part-time employees will become eligible to take PFL after working 175 days preceding the first full day the leave begins.³³ There is no minimum hour requirement that either full or part-time employees must meet before

20. See 12 N.Y.C.R.R. § 380-2.2 (2017). The PFL is not available for an employee to care for his or her own serious health condition. 12 N.Y.C.R.R. § 380-2.5(g)(4) (2017).

21. 12 N.Y.C.R.R. § 380-2.3 (2017).

22. 12 N.Y.C.R.R. § 380-2.2.

23. *Id.* § 380-2.2(b).

24. See 12 N.Y.C.R.R. § 355.9(a)(16) (2017); 12 N.Y.C.R.R. § 380-2.1.

25. See 12 N.Y.C.R.R. § 355.9(a)(16); 29 C.F.R. § 825.102 (2018). Serious health condition under the PFL is defined as "an illness, injury, impairment, or physical or mental condition that involves: inpatient care in a hospital, hospice, or residential health care facility; or continuing treatment or continuing supervision by a health care provider." 12 N.Y.C.R.R. § 355.9(a)(16).

26. 29 C.F.R. 825.100(a) (2018); N.Y. WORKERS' COMP. LAW § 201(20) (McKinney Supp. 2019).

27. See 29 C.F.R. § 825.100(a); WORKERS' COMP. § 201(20).

28. See 12 N.Y.C.R.R. § 380-2.1(a) (2017); 29 C.F.R. § 825.124 (2018).

29. See 12 N.Y.C.R.R. § 380-2.1(a).

30. See 12 N.Y.C.R.R. § 380-2.5(a)-(b) (2017).

31. *See id.*

32. *Id.* § 380-2.5(a)(1).

33. *Id.* § 380-2.5(b).

becoming eligible.³⁴

Certain limited groups of employees, even if they are employed by covered employers, are exempt from the law and employers need not provide PFL (or DBL) coverage. This includes livery drivers, black car drivers, ministers, and jockeys.³⁵ Persons “engaged in a professional or teaching capacity in or for a religious, charitable or educational institution” are also exempt.³⁶

While the above employees are exempt, other employees, who will either (a) regularly work twenty hours or more per week, but will not work twenty-six consecutive weeks; or (b) regularly work less than twenty hours but will not work 175 days in fifty-two consecutive weeks, must be given the opportunity to waive, in writing, PFL coverage and the corresponding payroll deductions.³⁷

In addition to offering a waiver notice to certain employees, the PFL regulations set forth a number of additional notice requirements, both for employees and employers. On the employee side, the notice requirements are the same as under FMLA: “[A]n employee must provide the employer with at least 30 days advance notice before leave is to begin if the qualifying event is foreseeable.”³⁸ If the leave is foreseeable, and the employee does not provide adequate notice, “the carrier may file a partial denial of the family leave claim for a period of up to 30 days from the date the notice is provided.”³⁹ If, however, “30 days advance notice is not practicable . . . notice must be given as soon as practicable.”⁴⁰ This also applies to each individual day or period of days taken for intermittent leave.⁴¹ The employee must inform the employer of the dates of the leave, or risk the carrier withholding payment.⁴² The regulations provide that an employer can waive the thirty-day notice requirement, but are silent on whether the intermittent notice requirement can be waived.⁴³ The content of the notice shall be “sufficient to make the employer aware of the qualifying event and the anticipated timing and duration of the leave.”⁴⁴

34. *See id.* § 380-2.5.

35. 12 N.Y.C.R.R. § 355.2(c)(2), (8)–(10) (2017).

36. *Id.* § 355.2(c)(3).

37. *See* 12 N.Y.C.R.R. § 380-2.6(a) (2017).

38. 12 N.Y.C.R.R. § 380-3.1(a) (2017); 29 C.F.R. § 825.302(a) (2018).

39. 12 N.Y.C.R.R. § 380-3.5 (2017).

40. 12 N.Y.C.R.R. § 380-3.1(a).

41. *See id.* § 380-3.1(c).

42. *See id.* § 380-3.1(a); 12 N.Y.C.R.R. § 380-3.5.

43. *See* 12 N.Y.C.R.R. § 380-3.1(d). This may have implications for collective bargaining as well; if the notice requirements can be waived, this suggests that they are a discretionary subject under the Act and may therefore be subject to bargaining.

44. 12 N.Y.C.R.R. § 380-3.2(a) (2017).

Employers must notify their employees of their rights under PFL. The regulations obligate an employer to place a poster in the workplace, as well as inform their employees through a handbook or separately written policy.⁴⁵ Furthermore, when an employee initially notifies the employer that he or she is seeking leave, “the employee need not expressly assert rights under PFL or even mention family leave.”⁴⁶ The regulations place the burden on the employer to seek further information from the employee to determine whether the employee is seeking PFL.⁴⁷

Employers are also required to inform employees when their PFL leave has been concurrently designated as FMLA leave.⁴⁸ If an employer fails to provide this notice, it loses the right to have the leave run concurrently with FMLA.⁴⁹ On the other hand, if an employer designates FMLA leave for a reason also covered by PFL, informs the employee of this, and then the employee still declines to apply for payment, the leave period may be counted against the employee’s maximum leave duration.⁵⁰

B. Proposed Call-In Pay & Scheduling Requirements

New York employers may soon be subject to new call-in pay and scheduling requirements. On November 22, 2017, the New York State Department of Labor (NYS DOL) published proposed regulations in the State Register.⁵¹ These proposed regulations are in keeping with an overall regulatory trend in New York to challenge “demand scheduling” of workers. If passed, the proposed regulations would amend New York’s Miscellaneous Industries Minimum Wage Order, including those provisions applicable to non-exempt non-profits.⁵²

Under the Miscellaneous Industries wage order, non-exempt employees who report to work are currently entitled to call-in pay equal to the lesser of four hours of pay, or, pay for the number of hours in an employee’s regularly scheduled shift, at the state minimum wage rate.⁵³

45. 12 N.Y.C.R.R. § 380-7.2 (a)(1)–(2), (e) (2017).

46. 12 N.Y.C.R.R. § 380-3.2(b).

47. *Id.*

48. 12 N.Y.C.R.R. § 380-2.5(g)(1) (2017).

49. *Id.* § 380-2.5(g)(2).

50. *Id.* § 380-2.5(g)(3).

51. *See* 39 N.Y. Reg. 8 (proposed Nov. 22, 2017) (to be codified at 12 N.Y.C.R.R. §§ 142-2.3, 142-3.3 (2019)).

52. *See id.* at 8–10; *see* Jeffrey W. Brecher et al., *New York State Department of Labor Issues Revised Proposed ‘Predictive Scheduling’ Regulations*, JACKSON LEWIS (Dec. 11, 2018), <https://www.jacksonlewis.com/publication/new-york-state-department-labor-issues-revised-proposed-predictive-scheduling-regulations>.

53. 12 N.Y.C.R.R. § 142-2.3 (2018).

The NYS DOL has interpreted this provision in a way that it only impacts non-exempt workers who earn at or very near the minimum wage. This interpretation allows for an offset where “if the amount paid to an employee for the workweek exceeds the minimum and overtime rate for the number of hours worked and the minimum rate for any call-in pay owed, no additional payment for call in pay is required during that workweek.”⁵⁴ Additionally, under the current law, employers are generally free to schedule, and if necessary, cancel shifts before employees report to work without incurring any additional payment obligations.⁵⁵

The proposed regulations would require employers to pay employees, who report to work for a shift that was not scheduled at least fourteen days in advance, an additional two hours of call-in pay.⁵⁶ Additionally, employers will be required to pay employees, whose shifts are cancelled within seventy-two hours of the start of that shift, at least four hours of call-in pay.⁵⁷ The proposed regulations also mandate that employees who are required to be on-call and available to work for any shift will be entitled to at least four hours of call-in pay.⁵⁸ Finally, employees who are required to be in contact with their employer within seventy-two hours of the start of a shift to confirm whether they should report to work for that shift will be entitled to four hours of call-in pay.⁵⁹

Pursuant to the proposed regulations, the call-in pay must be calculated at the current state minimum wage (which varies by location and workforce size), without any allowances, and employees must receive their “regular rate” for their actual time of attendance.⁶⁰ These new requirements will not apply to otherwise covered employees whose weekly wages exceed forty times the applicable state minimum wage.⁶¹

Finally, the proposed regulations will not apply to certain employees “who are covered by a valid collective bargaining agreement that expressly provides for call-in pay.”⁶² The regulations may also not apply in other certain circumstances, such as when an employer cannot begin

54. Letter from Maria L. Colavito, Counsel, N.Y. State Dep’t of Labor, No. RO-09-01444 (Dec. 2, 2009), <https://www.labor.ny.gov/legal/counsel/pdf/Frequency%20of%20Pay%20%28Sec.%20191%29/RO-09-0115%20-%20Frequency%20of%20Pay.pdf>.

55. Compare 12 N.Y.C.R.R. § 142-2.3, with 39 N.Y. Reg. at 8.

56. 39 N.Y. Reg. at 8.

57. *See id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. 39 N.Y. Reg. at 9.

62. *Id.*

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or continue operations due to a state of emergency or other “act of God” beyond its control.⁶³ After the rules were proposed, comments were submitted, and four public hearings were held to solicit public comment on how best to address call-in pay.⁶⁴ However, as of the end of the *Survey* year, the NYS DOL had taken no further action in relation to the proposed regulations.⁶⁵

C. New York State Minimum Wage, Salary, & Tip Credit Increases

As part of the 2016–2017 State Budget, the Governor signed legislation enacting an increasing minimum wage plan. On December 31, 2017, under this plan, the state minimum wage increased to thirteen dollars an hour for employers of eleven employees or more operating in NYC, and twelve dollars an hour for employers of ten employees or fewer in NYC.⁶⁶ Employers in Long Island and Westchester saw a minimum wage increase to eleven dollars per hour, while the remainder of New York employers became subject to a \$10.40 per hour minimum wage.⁶⁷

Required wages for tipped workers and amounts that may be taken for a tip credit toward meeting the minimum wage also increased during the *Survey* period.⁶⁸ These amounts changed based on the employee’s industry type (e.g., hospitality industry, building, etc.), geographical area, size of employer, and specific employment (e.g., food service worker, service employee).⁶⁹ Changes in the amounts employers must provide for uniform maintenance also went into effect December 31, 2017.⁷⁰ In the Hospitality Industry, amounts for meal credits for restaurants and all-year hotels increased for food service and regular service employees, as well as all other employees of those entities.⁷¹ Meal credit increases also went

63. *Id.*

64. *See Hearings on Employee Scheduling*, N.Y. DEP’T. LABOR, <https://labor.ny.gov/workerprotection/laborstandards/oncallscheduling.shtm> (last visited Feb. 14, 2019).

65. *See* Press Release, N.Y. State Senate, Jacobs Calls on Department of Labor to Rescind Proposed Employee Scheduling Rule (Jan. 5, 2018), https://www.nysenate.gov/sites/default/files/press-release/attachment/press_release_-_jacobs_calls_on_dol_to_rescind_employee_scheduling_rule_010418.pdf.

66. *General Minimum Wage Rate Schedule*, N.Y. DEP’T. LABOR, <https://www.ny.gov/new-york-states-minimum-wage/new-york-states-minimum-wage> (last visited Feb. 14, 2019).

67. *Id.*

68. *See* N.Y. DEP’T. OF LABOR, HOSPITALITY INDUSTRY: WAGE ORDER SUMMARY, pt. 146, at 1 (2017), <https://labor.ny.gov/formsdocs/wp/Part146.pdf>.

69. *See id.* at 1–2.

70. *Id.* at 2.

71. *Id.* at 3.

into effect for resort hotels.⁷² Lodging credit amounts for restaurants and hotels, both on per day and per week bases, were altered as well.⁷³

Finally, the salary level threshold for employees to be considered “exempt” from minimum wage and overtime requirements under the Miscellaneous Industries and Hospitality Industry Wage Orders for the executive and administrative exemptions were increased on December 31, 2017.⁷⁴ For employers of more than eleven employees in NYC, the amount increased to \$975.00 per week, up from \$825.00 per week.⁷⁵ For NYC employers with ten or fewer employees, the new minimum salary for exempt employees increased to \$900.00 per week, up from \$787.00 per week.⁷⁶ Similarly proportional increases were seen for employers in the rest of the state, with employers in Long Island and Westchester’s new minimum weekly wage for exempt employee set at \$825.00, and at \$727.50 for employers in the remainder of the state.⁷⁷ These increases are particularly significant in light of the federal government’s stalled attempts to increase these thresholds for federal compliance, as explained *infra*.

D. Second Circuit Unpaid Intern Decisions Adopts and Applies the “Primary Beneficiary” Test

On December 8, 2017, the Second Circuit Court of Appeals affirmed *Xuedan Wang v. Hearst Corp.*, a decision analyzing the status of unpaid interns.⁷⁸ The plaintiff Wang, along with three other college-age individuals who participated in unpaid internship programs brought suits against Hearst Corporation, a mass media conglomerate, alleging that they and a class of interns working for various print magazines at Hearst were owed wages under the Fair Labor Standards Act (FLSA) and the New York Labor Law.⁷⁹

The *Xuedan Wang* case had been previously ruled on by the Second Circuit on July 2, 2015.⁸⁰ That decision was an appeal from the district court’s ruling denying summary judgment to the plaintiffs on the issue of

72. *Id.*

73. N.Y. DEP’T OF LABOR, *supra* note 68, at 4.

74. *Id.* at 5.

75. *Id.*

76. *Id.*

77. *Id.*

78. (*Xuedan Wang II*), 877 F.3d 69, 71 (2d Cir. 2017) (citing *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2016)); (*Xuedan Wang I*), 203 F. Supp. 3d 344, 346 (S.D.N.Y. 2016), *aff’d*, *Xuedan Wang II*, 877 F.3d 69 (2d Cir. 2017).

79. *Xuedan Wang II*, 877 F.3d at 72.

80. *Xuedan Wang v. Hearst Corp.*, 617 F. App’x 35, 38 (2d Cir. 2015).

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whether the interns were employees.⁸¹ The Second Circuit initially vacated the denial and remanded the case to be redecided in light of its new standard for unpaid interns.⁸² Also, at that time, the Second Circuit set forth the “primary beneficiary” test, as part of a companion case on the same issue, *Glatt v. Fox Searchlight Pictures, Inc.*⁸³ As part of this test, the court provided a list of seven, non-exhaustive factors to be considered in assessing unpaid internships: (1) whether the parties “understand that there is no expectation of compensation”; (2) whether “the internship provides training . . . similar to that . . . [received] in an educational environment”; (3) whether the internship is connected to a formal education program or receipt of academic credit; (4) whether the internship corresponds with the academic calendar, accommodating the student’s school needs; (5) whether the duration of the internship is limited to the period in which the intern is provided with beneficial learning; (6) whether “the intern’s work . . . displaces . . . the work of paid employees”; and (7) whether the parties understand that there is no “entitlement to a paid job at the conclusion of the [program].”⁸⁴

On remand, the district court found that all of these factors in the “primary beneficiary” test, except for the sixth factor, either favored Hearst or were neutral, which lead the court to conclude as a matter of law that the plaintiffs were interns, not employees.⁸⁵ This decision was then appealed to the Second Circuit.⁸⁶

In its 2017 ruling, the Second Circuit found that the basic question surrounding the dispute was whether the second factor of the test (whether the internship provides training similar to that provided in an educational environment) was “at the heart of the dispute.”⁸⁷ In making its decision, the court analyzed whether “training” consisted solely of academic learning, or whether it also encompassed “vocational benefits.”⁸⁸ Ultimately, the court concluded that training included vocational benefits, and that the factor “clearly contemplates that training opportunities offered to the intern include ‘product[s] of experiences on

81. *Id.* at 36.

82. *Id.* at 38 (citing *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 379 (2d Cir. 2015)).

83. 791 F.3d at 383.

84. *Id.* at 384.

85. *See Xuedan Wang I*, 203 F. Supp. 3d 344, 354–55 (S.D.N.Y. 2016).

86. *See Xuedan Wang II*, 877 F.3d 69, 71 (2d Cir. 2017).

87. *See id.* at 72–73 (quoting *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2016)).

88. *Id.* at 74 (quoting *Glatt*, 811 F.3d at 536) (citing *Glatt*, 811 F.3d at 537).

the job.”⁸⁹ Moreover, while the court found that the district court was correct in ruling that the sixth factor was in favor of the plaintiffs, it also found that this alone was not dispositive and that the test did not require that the employer “derive no immediate advantage from the activities of the intern.”⁹⁰

Finally, in deciding for Hearst for the second time, the Second Circuit cleared an easier path to summary judgment on the basis of the “primary beneficiary” test. The court did this by holding that an individual’s status as an employee is a matter of law, and therefore, appropriate for summary judgment.⁹¹ Accordingly, so long as a district court can apply the factors on the basis of facts that are not in dispute, the question of whether an individual is an employee or intern can be properly decided at summary judgment.⁹²

E. The New York State Department Labor Issues Emergency Regulations Regarding Compensation for Live-In Home Care Aides

In October 2017, the NYS DOL used its “emergency” regulatory authority to amend its Minimum Wage Orders for Miscellaneous Industries and Occupations and Nonprofit Institutions, as it relates to home care workers assigned to so-called twenty-four-hour “live-in” shifts.⁹³

The emergency amendments confirm that home care workers who are assigned twenty-four-hour shifts but who do not live on the premises of the employer, do not need to be paid for eight hours of bona fide sleep time and three hours of bona fide meal times, and thus, may properly be paid for thirteen hours of work despite technically being at the residence for twenty-four hours.⁹⁴ The regulatory amendments were issued by the NYS DOL in order to

preserve the status quo, prevent the collapse of the home care industry, and avoid institutionalizing patients who could be cared for at home, in the face of recent decisions by the State Appellate Divisions for the First and Second Departments that treat meal periods and sleep time by home care aides as hours worked for purposes of state (but not federal) minimum wage.⁹⁵

89. *Id.* (quoting *Glatt*, 811 F.3d at 536).

90. *Id.* at 75 (citing *Glatt*, 811 F.3d at 534).

91. *See Xuedan Wang II*, 877 F.3d at 76 (citing *Glatt*, 811 F.3d at 537).

92. *See id.*

93. 39 N.Y. Reg. 5 (October 25, 2017) (to be codified at 12 N.Y.C.R.R. §§ 142-2.1(b), 142-3.1(b) (2019)) (currently codified at 12 N.Y.C.R.R. § 142-3.7 (2018)).

94. *Id.*

95. *Id.* at 6.

As noted, the amendments became necessary following decisions in three cases before the First and Second Departments, holding that home care workers who do not regularly reside at the location of the individual they are caring for are entitled to twenty-four hours of pay during any twenty-four-hour live-in shift, irrespective of sleep or meal time.⁹⁶ These appellate court decisions were inconsistent with the NYS DOL's longstanding policy and interpretation that only thirteen hours of pay is required in the typical twenty-four-hour live-in shift, so long as appropriate sleep and meal break times are provided.⁹⁷ The appellate courts reasoned that this thirteen-hour rule applied only to employees that actually live on the premises of the employer and not to non-residential employees.⁹⁸ The appellate court decisions were also inconsistent with all federal courts that have addressed the issue, as the federal courts found that the NYS DOL rule applied both to residential and non-residential

96. See *Tokhtaman v. Human Care, LLC*, 149 A.D.3d 476, 477, 52 N.Y.S.3d 89, 91 (1st Dep't 2017) (citing 12 N.Y.C.R.R. § 142-2.4 (2018)); *Andryeyeva v. N.Y. Health Care Inc. (Andryeyeva I)*, 153 A.D.3d 1216, 1218–19, 61 N.Y.S.3d 280, 282–83 (2d Dep't 2017) (first citing *Tokhtaman*, 149 A.D.3d at 477, 52 N.Y.S.3d at 91; then 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); then citing 12 N.Y.C.R.R. § 142-2.1 (2018); then citing *Tokhtaman*, 149 A.D.3d at 477, 52 N.Y.S.3d at 91; then citing *Yaniveth R. v. LTD Realty Co.*, 27 N.Y.3d 186, 192–93, 51 N.E.3d 521, 524, 32 N.Y.S.3d 10, 13 (2016); and then citing *Settlement Home Care v. Indus. Bd. of Appeals of Dep't of Labor*, 515 A.D.2d 580, 581–82, 542 N.Y.S.2d 346, 348 (2d Dep't 1989)); *Moreno v. Future Care Health Servs., Inc.*, 153 A.D.3d 1254, 1255–56, 61 N.Y.S.3d 589, 591 (2d Dep't 2017) (first citing *Andryeyeva II*, 153 A.D.3d at 1219, 61 N.Y.S.3d at 282–83; then citing *Tokhtaman*, 149 A.D.3d at 477–78, 52 N.Y.S.3d at 91; then citing 12 N.Y.C.R.R. § 142-2.1; then citing *Andryeyeva II*, 153 A.D.3d at 1219, 61 N.Y.S.3d at 282–83 then citing *Yaniveth R.*, 27 N.Y.3d at 192–93, 51 N.E.3d at 524, 32 N.Y.S.3d at 13; and then citing *Settlement Home Care*, 515 A.D.2d at 581–82, 542 N.Y.S.2d at 348).

97. See *Tokhtaman*, 149 A.D.3d at 477, 52 N.Y.S.3d at 91 (first 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, 826–29 (Sup. Ct. N.Y. Cty. 2015); then citing *Andryeyeva v. N.Y. Health Care Inc. (Andryeyeva I)*, 45 Misc. 3d 820, 826–33, 994 N.Y.S.2d 278, 284–87 (Sup. Ct. Kings Cty. 2014); and then citing *Kodirov v. Cmty. Home Care Referral Serv., Inc.*, 35 Misc. 3d 1221(A), 951 N.Y.S. 2d 86 (Sup. Ct. Kings Cty. 2012)); *Andryeyeva II*, 153 A.D.3d at 1218–19, 61 N.Y.S.3d at 282–83 (first citing *Tokhtaman*, 149 A.D.3d at 477, 52 N.Y.S.3d at 91; then citing *Visiting Nurse Serv. of N.Y. Home Care*, 5 N.Y.3d at 506, 840 N.E.2d at 580, 806 N.Y.S.2d at 468; then citing 12 N.Y.C.R.R. § 142-2.1; then citing *Tokhtaman*, 149 A.D.3d at 477, 52 N.Y.S.3d at 91; then citing *Yaniveth R.*, 27 N.Y.3d at 192–93, 51 N.E.3d at 524, 32 N.Y.S.3d at 13; and then citing *Settlement Home Care*, 515 A.D.2d at 581–82, 542 N.Y.S.2d at 348); *Moreno*, 153 A.D.3d at 1255–56, 61 N.Y.S.3d at 591 (first citing *Andryeyeva II*, 153 A.D.3d at 1219, 61 N.Y.S.3d at 282–83; then citing *Tokhtaman*, 149 A.D.3d at 477–78, 52 N.Y.S.3d at 91; then citing 12 N.Y.C.R.R. § 142-2.1; then citing *Andryeyeva II*, 153 A.D.3d at 1219, 61 N.Y.S.3d at 282–83; then citing *Yaniveth R.*, 27 N.Y.3d at 192–93, 51 N.E.3d at 524, 32 N.Y.S.3d at 13; and then citing *Settlement Home Care*, 515 A.D.2d at 581–82, 542 N.Y.S.2d at 348).

98. See *supra* note 97.

employees, and that this standard was valid, both before and after the emergency amendments were implemented.⁹⁹

Thus, through these emergency amendments, the NYS DOL codified on an emergency basis, its thirteen-hour rule, which states non-resident live-in aides need not be compensated for hours of sleep and meals.¹⁰⁰ As of the end of the *Survey* year, the NYS DOL has continued the emergency regulations until at least, September 27, 2018; however, a challenge to the regulations remains pending in New York County Supreme Court, contending that the regulations were not properly authorized because there was no genuine “emergency.”¹⁰¹

While this challenge to the emergency rules remains pending, there remain two potential avenues for the emergency regulation to become permanent. First, the NYS DOL proposed a permanent regulation on April 25, 2018,¹⁰² that largely mirror the emergency regulations, and would add the following language to the relevant minimum wage regulations:

Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for an employee who works a shift of 24 hours or more.¹⁰³

A public hearing on the proposed permanent regulations was scheduled for July 11, 2018, and the comment period ended on July 16, 2018, just after the conclusion of the *Survey* year.¹⁰⁴

The second avenue is a final New York Court of Appeals decision in *Andryeyeva* and *Moreno*—two of the three appellate court decisions prompting the emergency regulations.¹⁰⁵ On March 7, 2018, the Second Department issued orders in both cases, granting the parties leave to

99. See *Bonn-Wittingham v. Project O.H.R., Inc.*, No. 16-cv-541(ARR)(JO), 2017 U.S. Dist. LEXIS 75286, at *8 (E.D.N.Y. May 17, 2017); *De Carrasco v. Life Care Servs., Inc.*, No. 17-cv-5617(KBF), 2017 U.S. Dist. LEXIS 206682, at *12–15 (S.D.N.Y. Dec. 15, 2017).

100. See 12 N.Y.C.R.R. § 142-2.1(b).

101. *Chinese Staff & Workers Ass’n v. Reardon*, No. 450789/2018, 2018 N.Y. Slip Op. 32391(U), at 8 (Sup. Ct. N.Y. Cty. Sept. 25, 2018).

102. 40 N.Y. Reg. 43 (proposed Apr. 25, 2018) (to be codified at 12 N.Y.C.R.R. §§ 142-2.1(b), 142-3.1(b), 142-3.7 (2019)).

103. *Id.* at 44.

104. *Id.* at 43.

105. See *Andryeyeva II*, 153 A.D.3d 1216, 1217, 61 N.Y.S.3d 280, 281 (2d Dep’t 2017); *Moreno v. Future Health Care Servs., Inc.*, 153 A.D.3d 1254, 1255, 61 N.Y.S.3d 589, 591 (2d Dep’t 2017).

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appeal the decisions to the Court of Appeals.¹⁰⁶ Ultimately, the permanent regulations may not be necessary if, as predicted, the Court of Appeals embraces the reasoning set forth by the federal courts, and reinforces that the thirteen-hour rule is valid and applies to both residential and non-residential employees.

II. NEW YORK STATE DISCRIMINATION DEVELOPMENTS*A. Comprehensive Legislation Relating to Sexual Harassment*

On April 12, 2018, as part of Governor Cuomo's 2018 Women's Opportunity Agenda for New York, New York published new legislation aimed at curtailing workplace sexual harassment.¹⁰⁷ The legislation contains provisions for state employees, state contractors, other employers, and requires policies, training, and provisions relating to the confidentiality of settlement agreements.¹⁰⁸ The legislation also instructs the State Department of Labor and Division of Human Rights to work collaboratively to publish guidance on these issues.¹⁰⁹

Under the legislation, any individual elected, appointed, or employed by New York State, who has been subject to a final judgment of personal liability for personal wrongdoing related to an adjudicated award that resulted in a judgment in a sexual harassment claim, must reimburse any state agency or entity that made a payment to a plaintiff on the individual's behalf for his or her share of the judgment within ninety days of such payment.¹¹⁰ The law contains similar provisions for commissions, members of public boards or commissions, trustees, directors, officers, employees, or any other person holding a position by election, appointment, or employment in a public entity.¹¹¹

Furthermore, pursuant to the new law, all entities that are state contractors and subject to competitive bidding requirements are required to certify under penalty of perjury that they have a written policy addressing sexual harassment, and that they provide annual sexual harassment training.¹¹² Both the policy and training must be in keeping with requirements to be published by the state Department of Labor and

106. See *Andryeyeva II*, 153 A.D.3d at 1219, 61 N.Y.S.3d at 283; *Moreno*, 153 A.D.3d at 1256, 61 N.Y.S.3d at 591.

107. See N.Y. Assembly Bill No. 9507-C, 241st Sess. (2018) (enacted).

108. Act of April 12, 2018, 2018 McKinney's Sess. Law News no. 2, ch. 57, at 170–71 (codified at N.Y. LAB. LAW § 201-g(1)(b) (McKinney Supp. 2019)).

109. *Id.* (codified at LAB. § 201-g(1)).

110. *Id.* at 169 (codified at N.Y. C.P.L.R. 17-a(2) (McKinney Supp. 2019)).

111. *Id.* at 169–70 (codified at N.Y. C.P.L.R. 18-a (McKinney Supp. 2019)).

112. *Id.* at 167 (codified at N.Y. FIN. LAW § 139-1 (McKinney Supp. 2019)).

Division of Human Rights.¹¹³

Moreover, as of October 9, 2018, all employers in New York are required to implement a written sexual harassment prevention policy that meets or exceeds the minimum standards of a model policy to be drafted and published by the state Department of Labor and Division of Human Rights.¹¹⁴ Similarly, for the training, the legislation requires all employers to train their employees using a model sexual harassment training program that meets or exceeds the minimum standards provided by the state Department of Labor and Division of Human Rights.¹¹⁵ This training must “be provided to all employees on an annual basis.”¹¹⁶

Effective at the time the legislation was passed, the current New York Human Rights law was amended to cover sexual harassment of non-employees in the workplace.¹¹⁷ This includes “contractor[s], subcontractor[s], vendor[s], consultant[s], or other[s] . . . providing services . . . [under] a contract.”¹¹⁸ Under the new law, employers can now be liable for sexual harassment of non-employees when they, their agents, or their supervisors knew or should have known that the non-employee was subject to such harassment and did not take immediate and appropriate corrective action.¹¹⁹ However, the extent of the employer’s control over the non-employee and other legal responsibility which the employer has with respect to the harasser can be considered in determining ultimate liability.¹²⁰ As of the end of the *Survey* year, there were no reported cases analyzing a claim brought pursuant to this amendment.

Finally, as of July 2018, all employers are prohibited from conditioning settlement of sexual harassment claims on confidentiality or mandating that sexual harassment claims be subject to arbitration.¹²¹ Specifically, settlements, agreements, or resolutions cannot include a non-disclosure provision unless the confidentiality is the complainant’s preference, and complainants have twenty-one days to consider all such non-disclosure terms and conditions, and after signing, seven days to

113. 2018 McKinney’s Sess. Law News no. 2, ch. 57, at 170 (codified at LAB. § 201-g(1)).

114. *Id.*

115. *Id.* at 171 (codified at LAB. § 201-g(2)(c)).

116. *Id.* (codified at N.Y. LAB. LAW § 201-g(2)(c)).

117. *Id.* at 171–72 (codified at N.Y. EXEC. LAW § 296-d (McKinney Supp. 2019)).

118. 2018 McKinney’s Sess. Law News no. 2, ch. 57, at 171 (codified at EXEC. § 296-d).

119. *Id.* at 171–72 (codified at EXEC. § 296-d).

120. *Id.* at 172 (codified at EXEC. § 296-d).

121. *Id.* at 168–69 (codified at N.Y. C.P.L.R. 7515(b) (McKinney Supp. 2019)).

revoke the agreement.¹²² Moreover, unlike other statutes, such as the Age Discrimination in Employment Act, which contains a twenty-one-day period for complainants to consider terms, no portion of this twenty-one-day period may be waived, the complainant must be given the full twenty-one days to consider the agreement.¹²³

As for arbitration, any agreement provisions which mandate arbitration of sexual harassment claims are null and void, except in cases where doing so would be inconsistent with federal law.¹²⁴ It remains to be seen whether this particular provision will be found to be preempted by the Federal Arbitration Act, which favors a liberal policy favoring enforcement of arbitration agreements.¹²⁵

B. Second Circuit Rules Title VII Prohibits Sexual Orientation Discrimination

In February 2018, the Second Circuit Court of Appeals issued a decision in *Zarda v. Altitude Express, Inc.*, finding that sexual orientation discrimination is actionable under Title VII.¹²⁶ The case involved skydiving instructor, Donald Zarda, who brought a claim for sex discrimination under Title VII after he was involuntarily terminated by Altitude Express in 2010.¹²⁷ Zarda claimed that he was terminated because of his sexual orientation after he had disclosed to a customer that he was gay.¹²⁸

The case was dismissed in lower courts because of Second Circuit precedent finding that sexual orientation was not actionable under Title VII.¹²⁹ However, in *Zarda*, the Second Circuit reversed its earlier precedent, finding that “the legal framework for evaluating Title VII claims has evolved substantially,” and that Title VII’s sex discrimination must include sexual orientation discrimination due to this evolution.¹³⁰

The circuit court, ruling en banc, held that “sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of

122. *Id.* at 170 (codified at N.Y. C.P.L.R. 5003-b (McKinney Supp. 2019)).

123. Compare 2018 McKinney’s Sess. Law News no. 2, ch. 57, at 170 (codified at N.Y. C.P.L.R. 5003-b), with Age Discrimination in Employment Act, Pub. L. No. 101-433, 104 Stat. 983 (1990) (codified at 29 U.S.C. § 626 (2012)).

124. N.Y. C.P.L.R. 7515(b)(i).

125. Federal Arbitration Act, ch. 392, 61 Stat. 669 (1947) (codified at 9 U.S.C. §§ 1–16 (2012)).

126. 883 F.3d 100, 132 (2d Cir. 2018) (quoting 42 U.S.C § 2000e(k) (2012)).

127. *Id.* at 108–09.

128. *Id.* at 109.

129. *Id.* (first citing EEOC Decision No. 0120133080, 2015 EEOPUB LEXIS 1905, at *11 (2015); and then citing *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000)).

130. *Id.* at 131 (citing 42 U.S.C § 2000e).

sex discrimination.”¹³¹ To “identify the sexual orientation of a particular person,” an employer must “know the sex of the person and that of the people to whom he or she is attracted.”¹³² Moreover, “[b]ecause one cannot fully define a person’s sexual orientation without identifying his or her sex, sexual orientation is a function of sex Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.”¹³³ The Second Circuit also used a comparison test, asking “whether an employee’s treatment would have been different ‘but for that person’s sex,’” and found that if Zarda had been a woman who expressed a sexual preference for men, Zarda could have kept the job.¹³⁴

This decision puts the Second Circuit in line with the Seventh Circuit, but at odds with other circuit courts, as well as with some federal agencies.¹³⁵ For example, the U.S. Justice Department filed a brief in the Zarda case and argued that sexual orientation was not a protected category under Title VII, while the EEOC takes the position that sexual orientation is a protected category.¹³⁶ The defendant in *Zarda* filed a petition for review before the U.S. Supreme Court,¹³⁷ and while the circuit split makes it more likely the U.S. Supreme Court may take up the issue, no further action had been taken on the question as of the end of the *Survey* period.¹³⁸

131. *Zarda*, 883 F.3d at 112.

132. *Id.* at 113 (citing *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 358 (7th Cir. 2017) (en banc) (Flaum, J., concurring)).

133. *Id.* (citing *Hively*, 853 F.3d at 358 (en banc) (Flaum, J., concurring)).

134. *Id.* at 116, 119 (quoting *Cty. of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)).

135. *See, e.g., Hively*, 853 F.3d at 360–61 (Sykes, J., dissenting) (first citing *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, 1062 (7th Cir. 2003); then citing *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000); then citing *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000); and then citing *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984)) (explaining that sexual orientation discrimination is a “distinct form of discrimination and is not synonymous with sex discrimination.”); *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (citing *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979)).

136. Brief for the United States as Amicus Curiae Supporting Defendants-Appellees at 11, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. 2017); *see Baldwin v. Fox*, EEOC Decision No. 012013300, 2015 WL 4397641, at *5 (2015) (EEOC held that claim of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII).

137. *Zarda*, 883 F.3d 100, *petition for cert. filed*, 86 U.S.L.W. 1175 (U.S. May 29, 2018) (No. 17-1623).

138. *See* Bernie Pazanowski, *Circuit Splits Reported in U.S. Law Week—March 2018*, BLOOMBERG LAW (Apr. 4, 2018), https://www.bloomberglaw.com/document/X8AHNVHK000000?bna_news_filter=us-law-week&jcsearch=BNA%252000000161d89ad2fdaf67defbcb750000#jcite; *see also* Jon Steingart, *SCOTUS Again Pushes Back Decision on Taking LGBT*

C. First Department Rules Spousal Jealousy Can Support A Viable Gender Discrimination Claim

In a case with a set of facts unlikely to be fully replicated in the near-future, the First Department held that a plaintiff who alleged she had been terminated because her manager's spouse was jealous of the plaintiff, stated a viable gender discrimination claim under the New York State and City Human Rights Laws and refused to dismiss the claims.¹³⁹ The plaintiff was initially hired in 2012 as a yoga and massage therapist by the defendant, Charles Nicolai, and Mr. Nicolai served as the plaintiff's direct supervisor/manager.¹⁴⁰ The company, Wall Street Chiropractic and Wellness, was co-owned by Mr. Nicolai's wife, Stephanie Adams, who served as chief operating officer, and who was also named as a defendant.¹⁴¹

In her Complaint, the plaintiff alleged that Mr. Nicolai treated her in a professional manner and never subjected her to sexually harassing behavior.¹⁴² However, in June 2013, Mr. Nicolai allegedly "informed Plaintiff that his wife might become jealous of Plaintiff, because Plaintiff was 'too cute.'"¹⁴³ Approximately four months later, as Mr. Nicolai had warned, Ms. Adams sent the plaintiff a text message at 1:31 a.m., stating, "You are NOT welcome any longer at Wall Street Chiropractic, DO NOT ever step foot in there again, and stay the [expletive] away from my husband and family!!!!!! And remember I warned you."¹⁴⁴

Later that same morning, at 8:53 a.m., Mr. Nicolai wrote the plaintiff an email stating, "You are fired and no longer welcome in our office. If you call or try to come back, we will call the police."¹⁴⁵

Initially, the lower court dismissed the plaintiff's gender discrimination claims, holding that it is not unlawful gender discrimination for an employer to terminate an at-will employee based solely on the jealousy of a female spouse.¹⁴⁶ However, the First

Job Bias Cases, BLOOMBERG LAW (Jan. 14, 2019, 12:51 PM), <https://news.bloomberglaw.com/us-law-week/scotus-again-pushes-back-decision-on-taking-lgbt-job-bias-cases>.

139. *Edwards v. Nicolai*, 153 A.D.3d 440, 442, 60 N.Y.S.3d 40, 42 (1st Dep't 2017).

140. *Id.* at 441, 60 N.Y.S.3d at 41.

141. *Id.*

142. *Id.* at 441–42, 60 N.Y.S.3d at 41–42.

143. *Id.* at 441, 60 N.Y.S.3d at 41.

144. *Edwards*, 153 A.D.3d at 441, 60 N.Y.S.3d at 41.

145. *Id.* (internal quotations omitted).

146. *See id.* at 442, 60 N.Y.S.3d at 42 (quoting *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 75, 872 N.Y.S.2d 27, 37 (1st Dep't 2009)) (first citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998); and then citing *King v. Bd. of Regents of Univ. of Wis. Sys.*, 898 F.2d 533, 539 (7th Cir. 1990)).

Department reversed, holding:

It is well established that adverse employment actions motivated by sexual attraction are gender-based and, therefore, constitute unlawful gender discrimination. Here, while plaintiff does not allege that she was ever subjected to sexual harassment at [the employer], she alleges facts from which it can be inferred that Nicolai was motivated to discharge her by his desire to appease his wife's unjustified jealousy, and that Adams was motivated to discharge plaintiff by that same jealousy. Thus, each defendant's motivation to terminate plaintiff's employment was sexual in nature.¹⁴⁷

In short, the appellate division agreed with the lower court that, generally, it is not unlawful to terminate an employee at the urging of the employer's spouse.¹⁴⁸ However, it is unlawful if the spouse's urging is based on unlawful, gender-related reasons (i.e., sexual attraction), and the employer acts on that unlawful, gender-related reason.¹⁴⁹

III. DEVELOPMENTS IMPACTING NEW YORK PUBLIC SECTOR EMPLOYMENT

A. "*Janus*" and New York State's Civil Service Law Amendments in Response

On June 27, 2018, the U.S. Supreme Court made a landmark ruling regarding the funding of public sector employee associations in *Janus v. AFSCME, Council 31*.¹⁵⁰ This decision struck down provisions of Illinois law requiring non-union members to pay agency fees to the union, and opened the door for this to become the law in other jurisdictions.¹⁵¹

Mark Janus, a child welfare worker in Illinois, decided not to join the American Federation of State, County, and Municipal Employees (AFSCME), Council 31.¹⁵² However, under Illinois law (and New York law), Janus was still required to pay fees, known as "agency fee[s]" to the AFSCME.¹⁵³ The fee was approximately seventy-eight percent of full union dues, or in Janus' case, \$23.48 per week. Janus objected to the

147. *Id.* (quoting *Williams*, 61 A.D.3d at 75, 872 N.Y.S.2d at 37) (first citing *Oncale*, 523 U.S. at 80; and then citing *King*, 898 F.2d at 539).

148. *Id.*

149. *Edwards*, 153 A.D.3d at 442, 60 N.Y.S.3d at 42.

150. *See* 138 S. Ct. 2448, 2459–60 (2018).

151. *Id.* at 2460.

152. *Id.* at 2461.

153. *See id.* at 2459, 2461; Natasha Vaughn, *How New York is Protecting Union Fees*, DEMOCRAT & CHRONICLE (Apr. 13, 2018, 4:07 PM), <https://www.democratandchronicle.com/story/news/politics/albany/2018/04/13/how-new-york-protecting-union-fees/514167002>.

paying of these fees and filed suit.¹⁵⁴

The traditional justification for paying agency fees was a “fair share” theory, which reasons that because all members of a workforce enjoy benefits gained by the union, all workers, including non-union members, should pay their fair share of the costs of collective bargaining.¹⁵⁵ Illinois (and similarly situated states like New York), have laws requiring the union to “fairly represent” all members of a workforce, whether or not they were formally union members.¹⁵⁶ Due to these derived common benefits, the “fair share” theory justifies that non-union members can be forced to pay fees.¹⁵⁷

The U.S. Supreme Court, overturning nearly forty years of precedent, rejected this premise, and found in favor of *Janus*, striking down Illinois’ agency fee statute.¹⁵⁸ The Court based its ruling on the First Amendment principle, finding that “[f]orcing free and independent individuals to endorse ideas they find objectionable” is unconstitutional.¹⁵⁹ Specifically, the Court held that mandating public sector employees to contribute to unions involuntarily violated their freedoms of speech and association.¹⁶⁰ As a result, the Court held that “[s]tates and public-sector unions may no longer extract agency fees from nonconsenting employees.”¹⁶¹

In March 2018, New York, in anticipation of and in an attempt to blunt the impact of the *Janus* decision, passed Part RRR as an amendment to the state’s Budget Bill.¹⁶² Part RRR amends the state’s Civil Service Law, General Municipal Law, and Finance Law as those laws relate to union dues and the duty of fair representation.¹⁶³ Specifically, Part RRR requires public employers to: (1) notify the relevant union within thirty days of a new employee being hired, rehired, or promoted into a bargaining unit represented by that union; (2) provide the new employee’s name, address and work location to the union; (3) require dues to be reinstated automatically if a union member employee leaves

154. See *Janus*, 138 S. Ct. at 2461–62.

155. See *id.* at 2487 (Kagan, J., dissenting).

156. *Id.* at 2460 (citing 5 ILL. COMP. STAT. ANN. 315/6 (2016)); *Id.* at 2488 (Kagan, J., dissenting); *Right to Fair Representation*, NLRB, <https://www.nlr.gov/rights-we-protect/whats-law/employees/i-am-represented-union/right-fair-representation> (last visited Mar. 4, 2019).

157. *Janus*, 138 S. Ct. at 2491 (Kagan, J., dissenting).

158. See *id.* at 2460.

159. *Id.* at 2463–64.

160. *Id.* at 2486.

161. *Id.* at 2486.

162. N.Y. Senate Bill No. 7509-C, 241st Sess. (2018) (enacted).

163. *Id.*

service but is reinstated to a position with the same employer in the same bargaining unit within one year; (4) recognize dues deduction authorizations that are signed electronically; and (5) continue to recognize an employee's union membership during any paid or unpaid leave of absence (voluntary or otherwise).¹⁶⁴

Part RRR also amended both the General Municipal Law and Finance Law by eliminating the right to revoke dues deductions in writing at any time.¹⁶⁵ Instead, it mandates that the dues authorization shall remain in effect until the employee "revokes membership . . . in writing in accordance with the terms of the signed authorization . . ."¹⁶⁶ The legislation does not, however, establish any limitations or restrictions on the terms that a union may include in its authorization card to restrict revocation of membership or cancellation of dues.

Part RRR will also require public employers to permit union representatives to meet with new employees for a reasonable amount of time and "without charge to leave credits . . ."¹⁶⁷ As noted, much of this legislation is intended to blunt the impact of *Janus* by improving the unions' chances of persuading employees to join and pay dues voluntarily, but Part RRR also limits a union's obligations to non-members.¹⁶⁸ As the *Survey* year comes to a close, it remains to be seen the long-term impacts of *Janus* on union membership, and, in New York, whether these new regulations will allow unions to fare better than in other states lacking similar protections.

B. Paid Leave for Cancer Screenings

In contrast to *Janus*, with no controversy and little publicity, on December 18, 2017, New York enacted legislation that amended Civil Service Law §§ 159-b and 159-c.¹⁶⁹ Previous to the amendments, those sections had entitled most public sector employees to take up to four hours of paid leave per year to be screened for breast cancer (§ 159-b), and up to four hours of paid leave per year to be screened for prostate cancer (§ 159-c).¹⁷⁰ These leaves could be taken without deducting any

164. *Id.*

165. *Id.*

166. *Id.*

167. N.Y. Senate Bill No. 7509-C, 241st Sess.

168. *Id.*

169. Act of Dec. 18, 2017, 2017 McKinney's Sess. Laws of N.Y., ch. 465, at 1042 (codified at N.Y. CIV. SERV. LAW § 159-b (McKinney Supp. 2019)).

170. CIV. SERV. § 159-b(1); N.Y. CIV. SERV. LAW § 159-c(1) (McKinney 2011) (repealed 2018).

available leave time from the employee.¹⁷¹

Under the new law, which became effective on March 18, 2018, Civil Service Law § 159-b was amended so that it applies to all types of cancer screenings.¹⁷² Due to that fact that prostate cancer screenings were covered by this amendment, Civil Service Law § 159-c was repealed.¹⁷³ The four hours of time available was extended to all types of cancer screenings, and employees could not be forced to use available leave for these purposes.¹⁷⁴

C. New York Court of Appeals Confirms Police Disciplinary Procedures Are Generally Non-Negotiable

In *City of Schenectady v. New York State Public Employment Relations Board*, the Court of Appeals held that, generally, police discipline is not a proper subject for collective bargaining.¹⁷⁵ In this case, the City of Schenectady brought an Article 78 proceeding to review a determination made by the New York State Public Employment Relations Board (PERB).¹⁷⁶ PERB had found, and the Third Department agreed, that the City had committed an improper employer practice by enacting new police disciplinary procedures different from those contained in the parties' expired collective bargaining agreement without bargaining with the union.¹⁷⁷

However, the Court of Appeals overturned this decision, citing to its previous case law, specifically finding that statutory grants of local control over police discipline (which are statutorily provided in most jurisdictions), effectively "render[] discipline a prohibited subject for collective bargaining."¹⁷⁸ Accordingly, despite numerous attempts by unions and lobbying efforts to make police discipline a mandatory subject of collective bargaining, the Court of Appeals reaffirmed that police discipline remains a prohibited subject for collective bargaining where

171. CIV. SERV. § 159-b(2); CIV. SERV. § 159-c(2).

172. CIV. SERV. § 159-b.

173. See CIV. SERV. § 159-c.

174. CIV. SERV. § 159-b.

175. 30 N.Y.3d 109, 116, 86 N.E.3d 536, 540, 64 N.Y.S.3d 644, 648 (2017).

176. *Id.* at 112, 86 N.E.3d at 538, 64 N.Y.S.3d at 646.

177. *Id.* at 112–13, 86 N.E.3d at 538, 64 N.Y.S.3d at 646 (citing *City of Schenectady v. N.Y. State Pub. Emp't Relations Bd.*, 136 A.D.3d 1086, 1087, 24 N.Y.S.3d 784, 785 (3d Dep't 2016)).

178. *Id.* at 113, 86 N.E.3d at 538, 64 N.Y.S.3d at 646 (first citing *Patrolmen's Benevolent Ass'n, Inc. v. N.Y. State Pub. Emp't Relations Bd.*, 6 N.Y.3d 563, 570, 848 N.E.2d 448, 449, 815 N.Y.S.2d 1, 2 (2006); and then citing *In re Town of Wallkill*, 19 N.Y.3d 1066, 1069, 979 N.E.2d 1147, 1149, 955 N.Y.S.2d 821, 823 (2012)).

statutory grants of local control have been granted over such discipline.¹⁷⁹

IV. OTHER MISCELLANEOUS NEW YORK DEVELOPMENTS

A. Third Department Finds Postmates, Inc. Couriers to be Independent Contractors Under New York Unemployment Insurance Law

In the case of *In re Vega*, the Third Department found couriers providing services for the web-based platform Postmates, Inc. to be independent contractors under the New York Unemployment Insurance Law.¹⁸⁰ This decision is one of many across the country attempting to grapple with the proliferation of web-based platforms such as Uber, Grubhub, Lyft, and other similar businesses with models that rely almost exclusively on independent contractors.¹⁸¹

Postmates, Inc. allows customers to request pick-up and delivery service from local restaurants or stores, which are then delivered to the customer by a courier within about an hour.¹⁸² Postmates terminated its relationship with one of its couriers based upon negative customer feedback, and the courier proceeded to file for unemployment insurance benefits, alleging he was entitled to benefits as a former employee of Postmates.¹⁸³

Initially, the Unemployment Insurance Appeal Board (the “Appeal Board”) ruled that an employer-employee relationship existed and found Postmates liable for additional unemployment insurance contributions for claimants and all other “similarly situated” couriers.¹⁸⁴ Postmates appealed to the Third Department, which reversed, finding the Appeal Board’s determination was not supported by substantial evidence.¹⁸⁵

179. See *id.* at 114–16, 86 N.E.3d at 539–40, 64 N.Y.S.3d at 647–48 (first citing *Patrolmen’s Benevolent Ass’n*, 6 N.Y.3d at 570, 848 N.E.2d at 449, 815 N.Y.S.2d at 2; and then citing *In re Town of Wallkill*, 19 N.Y.3d at 1069, 979 N.E.2d at 1149, 955 N.Y.S.2d at 823).

180. See 162 A.D.3d 1337, 1339, 78 N.Y.S.3d 810, 812–13 (3d Dep’t 2018) (first citing *In re Yoga Vida N.Y.C., Inc.*, 28 N.Y.3d 1013, 1016, 64 N.E.3d 276, 278, 41 N.Y.S.3d 456, 458 (2016); and then citing *In re Courto*, 159 A.D.3d 1240, 1241–42, 74 N.Y.S.3d 108, 110–11 (3d Dep’t 2018)).

181. See generally *Lawson v. Grubhub, Inc.*, No.15-cv-05128-JSC, 2017 U.S. Dist. LEXIS 106291 (N.D. Cal. July 10, 2017) (evaluating employment status of Grubhub delivery drivers); *O’Connor v. Uber Techs., Inc.*, 201 F. Supp.3d 1110 (N.D. Cal. 2016) (evaluating employment status of Uber drivers); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015) (evaluating employment status of Lyft drivers).

182. *In re Vega*, 162 A.D.3d at 1337, 78 N.Y.S.3d at 811.

183. *Id.*

184. *Id.*

185. *Id.* at 1337–39, 78 N.Y.S.3d at 811–13 (first citing *In re Yoga Vida N.Y.C.*, 28 N.Y.3d at 1016, 64 N.E.3d at 278, 41 N.Y.S.3d at 458; then citing *In re TMR Sec.*

In so ruling, the Third Department applied its long-established employment analysis, i.e., did the putative employer exercise more than incidental control over the results produced or the means used to achieve those results.¹⁸⁶ The court found insufficient control based on the following factors: there was no application or interview; claimant was required only to download Postmates' application software platform and provide his name, telephone, social security number, and driver's license number; claimant was not required to report to any supervisor; there was no requirement that the claimant ever log on to the Postmates' platform and actually work; claimant remained free to work as much or as little as he wanted; even when logged into the platform, the courier remained free to decline delivery requests and to simultaneously work for other companies, including Postmates' direct competitors; no uniform was required and claimant was not provided any identification card or logo; and claimant was paid only for deliveries he completed and was not reimbursed for any delivery-related expenses.¹⁸⁷

The court held that although Postmates determined the rate to be paid, tracked the subject deliveries in real time, handled customer complaints, and obtained a background check on the courier from a third-party, this was evidence of only "incidental control," which is insufficient on its own to establish an employment relationship.¹⁸⁸

It remains to be seen whether the court's *Postmates* decision will impact a June 9, 2017 decision by an Administrative Law Judge (ALJ) within the Unemployment Insurance Division finding Uber drivers to be employees of Uber Technologies.¹⁸⁹ As of the end of the *Survey* period, an appeal of the ALJ's decision remains pending before the Appeal

Consultants, Inc., 145 A.D.3d 1402, 1403–04, 45 N.Y.S.3d 240, 242 (3d Dep't 2016); then citing *In re Bogart*, 140 A.D.3d 1217, 1219, 34 N.Y.S.3d 195, 196 (3d Dep't 2016); then citing *In re Chan*, 128 A.D.3d 1146, 1146–47, 8 N.Y.S.3d 489, 490 (3d Dep't 2015); then citing *In re Jennings*, 125 A.D.3d 1152, 1153, 3 N.Y.S.3d 209, 210–11 (3d Dep't 2015); then citing *In re Holleran*, 98 A.D.3d 757, 758–59, 950 N.Y.S.2d 205, 207 (3d Dep't 2012); and then citing *In re Crystal*, 150 A.D.3d 1595, 1597, 55 N.Y.S.3d 518, 520 (3d Dep't 2017)).

186. *Id.* at 1338, 78 N.Y.S.3d at 812 (first citing *Empire State Towing & Recovery Assn., Inc. v. Comm'r of Labor*, 15 N.Y.3d 433, 437, 938 N.E.2d 984, 986, 912 N.Y.S.2d 551, 553 (2010); then citing *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); and then citing *In re Courto*, 159 A.D.3d 1240, 1241, 74 N.Y.S.3d 108, 110 (3d Dep't 2018)).

187. *In re Vega*, 162 A.D.3d at 1338–39, 78 N.Y.S.3d at 812.

188. *Id.* at 1339, 78 N.Y.S.3d at 812 (first citing *In re Yoga Vida N.Y.C.*, 28 N.Y.3d at 1016, 64 N.E.3d at 278, 41 N.Y.S.3d at 458; and then citing *In re Courto*, 159 A.D.3d at 1241–42, 74 N.Y.S.3d at 110–11).

189. Rachel Graf, *NY Uber Drivers Entitled to Employee Status, Agency Says*, LAW360 (June 14, 2017), <https://www.law360.com/articles/934549/ny-uber-drivers-entitled-to-employee-status-agency-says>.

Board.¹⁹⁰ Procedurally, after the Appeal Board decision, as in *Postmates*, both parties will have the right to appeal the decision to the Third Division.¹⁹¹

B. New York Court Finds Retailer Not Responsible for Unforeseeable Violence Allegedly Set in Motion by One of its Employees

In another *Survey* period decision involving a unique set of facts, a federal district court, applying New York law, found that a department store employer could not be held legally responsible for violence that appeared to be set in motion by an employee of the store.¹⁹²

The case arose from a feud between two teenagers, who had apparently both dated the same person, that culminated in a brawl in a Marshalls department store in Brooklyn.¹⁹³ The plaintiff, a customer of the store, alleged that the Marshalls employee (whom she knew previously) threatened to fight the plaintiff and her sister, and that the employee took off her earrings in anticipation of a fight.¹⁹⁴ The plaintiff alleged she immediately complained to a cashier and asked to see a store manager.¹⁹⁵ The employee was sent to the employee break room while the manager asked the plaintiff and her sister to provide a written statement describing the incident.¹⁹⁶ However, while the plaintiff and her sister waited by the cash register, the employee's aunt and cousin entered the store and allegedly attacked the plaintiff and her sister, inflicting injuries that left the plaintiff with a concussion, a broken arm, bruising, and a lingering eye problem.¹⁹⁷

The plaintiff brought suit against a number of parties, including Marshalls, alleging that the department store: (1) “acted negligently by failing to protect her ([e.g.], by failing to employ a security guard on premises[.]” or employing other protective measures); (2) should be “vicariously liable for the alleged negligence of its employees who failed to prevent the attack”; and (3) negligently hired and allowed the employee “to remain on the store premises after the plaintiff and her sister

190. *Id.*

191. See THIRD JUDICIAL DEPARTMENT, INSTRUCTIONS FOR APPEAL BY CLAIMANT FROM DECISION OF UNEMPLOYMENT INSURANCE APPEAL BOARD 3, http://www.nycourts.gov/ad3/Civil/UI_Instructions_F.pdf.

192. *Cort v. Marshalls Dep't Store*, No. 14-CV-7385 (NGG) (RER), 2017 U.S. Dist. LEXIS 208424, at *15 (E.D.N.Y. Dec. 29, 2017).

193. *Id.* at *1–2.

194. *Id.* at *2–3.

195. *Id.* at *3.

196. *Id.*

197. *Cort*, 2017 U.S. Dist. LEXIS 208424, at *3.

reported that [the employee] had threatened and harassed them.”¹⁹⁸

While the court expressed sympathy to the plaintiff’s position that “she was suddenly attacked [inside of the] store, apparently at the behest of [one of its] employee[s],” the court ultimately denied all of the plaintiff’s claims against Marshalls because there was no evidence that such an attack was “reasonably foreseeable.”¹⁹⁹ Specifically, the court held “to the extent that . . . [the plaintiff] contends that the defendant was negligent in hiring, supervising, or retaining . . . [the employee], that claim also fails because [the plaintiff] has not shown that the defendant was aware that [the employee] had any propensity for instigating violent assaults on store patrons (or anyone else for that matter).”²⁰⁰ Accordingly, absent previous knowledge suggesting a propensity for this sort of behavior, Marshalls could not be held responsible for the employee’s conduct and the plaintiff’s injuries.²⁰¹

C. Federal Court Applying New York Law Declines to Enforce Non-Compete and Non-Solicitation Agreement for Key Employees of E-Discovery Employer

In the case of *In re Document Technologies Litigation*, the Southern District of New York, applying New York law, refused to enforce non-compete and non-solicitation agreements in a case involving e-discovery competitors and four individual defendants.²⁰²

The four individual defendants worked for the e-discovery company Document Technologies, Inc. (DTI), as high-level sales employees, and they had signed agreements with numerous restrictive covenants, including a one-year non-compete agreement, a one-year prohibition on soliciting the company’s employees, and a one-year restriction on soliciting the company’s clients.²⁰³ Despite these restrictions being in place, these employees were, at all times, at-will employees.²⁰⁴

One of the defendants was contacted to be a recruiter for a competitor, LDiscovery.²⁰⁵ The defendant communicated the opportunity to the three other defendants, and they ultimately met with LDiscovery to discuss a potential transition.²⁰⁶ After further discussions, in January

198. *Id.* at *5.

199. *Id.* at *6, *14, *17–18.

200. *Id.* at *7.

201. *Id.* at *18.

202. 275 F. Supp. 3d 454, 457–58 (S.D.N.Y. 2017).

203. *Id.* at 458.

204. *Id.*

205. *Id.*

206. *Id.*

2017, all four individual defendants signed employment agreements with LDiscovery.²⁰⁷ The agreements provided that the defendants would resign from DTI, take a “sabbatical year,” during which they would receive signing bonuses, but LDiscovery would not require any services that would put the defendants in violation of their restrictive covenants, and would begin employment in January 2018.²⁰⁸ During the sabbatical year, the employees participated in meetings to discuss strategy for when the individual defendants were to become active employees of LDiscovery, as well as preparing a rudimentary spreadsheet containing names, locations, contacts, and estimates of revenue for some of their DTI clients.²⁰⁹

DTI brought suit, alleging that the individual defendants had breached: (1) the terms of their non-compete covenants by executing employment agreements with LDiscovery, preparing the spreadsheet mentioned above, and participating in meetings to discuss strategy; and (2) their employee non-solicitation clauses by searching jointly for employment.²¹⁰

The court rejected both claims.²¹¹ First, the court found no violation of the non-compete, because under established New York law, a former employee may lawfully engage in preparatory acts during the term of a non-competition provision by engaging in acts such as incorporating a later competing business, building facilities, and filing and obtaining trademarks.²¹² The court held that preparing a customer spreadsheet is a similar preparatory act, and further explained that these acts cease to be preparatory only when they detrimentally impact the former employer’s economic interests, and the court found that this line was not crossed because the information was not used to communicate with or solicit DTI’s clients during the non-competition period.²¹³ As an interesting side note, the court also clarified that the defendants’ general knowledge of revenue attributable to each former client was not a protectable trade secret, “since labeling this knowledge as proprietary would ‘prevent former employees from ever pursuing clients or customers whom they

207. *In re Document Techs. Litig.*, 275 F. Supp. 3d at 458.

208. *Id.* at 458–59.

209. *Id.* at 460.

210. *Id.* at 464, 466.

211. *Id.* at 464–66.

212. *In re Document Techs. Litig.*, 275 F. Supp.3d at 465 (first citing *Stork H & E Turbo Blading, Inc. v. Berry*, 32 Misc. 3d 1208(A), 932 N.Y.S.2d 763 (Sup. Ct. Thompsons Cty. 2011); then citing *Walter Karl, Inc. v. Wood*, 137 A.D.2d 22, 28, 528 N.Y.S.2d 94, 98 (2d Dep’t 1988); and then citing *Abraham Zion Corp. v. Lebow*, 593 F. Supp. 551, 571 (S.D.N.Y. 1984)).

213. *Id.* at 465 (citing *Am. Fed. Group v. Rothenberg*, 136 F.3d 897, 906 (2d Cir. 1998)).

believe generate substantial business for their former employers.”²¹⁴

Second, the court rejected DTI’s claim that the individual defendants breached their employee non-solicitation clauses by jointly searching for employment.²¹⁵ Specifically, DTI argued that the “[i]ndividual [d]efendants breached the [non-solicitation clause] by jointly searching for new employment, because, . . . [this made them] ‘much more attractive than a lone wolf pitch to employers looking to poach their competitors’ rainmakers.”²¹⁶ The court rejected this argument, and further held that the restrictive covenant was unenforceable as it purports to prohibit at-will employees who have yet to accept an offer of new employment from inducing or even encouraging co-workers to leave their present employer.²¹⁷

The case serves as a reminder of the close scrutiny given to restrictive covenants in New York. Significantly, a number of states, as well as the New York City council, have introduced proposals to limit the use of non-compete agreements through legislation, but no such bills were enacted into law during the *Survey* period.²¹⁸

D. First Department Appellate Division Requires Disclosure of Medical Records of Organ Donors in Pursuit of Shocking Whistleblower Claim Under Labor Law § 740

In a shocking whistleblower claim arising under Labor Law § 740, the plaintiff sued his employer, an organ procurement organization, alleging that he was fired after complaining that the organization procured organs “from individuals who still showed signs of life,” and that the organization “pressured doctors to declare people dead” in violation of relevant health regulations.²¹⁹ To prevail on a claim under Labor Law § 740, a plaintiff is required to show he was fired because he objected to or threatened to disclose a practice in violation of law.²²⁰

The plaintiff alleged that the organization procured organs from four

214. *Id.* at 465–66 (citing *RogersCasey, Inc. v. Nankof*, No. 02 Civ. 2599 (JSR), 2003 U.S. Dist. LEXIS 6960, at *18 (S.D.N.Y. 2003)).

215. *Id.* at 466.

216. *Id.*

217. *In re Document Techs. Litig.*, 275 F. Supp. 3d at 466.

218. *See, e.g.*, S. 2371, 189th Gen. Ct. (Mass. 2016); S. 840, 2017–2018 Sess. (Cal. 2018); S. 1017, 2017–2018 Sess. (Cal. 2018); N.Y.C. Council Int. No. 1663 (N.Y. 2016); A. 1769, 218th Leg. (N.J. 2018); H.B. 1938, Gen. Assemb. (Pa. 2017).

219. *McMahon v. N.Y. Organ Donor Network*, 161 A.D.3d 680, 681, 78 N.Y.S.3d 61, 62–63 (2018) (citing 10 N.Y.C.R.R. § 400.16 (2018)).

220. *Id.* (first citing N.Y. LAB. LAW § 740(2) (McKinney 2015); and then citing *Webb-Weber v. Cmty. Action for Human Servs., Inc.*, 23 N.Y.3d 448, 452–53, 15 N.E.3d 1172, 1174, 992 N.Y.S.2d 163, 165 (2014)).

individuals who still showed signs of life, and the unique issue presented in the case was whether the plaintiff, in pursuing his case under Labor Law § 740, was entitled to the medical records of those four individuals.²²¹ The defendant objected on the grounds that it did not want to violate HIPAA, and that disclosure would violate New York State's physician-patient privilege.²²²

The court easily disposed of the HIPAA objection, stating that HIPAA was not a concern because these disclosures were made in the course of a judicial proceeding and pursuant to a protective order, and such disclosures are authorized under HIPAA.²²³ However, the court recognized that New York State's physician-patient privilege is not terminated by death, and in the instant case, the privilege had not been waived by the donors' next of kin and, therefore, still applied.²²⁴ Nonetheless, the court ordered disclosure (with redactions permitted) of the medical records, holding that the circumstances of the case warranted overcoming the privilege because "[a]llowing disclosure under these circumstances is consistent with the public policy underlying the whistleblower statute, i.e., to encourage employees to report hazards to supervisors and the public."²²⁵ This case clarifies disclosure of otherwise confidential records is permitted in certain whistleblower cases, particularly when these statutes are enacted to encourage reporting of hazardous conditions.

V. OTHER FEDERAL LEGISLATIVE, ADMINISTRATIVE, AND JUDICIAL DEVELOPMENTS IMPACTING NEW YORK EMPLOYERS

While this *Survey* focuses primarily on developments relating specifically to employers in New York, there were certain major federal developments impacting all employers, that are set forth briefly below.

221. *Id.* at 681, 78 N.Y.S.3d at 62.

222. *See id.*

223. *Id.* at 681, 78 N.Y.S.3d at 63 (citing 45 C.F.R. § 164.512(e)(1)(ii)(B), (iv), (v) (2018)).

224. *McMahon*, 161 A.D.3d at 681-82, 78 N.Y.S.3d at 63 (first citing *Chanko v. Am. Broad. Cos. Inc.*, 27 N.Y.3d 46, 53, 49 N.E.3d 1171, 1176, 29 N.Y.S.3d 879, 884 (2016); and then citing *Perez v. Fleischer*, 122 A.D.3d 1157, 1159, 997 N.Y.S.2d 773, 775-76 (2014)).

225. *Id.* at 682, 78 N.Y.S.3d at 63 (first citing *Seaman v. Wyckoff Hgts. Med. Ctr., Inc.*, 25 A.D.3d 596, 597, 807 N.Y.S.2d 409, 411 (2006); then citing *Cole v. Panos*, 128 A.D.3d 880, 883, 11 N.Y.S.3d 179, 183 (2015); and then citing *Leibowitz v. Bank Leumi Trust Co.*, 152 A.D.2d 169, 176, 548 N.Y.S.2d 513, 517 (1989)).

A. Current Status of New Federal Overtime Rule Increasing Salary Threshold

As was reported in last year's *Survey*, on May 23, 2016, the Obama Administration's United States Department of Labor (US DOL), published final regulations modifying the salary test to determine whether an employee is exempt from FLSA overtime requirements pursuant to one or more of the FLSA's exemptions (i.e., executive, administrative, professional, outside sales and computer employees).²²⁶ The final regulations doubled the minimum salary threshold that an employee must be paid in order to meet these exemption requirements—from \$455 per week to \$913 per week.²²⁷ The final regulations were set to take effect December 1, 2016; however, a Texas district court issued a nationwide preliminary injunction ten days before the rule was set to take effect.²²⁸ This same court followed up with a permanent injunction issued on August 31, 2017.²²⁹

Due to the change in presidential administrations, it was unclear whether the US DOL would appeal the permanent injunction decision (it had already abandoned its appeal of the temporary injunction). However, on October 30, 2017, the US DOL appealed the August decision, but announced that it would request the Fifth Circuit stay the appeal while the US DOL undertook further rulemaking to determine what the salary level should be.²³⁰ The Fifth Circuit granted the motion, staying the appeal pending the outcome of the new rulemaking.²³¹

In furtherance of this rulemaking, the US DOL published a Request for Information, which is an opportunity for the public to provide information that will aid the US DOL in formulating a proposal to revise the regulations.²³² The Request for Information solicited responses to

226. 29 C.F.R. § 541.0(b) (2018); WAGE & HOUR DIV., 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); see Levine & Lamanque, *supra* note 1, at 961–62.

227. 29 C.F.R. § 541.100(a)(1); WAGE & HOUR DIV., *supra* note 226, at 1; see Levine & Lamanque, *supra* note 1, at 960.

228. Nevada v. U.S. Dep't of Labor, 218 F. Supp. 3d 520, 532–34 (E.D. Tex. 2016) (issuing temporary injunction).

229. Nevada v. U.S. Dep't of Labor, 275 F. Supp. 3d 799–800, 808 (E.D. Tex. 2017) (issuing permanent injunction).

230. *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 Mar. 5, 2019) [hereinafter *Overtime Litigation Info*]; see Nevada, 218 F. Supp. 3d 520, 534 (E.D. Tex. 2016), *appeal pending*, Nevada v. U.S. Dep't of Labor, No. 16-41606 (5th Cir. Filed Aug. 31, 2017).

231. See *Overtime Litigation Info*, *supra* note 230.

232. *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act*,

eleven specific questions, and despite the comment period ending in September 2017, as of the end of the *Survey* period, the US DOL has not presented proposed revisions to the regulations.²³³

B. U.S. Supreme Court Finds Mandatory Arbitration Agreements for Class or Collective Actions

In a five-four decision, in *Epic Systems Corp. v. Lewis*, the U.S. Supreme Court ruled that the Federal Arbitration Act (FAA) provides parties the ability to enter into arbitration agreements requiring individual arbitrations, such that employees waive their ability to either bring or join in a class action.²³⁴ The Court rejected the employees' argument that by requiring individualized proceedings, the agreements violated the federal National Labor Relations Act (NLRA).²³⁵

The NLRA provides employees with the right to organize unions, bargain collectively, and engage in other concerted activities, and for three quarters of a century, the NLRA had no bearing on the legality of arbitration agreements waiving the right to class or collective actions.²³⁶ In finding such waivers lawful, the Supreme Court specifically noted:

This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful.²³⁷

The National Labor Relations Board (NLRB) first changed course from its seventy-five-year history in 2012 by taking an expansive view of concerted activities and holding that employers violate the NLRA when they require employees, as a condition of employment, to agree to resolve work-related disputes pursuant to an arbitration provision that waives the right to class or collective actions.²³⁸ The U.S. Court of Appeals for the Second, Fifth, and Eighth Circuits rejected the NLRB's position and

U.S. DEP'T OF LABOR, <https://www.dol.gov/whd/overtime/rfi2016.htm> (last visited Mar. 5, 2019).

233. *Id.*; Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 82 Fed. Reg. 34,616, 34,616 (proposed July 26, 2017) (codified at 26 C.F.R. § 541 (2018)).

234. 138 S. Ct. 1612, 1618–20 (2018).

235. *See id.* at 1619.

236. *See id.*

237. *Id.*; *see id.* at 1632.

238. *See* D. R. Horton, 357 N.L.R.B. 2277, 2282 (2012), *enforcement denied in relevant part*, 737 F. 3d 344, 349–64 (5th Cir. 2013).

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found these arbitration provisions lawful.²³⁹ However, the Seventh and Ninth Circuit reached the opposite conclusion, striking down the arbitration agreements as unlawful, and creating the circuit split that ultimately brought this case before the Court.²⁴⁰

As noted, the Court found that the NLRA cannot trump the FAA, holding that “nothing in our cases indicates that the NLRA guarantees class and collective action procedures.”²⁴¹ The Court further explained that Section Seven of the NLRA focuses on the right to organize unions and bargain collectively, and neither expresses “approval or disapproval of arbitration” or class action procedures and therefore cannot be found to preempt the FAA.²⁴²

Shortly after the decision was issued, the NLRB issued a statement confirming that it accepted the U.S. Supreme Court decision, that it had fifty-five pending cases before raising this very issue, and that it will work through these cases expeditiously in conformance with the Court’s decision.²⁴³

C. Service Advisors at Automobile Dealership Exempt from Overtime Requirements of the FLSA Under “Fair” Interpretation of FLSA Exemptions

In another five-four decision, the U.S. Supreme Court held in *Encino Motorcars, LLC v. Navarro* that service advisors who consult with customers about their servicing needs and sell them servicing solutions at automobile dealerships are exempt from the overtime requirements of the FLSA.²⁴⁴ In so ruling, the Court reversed a Ninth Circuit Court of Appeals’ decision finding that these service advisors were non-exempt employees eligible for overtime.²⁴⁵

By way of background, the FLSA contains an exemption from overtime pay requirements for “any salesman, partsman, or mechanic

239. *Patterson v. Raymours Furniture Co.*, 659 Fed. App’x 40, 43 (2d Cir. Sept. 2, 2016) (citing *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013)); *Murphy Oil USA v. NLRB*, 808 F.3d 1013, 1015 (5th Cir. 2015); *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016); *see* D. R. Horton, 357 N.L.R.B. at 2282.

240. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983–84 (9th Cir. 2016), *cert granted*, 137 S. Ct. 809 (2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1156 (7th Cir. 2016), *cert granted*, 137 S. Ct. 809 (2017).

241. *Lewis*, 138 S. Ct. at 1628.

242. *Id.* at 1624.

243. Press Release, National Labor Relations Board, Supreme Court Issues Decision in *NLRB v. Murphy Oil USA* (May 21, 2018), <https://www.nlr.gov/news-outreach/news-story/supreme-court-issues-decision-nlr-v-murphy-oil-usa>.

244. 138 S. Ct. 1134, 1138 (2018).

245. *Id.* at 1143.

primarily engaged in the business of selling such vehicles.”²⁴⁶ Historically, since at least 1978, both federal courts and the US DOL have generally interpreted this language to cover service advisors as “salesman,” thereby exempting these employees from overtime requirements.²⁴⁷ However, in 2011, the US DOL changed course and issued a rule that interpreted the term “salesman” to exclude service advisors; it was this rule that prompted this particular litigation.²⁴⁸

Here, the litigation was brought by a group of service advisors employed at a Mercedes Benz dealership in California.²⁴⁹ The service advisors performed the duties of meeting customers, listening to concerns about cars, suggesting repair and maintenance services, selling new accessories or replacement parts, recording service orders, and explaining the repair and maintenance work when customers return for their vehicles.²⁵⁰ Based on these duties, the majority opinion held that the service advisors are salesman who are primarily engaged in servicing automobiles, which places them squarely within the FLSA exemption set forth above.²⁵¹

While this decision is certainly valuable for the clarity it provides automobile dealerships, the most notable portion of the majority opinion, which has much further reaching implications, is how federal courts must evaluate FLSA exemptions.²⁵² Specifically, the Court rejected the view that exemptions under the FLSA must be construed narrowly, holding:

The Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. We reject this principle as a useful guidepost for interpreting the FLSA. Because the FLSA gives no “textual indication” that its exemptions should be construed narrowly, “there is no reason to give [them] anything other than a fair (rather than a ‘narrow’) interpretation.”²⁵³

The Court further explained that the narrow-construction principle relies on a flawed premise that FLSA pursues its remedial purpose at all costs, and the Court reinforced that the courts “have no license to give the

246. 29 U.S.C. § 213(b)(10)(A) (2012).

247. *Encino Motorcars*, 138 S. Ct. at 1138 (citing Dep’t of Labor, Wage & Hour Div., Opinion Letter No. 1520 (WH-467) (1978)).

248. Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832, 18,833 (Apr. 5, 2011) (codified at 29 C.F.R. § 779.372(c) (2018)).

249. *Encino Motorcars*, 138 S. Ct. at 1138.

250. *Id.* at 1138–39 (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2121–22 (2016)).

251. *Id.* at 1140.

252. *Id.* at 1142.

253. *Id.* (citing *Navarro v. Encino Motorcars*, 845 F. 3d 925, 935 (9th Cir. 2017)).

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exemption anything but a fair reading.”²⁵⁴ Accordingly, all federal courts, including the Second Circuit Court of Appeals which traditionally construed FLSA exemptions narrowly,²⁵⁵ will now be prohibited from doing so.

VI. NEW YORK CITY DEVELOPMENTS

The *Survey* period saw significant legislative and judicial developments impacting New York City employers, a trend that has continued beyond the *Survey* period, as the New York City Council and Mayor take a more aggressive approach in regulating employment relationships within the City.

A. The Stop Sexual Harassment in NYC Act

For example, on May 9, 2018, New York City Mayor Bill de Blasio also signed comprehensive legislation aimed at addressing sexual harassment, the Stop Sexual Harassment in NYC Act.²⁵⁶ This legislation goes further than the New York State requirements, and includes the following:

- (a) Effective April 2019, employees with 15 or more employees are required to conduct annual anti-sexual harassment training. The training must include specific elements, such as an explanation of sexual harassment under the New York City Law, information concerning bystander intervention, and information on the complaint process available through the New York City Commission on Human Rights (as well as federal and state agencies).²⁵⁷
- (b) Effective September 2018, all City employers are required to conspicuously display anti-sexual harassment rights and responsibilities notices in both English and Spanish (regardless of whether any employees speak Spanish) and distribute a factsheet to individuals at the time of hire that must be made available in English and Spanish.²⁵⁸
- (c) Expands liability for gender-based claims under the New York City Human Rights Law to *all* New York City employers. Previously the law applied only to employers with four or more employees.²⁵⁹
- (d) Extends the previous one-year statute of limitations for filing a

254. *Encino Motorcars*, 138 S. Ct. at 1142.

255. *See, e.g.,* *Fernandez v. Zoni Language Ctrs., Inc.*, 858 F.3d 45, 48 (2d Cir. 2017).

256. N.Y.C. ADMIN. CODE § 8-107(29) (2019).

257. N.Y.C. LOCAL LAW NO. 96, § 1 (Apr. 11, 2018) (to be codified at N.Y.C. ADMIN. CODE § 8-107(30)).

258. N.Y.C. ADMIN. CODE § 8-107(29).

259. N.Y.C. ADMIN. CODE § 8-102 (2019).

claim of gender-based harassment with the New York City Commission of Human Rights to three years.²⁶⁰

B. New York City's Fair Workweek Law

While New York State's call-in pay regulations are only proposed, New York City's Fair Workweek law, which went into effect on November 27, 2017, made significant changes to scheduling, notice, and recordkeeping requirements for fast food and retail workers in the City.²⁶¹

Specifically, the law requires fast-food employers to provide employees with a good faith estimate of weekly hours, days, and times before an employee begins their employment.²⁶² The law also requires employers to provide employees with two weeks' written notice of their schedules, which cannot be changed unless the employee provides written consent and is paid additional premiums.²⁶³ Similarly, an employer cannot require an employee to work two shifts with fewer than eleven hours between the shifts unless the employee consents in writing and is paid additional compensation.²⁶⁴ The law also requires that when new shifts become available, an employer must give priority to existing employees before hiring new employees.²⁶⁵ These requirements are applicable to fast food workers at fast food chains with at least thirty locations across the United States who perform any of the following tasks: cooking, customer service, food or drink preparation, delivery, security, stocking, cleaning, and routine maintenance.²⁶⁶

For retail employers, the new law generally prohibits the use of on-call scheduling. Specifically, a retail employer may not, with certain very limited exceptions: (1) schedule a retail employee for an on-call shift; (2) cancel a regular shift within seventy-two hours of the scheduled start of the shift; (3) require an employee to work with less than seventy-two hours' notice unless the employee consents in writing; or (4) require an employee to contact the employer to confirm whether the employee should report to work with less than seventy-two hours before the start of the shift.²⁶⁷ For purposes of the law, a retail employer is defined as a business that primarily sells consumer goods and employs at least twenty

260. N.Y.C. LOCAL LAW NO. 100, § 1 (Apr. 11, 2018) (to be codified at N.Y.C. ADMIN. CODE § 8-109(e) (2019)).

261. See N.Y.C. ADMIN. CODE § 20-1241 (2019).

262. N.Y.C. ADMIN. CODE § 20-1221 (2019).

263. N.Y.C. ADMIN. CODE §§ 20-1221–1222 (2019).

264. N.Y.C. ADMIN. CODE § 20-1231 (2019).

265. N.Y.C. ADMIN. CODE § 20-1241.

266. N.Y.C. ADMIN. CODE § 20-1201 (2019).

267. N.Y.C. ADMIN. CODE § 20-1251 (2019).

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workers within New York City.²⁶⁸

C. New York City Expands Protections of Paid Time Off to “Safe Time”

New York City’s Paid Sick Leave Law first took effect in 2014, and it generally requires New York City employers with five or more employees to provide up to forty hours of sick time to covered employees in a calendar year.²⁶⁹ During the *Survey* year, the protections of this Act were expanded to cover leave related to domestic violence, unwanted sexual contact, stalking, and/or human trafficking.²⁷⁰

Specifically, employees can take time off to, for example, obtain services from a domestic violence shelter, rape crisis center, or other services program; participate in safety planning, relocate, enroll a child in a new school, or take other actions to protect their safety or that of their family members; meet with an attorney or social service provider to obtain information and advice related to custody, visitation, matrimonial issues, orders of protection, immigration, housing, and discrimination in employment, housing, or consumer credit; file a domestic incident report with law enforcement or meet with a district attorney’s office; or other actions necessary to maintain, improve, or restore the physical, psychological, or economic health or safety of the employee or the employee’s family member or to protect those who associate or work with the employee.²⁷¹

The amendments also expand the definition of family member for both Sick and Safe time, to “any other individual related by blood to the employee, and any other individual whose close association with the employee is the equivalent of a family relationship.”²⁷²

D. New York City Salary History Ban Law

New York City’s Salary History Ban Law went into effect on October 31, 2017, and the law bans nearly all City employers from (1) asking job applicants about their compensation history, or (2) relying on a job applicant’s compensation history when making a job offer or negotiating an employment contract unless that employee or applicant freely volunteers such information.²⁷³ The law does not apply to internal transfers or promotions with the employee’s current employer, nor does

268. N.Y.C. ADMIN. CODE § 20-1201.

269. N.Y.C. ADMIN. CODE §§ 20-911, 20-913 (2019).

270. N.Y.C. ADMIN. CODE § 20-914 (2019).

271. N.Y.C. ADMIN. CODE § 20-914.

272. N.Y.C. ADMIN. CODE § 20-912 (2019).

273. N.Y.C. ADMIN. CODE § 8-107(25) (2019).

it apply to public sector jobs for which the salary is governed by a collective bargaining agreement.²⁷⁴

Albany and Westchester County have also enacted similar legislation, with effective dates of December 17, 2017,²⁷⁵ and July 9, 2018,²⁷⁶ respectively. The New York State Assembly passed what would have been a statewide ban on April 16, 2018; however, this bill did not move in the Senate, and, therefore, no statewide salary history ban is in effect.²⁷⁷

E. New York City Employers Must Engage in a “Cooperative Dialogue” for Accommodation Requests

Effective October 15, 2018, New York City employers must adhere to the “cooperative dialogue” process now mandated by law when an employee requests a reasonable accommodation.²⁷⁸

This “cooperative dialogue” process applies to requests for accommodations based on: disability; pregnancy, childbirth, or related medical conditions; religious observance; and status as a victim of domestic violence, sexual violence, or stalking.²⁷⁹

The process itself requires employers to engage in a good faith dialogue with the employee or applicant concerning the individual’s accommodation needs, potential accommodations, and any difficulties or hardships the accommodation proposed could have on the employer.²⁸⁰ This process must continue until an accommodation is either granted or denied, and significantly, the law now requires that the employer provide a final written determination of the accommodation that was either granted or denied to the person requesting the accommodation.²⁸¹

F. New York Court of Appeals Defines Punitive Damages Standard for New York City Human Rights Law Claims

In *Chauca v. Abraham*, the New York State Court of Appeals set the standard for punitive damages under the New York City Human Rights Law, holding that the plaintiffs were entitled to punitive damages “where the wrongdoer’s actions amount to willful or wanton negligence, or

274. *Id.* § 8-107(25)(e)(4).

275. ALBANY, N.Y., HUMAN RIGHTS LAW § 48-26 (2018).

276. WESTCHESTER COUNTY, N.Y., HUMAN RIGHTS LAW § 700.03 (2018).

277. N.Y. Assembly Bill No. 2040-C, 240th Sess. (2017).

278. N.Y.C. LOCAL LAW No. 50, COUNCIL INT. No. 804-A (2017) (codified at N.Y.C. ADMIN. CODE §§ 8-102, 8-107 (2019)).

279. N.Y.C. ADMIN. CODE § 8-107(28)(a).

280. N.Y.C. ADMIN. CODE §§ 8-102, 8-107(28)(a).

281. N.Y.C. ADMIN. CODE § 8-107(28)(d).

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recklessness, or . . . ‘a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard.’”²⁸²

Before *Chauca*, no court had specifically defined the NYCHRL’s standard for punitive damages, and the Court of Appeals clarified that the appropriate standard is the common law understanding of the term punitive damages in New York State.²⁸³

CONCLUSION

This *Survey* period was highlighted by expanded sexual harassment protections at the State and City level, growing pains related to implementation of New York’s expansive Paid Family Leave law, and the State and City reacting to what it perceives as attacks on employee and/or union rights at the federal level. It is anticipated this contentious relationship at the federal, State, and City level will continue, which makes it safe to predict a similarly active *Survey* period for the upcoming year.

282. 30 N.Y.3d 325, 329, 89 N.E.3d 475, 477, 67 N.Y.S.3d 85, 87 (2017).

283. *Id.* at 329, 89 N.E.3d at 478, 67 N.Y.S.3d at 88.