LABOR AND EMPLOYMENT LAW

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INTRODUCTION

This *Survey* year saw the most significant changes at the state level, primarily in the area of sexual harassment prevention and further expansion of both the New York State Human Rights Law (NYHRL) and the New York City Human Rights Law (NYCHRL). After making substantial changes to New York's sexual harassment law last year, this year the State followed up with additional amendments and an even more robust overhaul of the law governing discrimination and harassment claims.

It is highly anticipated that the wide-sweeping changes at the state level will result in an increase of claims alleging violations of the New York Human Rights Law. However, some things remain to play out in the courts, such as how the new standard for actionable harassment claims will be interpreted. Whether or not these changes will actually reduce workplace harassment will require additional complex studies into the future.

Unsurprisingly, the NYCHRL was also amended in several respects, including adding greater protections for nursing mothers, raising the obligation of employers to respond to employee requests for reasonable accommodations, and putting an end to pre-employment drug testing for marijuana.

At the federal level, the Supreme Court issued significant decisions concerning the requirement Title VII's administrative exhaustion requirement, and class action arbitrations. Courts within the Second Circuit also issued important decisions regarding disability discrimination and wage and hour suits. The Department of Labor ("DOL") and the National Labor Relations Board ("NLRB") were active as well, issuing a number of opinions and decisions during the survey period that employers should be aware of.

I. DEVELOPMENTS IN NEW YORK STATE DISCRIMINATION AND HARASSMENT LAW

A. Significant Amendments to the Employment Discrimination Provisions of the New York Human Rights Law

On June 19, 2019, the New York State Assembly and Senate passed amendments to the NYHRL, the effects of which are sweeping.[1] These changes will likely have a significant impact on how discrimination and harassment cases are litigated, both in the administrative realm and in court. In New York, the administrative agency tasked with enforcement of the NYHRL, is the New York Division of Human Rights (Division).[2] Under New York law, employees have the option of filing claims under the NYHRL with the Division or in New York State Supreme Court.[3]

The most notable change in the law is a change to the legal definition of "harassment."[4] Prior to these amendments, the standard was that harassment based on protected characteristics was not actionable unless it was "severe or pervasive."[5] The "severe or pervasive" standard, which applies to hostile work environment claims brought under federal anti-discrimination laws, is a fairly demanding one. The amendments significantly reduce the threshold for actionable conduct under the NYHRL. Under the NYHRL, workplace harassment based on a protected characteristic may now be actionable "regardless of whether such

1. N.Y. EXEC. LAW §§ 292, 296, 297, 300 (McKinney 2019).
2. *Id.* § 295 (McKinney 2019).
3. *Id.* § 297.
4. *Id.* § 296.
5. *See id.* § 290.

harassment would be considered severe or pervasive under precedent applied to harassment claims."[6] While the burden used to be on employees to demonstrate that the harassment was severe or pervasive, employers must now establish an affirmative defense to allegations of workplace harassment, and show that "the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences"[7] In effect, the amendments completely change the standard of what constitutes actionable, unlawful, workplace harassment.[8] The new standard took effect sixty days after Governor Andrew Cuomo signed the legislation into law on August 12, 2019, on October 11, 2019.[9]

The amendments also changed and expanded the definition of an "employer" under the NYHRL.[10] Previously, the NYHRL only applied to employers with at least four employees.[11] The amendments now subject all employers to the prohibitions set forth in the NYHRL, regardless of number of employees.[12] This portion of the amendment took effect on February 8, 2020.[13]

Last year, the state significantly amended the NYHRL to expand prohibitions of sexual harassment in the workplace to non-employees, including interns, contractors, subcontractors, consultants, vendors, and any other individual providing services pursuant to a contract in the workplace.[14] This year's amendments extend the prohibition of harassment based on any protected class to these individuals.[15] This expansion took effect on October 11, 2019 as well.[16]

In addition, the legislation also weakened an affirmative defense currently available to employers in claims of workplace harassment. Previously, an employer was able to establish an affirmative defense to hostile work environment harassment claims if it could successfully

6. EXEC. § 296.

7. *Id.*

8. *Id.* §§ 295, 296, 297, 300.

9. *Id.*

10. Melissa Camire & Michael Marra, *New York Lawmakers Pass Game-Changing Reforms to State Discrimination Laws*, FISHER PHILLIPS (June 21, 2019), https://www.fisherphillips.com/resources-alerts-new-york-lawmakers-pass-game-changing-reforms.

11. EXEC. § 292.

12. *Id.*

13. *See id.*

14. EXEC. §§ 296-c, 296-d.

15. *Id.* § 296.

16. Camire & Marra, *supra* note 10.

assert that it took reasonable care to prevent and correct any harassing conduct, such as implementing and promulgating a harassment prevention policy and complaint mechanism or procedure, promptly investigating such complaints, and taking appropriate corrective action, *and* where the employee unreasonably failed to avail him or herself of the employer's preventive or corrective measures, by failing to report alleged harassment according to the employer's established policy.[17] The new legislation explicitly provides that "[t]he fact that such individual did not make a complaint about the harassment to such employer…shall not be determinative of whether such employer . . . shall be liable."[18] In other words, employers will no longer find themselves absolved of possible liability where an employee failed to report the harassing conduct pursuant to their established policies.[19] This change took effect on October 11, 2019 as well.[20]

As previously reported, as part of the overhaul of the NYHRL's sexual harassment provisions, the state introduced a prohibition on use of non-disclosure provisions in settlement agreements resolving a sexual harassment claim, unless the inclusion of such a provision was the complainant's preference.[21] The 2019 amendments expanded this prohibition to all types of employment discrimination and harassment claims as of October 11, 2019.[22]

The amendments also increase financial penalties that employers face in employment discrimination claims.[23] Now, prevailing complainants may be awarded punitive damages, which were not previously available and have the purpose or intent of punishing the employer for unlawful conduct.[24] In addition, the prevailing party in an action brought under the NYHRL may now recover reasonable attorney's fees.[25] Prevailing employers, however, may only recover attorney's fees from the complainant if they prove that the action was frivolous.[26] These changes took effect on October 11, 2019.[27]

17. EXEC. § 296.

18. *Id.*

19. *Id.*

20. *Id.*

21. N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019).

22. *Id.*

23. *Compare* EXEC. § 297 (McKinney 2018) (allowing punitive damages only in cases of housing discrimination) *with* EXEC. § 297 (McKinney 2020) (allowing punitive damages in cases of discrimination by private employers).

24. EXEC. § 297 (McKinney 2020).

25. *Id.*

26. *Id.*

27. *Id.*

Lastly, the amendments expanded the statute of limitations for sexual harassment claims brought in the Division.[28] Complainants previously had one year from the last date of alleged harassment to file a complaint with the Division.[29] Effective August 12, 2020, complainants now have three years to file a complaint based on sexual harassment claims with the Division.[30]

It is important to note that all of these amendments are prospective only, and will therefore not apply retroactively.[31]

The amendments to the NYHRL are significant in the context of workplace harassment and discrimination. In light of the changes, it is highly anticipated that there will be an increase in the number of workplace harassment complaints filed, both internally, in New York State Supreme Court, and with administrative bodies, such as the Division.[32]

B. Second Circuit Court of Appeals Finds that "But-For" Causation Standard Applies to ADA Claims

In *Natofsky v. City of New York*, the plaintiff, who has a hearing disability, brought suit against his employer pursuant to Section 504 of the Rehabilitation Act[33] after he was demoted, and later resigned from his employment.[34]

Initially, the Second Circuit had to decide, as a matter of first impression, what the appropriate causation standard was for employment claims brought under Section 504.[35] Although the general causation standard set forth in 29 U.S.C. § 794(a) applies to most discrimination claims brought under the Rehabilitation Act, the Second Circuit held that 29 U.S.C. § 794(d) specifically "removes employment discrimination claims from the application of Section 794(a)'s general causation standard and mandates the application of the Americans with Disabilities Act (ADA)'s causation standard."[36] In so holding, the Second Circuit

28. *Compare* EXEC. § 297 (McKinney 2018) (requiring complaints to be filed within one year of the alleged unlawful discriminatory practices) *with* EXEC. § 297 (McKinney 2020) (allowing complaints of sexual harassment in employment to be filed up to three years from the alleged unlawful discriminatory practices).

29. EXEC. § 297 (McKinney 2018).

30. EXEC. § 297 (McKinney 2020).

31. *See id.*

32. *See id.*

33. 921 F.3d 337, 341 (2d Cir. 2019). The plaintiff also brought additional claims pursuant to both state and city laws. *Id.*

34. *Id.*

35. *Id.* at 345.

36. *Id.*

recognized that its interpretation of Section 504 is in conflict with the Fifth Circuit's interpretation, which is that Section 794(d) does not modify Section 794(a)'s causation standard with regard to employment discrimination claims.[37]

Having decided that the ADA's causation standard applies to employment discrimination claims brought pursuant to Section 504 of the Rehabilitation Act, the Second Circuit clarified the standard of causation imposed on employment discrimination claims under the ADA.[38] It noted that courts in the Second Circuit had historically utilized a "mixed-motive" test for claims brought under the ADA.[39] However, that was based on case law interpreting a prior version of the ADA, which "proscribed discriminatory acts that were engaged in 'because of' a disability," whereas the current law prohibits discriminatory acts "on the basis" of an employee's disability.[40] When the "because of" language was in effect, a defendant could avoid liability by demonstrating that an employment action would have been taken whether or not any illegal criteria was considered.[41]

Shortly thereafter, Title VII was amended to provide that an employment practice is unlawful where discrimination based on a protected characteristic is a motivating factor for engaging in the practice.[42] Although the ADA was amended contemporaneously with Title VII, it was not amended to include Title VII's new "motivating factor" causation standard.[43]

The Second Circuit rejected the plaintiff's argument that the ADA indirectly incorporated Title VII's "mixed-motive" causation standard.[44] Although the ADA incorporated many provisions of Title VII by reference, no reference was made to the provision containing its causation standard.[45] The Second Circuit therefore concluded that in changing the language of the ADA's causation standard, the legislature's intent was to put the focus on whether discrimination occurred, as to whether the disabled person was an individual with a disability under the law, and that

37. *Natofsky*, 921 F.3d at 345.

38. *Id.* at 346.

39. *Id.* (quoting Parker v. Columbia Pictures Indus., 204 F.3d 326, 336 (2d Cir. 2000)).

40. *Id.* (quoting 42 U.S.C. § 12112(a) (1991)).

41. *Id.* at 347 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 244–45 (1989)).

42. *Natofsky*, 921 F.3d at 347 (quoting 42 U.S.C. § 2000e-2(m) (1991)).

43. *See id.* (noting that the amendments to Title VII only applied to Title VII).

44. *Id.* at 349 (citing Gentry v. E.W. Partners Club Mgmt. Co., 816 F.3d 228, 235 (4th Cir. 2016)).

45. *Id.*

there was no indication that it intended to lower the causation standard.[46] Accordingly, the Second Circuit held that plaintiffs bringing ADA discrimination claims must satisfy the "but-for" causation standard.[47]

C. New York Extends Additional Protections for LGBTQ Rights by Passing the Gender Expression Non-Discrimination Act

The Gender Expression Non-Discrimination Act (GENDA), which was signed into law on January 25, 2019, provides members of the Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) community with greater protections against discrimination.[48] In 2015, New York amended the NYHRL to prohibit discrimination against transgender individuals.[49] The passing of GENDA added "gender identity or expression" to the NYHRL's list of protected characteristics.[50] The term "gender identity or expression" is defined as "a person's actual or perceived gender-related identity, appearance, behavior, expression, or other gender-related characteristic regardless of the sex assigned to that person at birth, including, but not limited to, the status of being transgender."[51] In New York, individuals now enjoy the same employment protections with regard to their gender identity or expression as have already been in place to protect against discrimination based on other protected characteristics, such as race, gender, or national origin.[52]

D. The First Department Recognizes the NYCHRL's Broad Definition of Marital Status

In *Morse v. Fidessa Corp.*, the plaintiff brought suit under the NYCHRL alleging that he was terminated from work because his former spouse, with whom he had two children and to whom his employer believed he was still married, left her employment with their common

46. *Id.*

47. *Natofsky*, 921 F.3d at 348 (first citing *Gentry*, 816 F.3d 228 at 235–36; then citing Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 321 (6th Cir. 2012); and then citing Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 963–64 (7th Cir. 2010)).

48. Press Release, N.Y. State, *Governor Cuomo Signs Landmark Legislation Protecting LGBTQ Rights* (Jan. 25, 2019), https://www.governor.ny.gov/news/governor-cuomo-signs-landmark-legislation-protecting-lgbtq-rights.

49. *Id.*

50. *Id.*

51. Gender Expression Non-Discrimination Act (GENDA) S.1047 (2019).

52. *See generally* N.Y. State, *supra* note 51 (quoting Assembly Member Deborah J. Glick in saying that "GENDA will ensure that New York State's civil rights and hate crimes laws include protections for the transgender and gender non-conforming communities").

employer and went to work for a competitor.[53] The plaintiff further alleged that he was told that if he divorced her, he would be considered for reemployment.[54] The plaintiff identified an unmarried couple where both partners worked for his employer before one left to work for a different firm, and the unmarried partner who remained with the firm was not terminated.[55] The defendant moved to dismiss on the basis that the NYCHRL's marital status protection did not cover decisions based on the particular identity of an employee's partner or spouse, but only on the basis of whether the employee was married.[56] The trial court denied the defendant's motion.[57]

Courts have long held that the "marital status" protection contained in the NYHRL does not provide protections associated with the identity of one's spouse.[58] In *Manhattan Pizza*, the plaintiff claimed that the employer's anti-nepotism policy, which forbid employees from working under the direction of relatives or spouses, constituted marital status discrimination.[59] The Court of Appeals held that the NYHRL's marital status protection prohibited employers from discriminating against "someone because he or she is single, married, divorced, separated or the like," but did not "prohibit discrimination based on an individual's marital *relationships*."[60] In *Morse*, the First Department faced the question of whether or not the NYCHRL prohibits employers from "discharging an employee because of the employee's marriage to a particular person."[61]

The First Department noted that the NYCHRL had been amended to require that all provisions be "construed 'broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible.'"[62] Accordingly, the First Department held that unlike the NYHRL, the NYCHRL's marital status protection refers not only "to whether an individual is married or not married," but also "to whether two individuals are married to each other or not married to each

53. 165 A.D.3d 61, 62, 84 N.Y.S.3d 50, 51 (1st Dep't 2018).

54. *Id.* at 62–63, 84 N.Y.S.3d at 51.

55. *Id.* at 63, 84 N.Y.S.3d at 51.

56. *Id.*

57. *Id.* (citing Morse v. Fidessa Corp., 57 Misc. 3d 653, 62 N.Y.S.3d 696 (Sup. Ct. N.Y. Cty. 2017)).

58. *See, e.g.*, Manhattan Pizza Hut, Inc. v. N.Y. State Human Rights Appeal Bd., 51 N.Y.2d 506, 511–12, 415 N.E.2d 950, 953, 434 N.Y.S.2d 961, 964 (1980).

59. *Id.* at 509, 415 N.E.2d at 951, 434 N.Y.S.2d at 962.

60. *Id.* at 512, 415 N.E.2d at 953, 434 N.Y.S.2d at 964.

61. *Morse*, 165 A.D.3d at 63, 84 N.Y.S.3d at 52.

62. *Id.* at 67, 84 N.Y.S.3d at 54 (quoting Albunio v. City of New York, 16 N.Y.3d 472, 477–78, 947 N.E.2d 135, 137, 922 N.Y.S.2d 244, 246 (2011)).

other."[63] Employers operating in New York City must be mindful not only of the NYCHRL's more expansive marital status protections, but also of the general ramifications associated with its plaintiff-friendly construction in all other aspects as well.

II. NEW YORK LEAVE LAWS

A. New York Amends Law with Respect to Employees' Paid Time Off to Vote

On April 1, 2019, New York State passed its annual budget.[64] Within the budget legislation, the state amended its paid voting time law.[65] Prior to the change, only employees who did not have four consecutive hours, either between the opening of the polls and the start of their shift, or between the end of their shift and the closing of the polls ("sufficient time . . . to vote"), would be entitled to up to two (2) hours of paid time off to vote at either the beginning or end of their shift. Employees that had "sufficient time . . . to vote" were not entitled to any paid time off to vote.[66] Employees also had to notify employers between two to ten days before the election of their need for paid time off to vote, if they qualified for the leave.[67]

The changes, effective immediately, changed employees' entitlement to paid time off to vote completely.[68] Under the new law, employees were entitled to up to three hours of paid time off necessary to vote.[69] The law completely eliminated the presumption that only employees with "sufficient time . . . to vote" outside of their working hours or scheduled hours were entitled to paid time off.[70] In effect, this meant that virtually any employee was entitled to up to three hours of paid time off to vote either at the beginning or end of their shift, as the employer may dictate, or as otherwise agreed upon between employer and employee.[71]

63. *Id.* at 68, 84 N.Y.S.3d at 54.

64. John Jay Bove, et al., *Highlights from the New York FY 2020 Budget*, NAT'L LAW REVIEW (Apr. 10, 2019), https://www.natlawreview.com/article/highlights-new-york-fy-2020-budget.

65. *Id.*

66. N.Y. ELEC. LAW § 3-110(1) (McKinney 2018).

67. *Id.* § 3-110(3).

68. *See* N.Y. ELEC. LAW § 3-110 (McKinney 2019).

69. *Id.* § 3-110(1).

70. *Compare* ELEC. § 3-110(1) (McKinney 2018), *with* ELEC. § 3-110(1) (McKinney 2019).

71. It should be noted that employees are only entitled to up to three hours of paid leave. That is to say that an employee who may require more than the three hours of paid time leave

The law also provided that employees were only required to notify their employer of their need for leave at least two days prior to the date of the election.[72]

On April 3, 2020, as part of its latest budget, New York reverted back to its prior voting leave law. As such, employees are only entitled to two hours of paid leave to vote if they do not already have sufficient non-working time to do so.[73]

III. CLASS ACTION DEVELOPMENTS

A. Southern District of New York Ruling Denies Class Certification of Gender-Based Disparate Impact, Disparate Treatment, and Equal Pay Act Claims

In *Kassman v. KPMG LLP*, the Hon. Lorna G. Schofield denied the plaintiffs' class certification with respect to gender discrimination claims brought pursuant to Title VII of the Civil Rights Act of 1964 (Title VII) and the Equal Pay Act (EPA).[74] "The proposed nationwide class consist[ed] of female Associates, Senior Associates, Managers, Senior Managers/Directors and Managing Directors employed within KPMG's Tax and Advisory Functions between October 30, 2009 and the date of judgment (the 'Class Positions' and 'Class Period')."[75] The plaintiffs argued that the proposed class members were paid less than similarly situated male employees on a firm-wide basis.[76]

KPMG's compensation strategy during the Class Period was to compensate at market rate, and it set "the 75th and 25th percentiles of its compensation for each position to the corresponding percentiles in the market."[77] Employee compensation consisted of annual salary increases and bonuses, and a firm-wide compensation budget was set each year.[78]

After the firm-wide compensation budget was determined, each position was assigned a benchmark merit increase and bonus figure by a "Compensation Tool," which recommended the percentage ranges for

to vote will nevertheless be entitled to unpaid leave necessary to vote and may not be subject to discipline for such exercise of their rights.

72. ELEC. § 3-110(3) (McKinney 2019).

73. Subhash Viswanathan, *New York Budget Legislation Includes an Amendment Reverting Back to the Old Voting Leave Law*, BOND, SCHOENECK, AND KING, PLLC (April 13, 2020), https://www.bsk.com/news-insights/new-york-budget-legislation-includes-an-amendment-reverting-back-to-the-old-voting-leave-law.

74. No. 11-cv-3743, 2018 U.S. Dist. LEXIS 203561, at *3, *88 (S.D.N.Y. Nov. 30, 2018).

75. *Id.* at *6.

76. *Id.* at *4.

77. *Id.* at *8.

78. *Id.* at *8–9.

merit increases and bonuses for all employees, based on an employee's performance and current salary as compared to the overall market.[79]

Sub-practice leaders ultimately took the benchmarks given by the Compensation Tool and used their discretion to make adjustments for employees on an individual basis.[80] These local leaders also determined the criteria for promotion on a local level, and promotions were determined at annual practice group meetings conducted by individual practice group members, rather than by the firm's central management.[81]

Pursuant to Fed. R. Civ. P. 23(a), class actions are appropriate only when:

> (1) [T]he class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[82]

The court noted that for commonality to be sufficient, the common contention must be such that a resolution of that contention will resolve an issue that is central to each of the claims of the individual class members.[83] The court stated that in order to prove their disparate impact claim, the plaintiffs were required to "'(1) identify a specific employment practice or policy; (2) demonstrate that a disparity exist[ed]; and (3) establish a causal relationship between the two.'"[84]

In *Dukes*, the Supreme Court held that plaintiffs attempting to show commonality based on an employment practice or policy constituting "a system of discretion," like that at issue in *Kassman*, must show "a common mode of exercising discretion that pervades the entire company."[85] The *Kassman* court noted that, "[i]n other words, when plaintiffs wish to challenge numerous employment decisions all at once, they must point to 'some glue holding the alleged *reasons* for all those decisions together.'"[86] The court considered four factors in determining whether the plaintiffs could establish sufficient glue to hold the challenged employment decisions together: "(1) the nature of the purported class; (2) the process through which discretion is exercised; (3)

79. *Kassman*, 2018 U.S. Dist. LEXIS 203561, at *9–10.

80. *Id.* at *11.

81. *Id.* at * 16.

82. FED. R. CIV. P. 23(a).

83. *Kassman*, 2018 U.S. Dist. LEXIS 203561, at *31–32 (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011)).

84. *Id.* (quoting Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 151 (2d. Cir. 2012)).

85. *Id.* at *49 (quoting *Dukes*, 564 U.S. at 355–56).

86. *Id.* (quoting *Dukes*, 564 U.S. at 339, 352) (emphasis added).

the criteria governing the discretion and (4) the involvement of upper management."[87]

In weighing the first factor, the court noted it is much easier to demonstrate the required commonality where the class is smaller and more localized, and that it will be much more difficult with a nationwide class.[88] The court found that the nature of the proposed class in *Kassman*, consisting of "at least 10,000 women in various offices throughout the country" and covering "a myriad of job descriptions," weighed against a finding of commonality.[89]

In considering the system's framework for using discretion, the court stated that "[a] process that constrains and channels the exercise of discretion may show sufficient common direction."[90] The framework governing the decisions challenged in *Kassman*, however, acted "more as a framework that dictates who will make discretionary decisions rather than how they will exercise their discretion."[91] The court ultimately found that the plaintiffs did not demonstrate sufficient common direction in the exercise of discretion so as to demonstrate commonality.[92]

With regard to the criteria governing the exercise of discretion, the court held that "[s]ubjective criteria, prone to different interpretations, generally do not provide common direction," whereas "objective criteria, or even subjective criteria defined uniformly, may establish a common mode of exercising discretion."[93] The court held that the "nebulous" use of criteria at KPMG was "very likely disadvantageous to women in a profession dominated by men", but that the "evaluation and promotion criteria [were] not sufficient[ly] specific to constrain discretion."[94]

Although a common practice can be demonstrated where a small group approves all of the compensation and promotion decisions, the "mere approval or limited oversight by higher-level executives, without

87. *Id.* at *52 (quoting Moussouris v. Microsoft Corp., No. 15-cv-1483, 2018 U.S. Dist. LEXIS 112792 (W.D. Wash. June 25, 2018), *appeal granted*, No. 18-80080, 2018 U.S. App. LEXIS 27041 (9th Cir. Sep. 20, 2018)).

88. *Kassman*, 2018 U.S. Dist. LEXIS 203561, at *52–54 (first citing Ellis v. Costco Wholesale Corp., 285 F.R.D. 492, 509, *aff'd in part, vacated in part,* 2012 U.S. Dist. LEXIS 169894 (N.D. Cal. Nov. 29, 2012); then citing Brown v. Nucor Corp., 785 F.3d 895, 916 (4th Cir. 2015)).

89. *Id.* at *53–54, 66.

90. *Id.* at *54–55.

91. *Id.* at *55.

92. *Id.* at *58, 61 (*See* Ross v. Lockheed Martin Corp., 267 F. Supp. 3d 174, 198; Jones v. Nat'l Council of Young Men's Christian Ass'ns of the United States, 34 F. Supp. 3d 896, 905 (N.D. Ill. 2014)).

93. *Kassman*, at *60 (*See Ross*, 267 F. Supp. 3d at 198; *Jones*, 34 F. Supp. 3d at 896).

94. *Id.* at *42.

more, falls short of showing a common denominator."[95] The final approval of the decisions, in aggregate, by KPMG's Vice-Chair and National Managing Partner for Tax and Advisory, was found to be insufficient to demonstrate more than "limited oversight," and the lack of involvement by upper management also weighed against a finding of commonality.[96] Accordingly, the court found that all of the relevant factors weighed against class-certification with regard to the plaintiffs' disparate impact claim.[97]

With respect to their disparate impact claim, plaintiffs were required to "present 'evidence supporting a rebuttable presumption that an employer acted with the deliberate purpose and intent of discrimination.'"[98] To show discrimination on a classwide basis, the plaintiffs were required to show "evidence of a 'systemwide pattern or practice' of pervasive discrimination against the class."[99]

The court held that the statistical evidence offered by plaintiffs to show that women were promoted and paid less than men was insufficient to demonstrate such a pattern or practice.[100] Instead, the court held that the evidence did "not show statistically significant disparities between similarly situated men and women in pay and promotion—much less the kind of gross disparities that, on their face, would suggest discriminatory intent."[101]The plaintiffs also failed to demonstrate that KPMG failed to remedy known disparities.[102] They pointed to documents that acknowledged that the company had a compensation discrepancy, but lauded the company's progress at addressing the issue.[103] The court held that evidence that "KPMG was aware of a pay and promotions gap, and that the firm's efforts [had] not completely eradicated the gap," was insufficient to show that it engaged in a pattern or practice of discrimination.[104] Thus, it declined to certify the proposed class with regard to the plaintiffs' disparate impact claim as well.[105]

95. *Id.* at *42–43.

96. *Id.* at *63.

97. *Id.* at *64.

98. *Kassman*, 2018 U.S. Dist. LEXIS 203561, at *64 (quoting United States v. City of New York, 717 F.3d 72, 87 (2d Cir. 2012)) (citing EEOC v. Mavis Disc. Tire, Inc., 129 F. Supp. 3d 90, 103).

99. *Id.* (quoting Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324, 336 (1977)).

100. *Id.* at *69–70, 74.

101. *Id.* at *66 (citing *Teamster*, 431 U.S. at 339 (citation omitted)).

102. *Id.* at *72 (citing Wal-Mart Stores, Inc. v. Dukes, 546 U.S. 338, 353 (2011)).

103. *Kassman*, 2018 U.S. Dist. LEXIS 203561, at *71–72.

104. *Id.* at * 72.

105. *Id.* at *75.

The plaintiffs also failed to show sufficient commonality in conjunction with their EPA claim.[106] The EPA requires that employers provide employees at a single "establishment" with equal pay for equal work.[107] In general, an establishment under the EPA is a "distinct physical place of business;"[108] however, "unusual circumstances may call for two or more distinct physical portions of a business enterprise being treated as a single establishment."[109] In the case at issue, the court found that "although KPMG set generally applicable guidelines, individual pay and promotion decisions were left to the discretion of local practice leaders."[110] Accordingly, the court did not find the type of unusual circumstances that would allow KPMG offices across the nation to be treated as a single establishment.[111]

The court also found that the employees of the proposed class were not sufficiently similarly situated.[112] The proposed class consisted of approximately 1,100 members from eighty different offices.[113] For those reasons, the court declined to certify the proposed class.[114]

IV. WORKER CLASSIFICATION

A. United States Department of Labor Offers Opinion Regarding Classification of Gig Economy Workers

On April 29, 2019, the United States Department of Labor ("US DOL") issued an opinion as to whether service providers working for a virtual marketplace company ("VMC") were employees or independent contractors.[115] The entity requesting the opinion described a VMC as "an online and/or smartphone-based referral service that connects service providers to end-market consumers to provide a wide variety of services . . ."[116]

The requesting entity represented that service providers are required to provide their name, contact information, and social security number

106. *Id.* at *77.
107. *Id.* (citing 29 U.S.C. § 206(d)(1) (2017)).
108. 29 C.F.R. § 1620.9(a) (2018).
109. *Id.* § 1620.9(b).
110. *Kassman*, 2018 U.S. Dist. LEXIS 203561, at *81.
111. *Id.* (quoting Meeks v. Comput. Assocs. Int'l, 15 F.3d 1013, 1017 (11th Cir. 1994)).
112. *Id.* at *77.
113. *Id.* at *82.
114. *Id.* at *87.
115. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Apr. 29, 2019).
116. *Id.*

before they can use the platform.[117] Service providers are also required to "self-certify their experience and qualifications" and to complete background and identity checks conducted by third-parties.[118] They are further required to accept a terms of use agreement and a service agreement, which classify the service providers as independent contractors and state that the VMC "provides only a platform for connecting providers with customers and disclaims any employment relationship between [the VMC] and the service providers."[119] The agreements also specified that services would be provided to consumers only by the service providers, and not by the VMC itself.[120]

Service providers are not required to undergo training, although the VMC provides them with information on how the platform works, tips on best practices, and feedback from existing users regarding the level of service expected by consumers.[121] The entire onboarding process is completed online, and service providers are not required to review any of the materials provided by the VMC.[122] After their accounts are activated, service providers can immediately begin working for consumers without reporting to the VMC at a physical location.[123]

After activation, the VMC provides information regarding consumers' service requests to the service providers.[124] Service providers can then communicate with the consumers regarding the details of the job.[125] Although the VMC sets default prices based on the region and the scope of services, service providers are allowed to request different prices from the consumers.[126] Consumers pay service providers through the VMC on a per job basis.[127]

Service providers are able to select service opportunities by time and place, "determine the tools, equipment and materials needed," and hire personnel.[128] The service agreements provide that the VMC would not inspect a service provider's work, but the VMC does allow for consumers

117. *Id.*
118. *Id.*
119. *Id.*
120. U.S. Dep't of Labor, *supra* note 115.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. U.S. Dep't of Labor, *supra* note 115.
126. *Id.*
127. *Id.*
128. *Id.*

to rate the service providers' performance.[129] Service providers are also allowed to provide services to consumers through other means, including other VMCs.[130] They were also able to "multi-app"—which is to "simultaneously acquire work on a competitor VMC platform in order to determine the most desirable or profitable service opportunity available at any given time."[131]

Service providers are permitted to accept, reject, or ignore any service opportunity; however, the VMC does charge service providers a cancellation fee on behalf of the consumer if the service provider cancels without sufficient notice.[132] The VMC does not require service providers to complete a minimum number of jobs.[133] Although service providers are designated as "inactive" if they do not take a job for a certain period of time, they can simply reactivate their account with a phone call or email.[134] The VMC only terminates its relationship with a service provider "who commits a material breach, such as: inappropriate behavior toward a consumer or the VMC; fraud; repeated cancelling or rescheduling of service opportunities on short notice; or receiving a consumer rating below a certain minimum threshold."[135]

In considering whether the service providers qualified as "independent contractors" under the Fair Labor Standards Act (FLSA), the US DOL examined six factors identified by the Supreme Court in *Rutherford Food Corp. v. McComb*:

> "(1) The nature and degree of the potential employer's control;
>
> (2) The permanency of the worker's relationship with the potential employer;
>
> (3) The amount of the worker's investment in facilities, equipment or helpers;
>
> (4) The amount of skill, initiative, judgment or foresight required for the worker's service;
>
> (5) The worker's opportunities for profit and loss; and
>
> (6) The extent of integration or the worker's services into the potential employer's business."[136]

129. *Id.*
130. U.S. Dep't of Labor, *supra* note 115.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *See* U.S. Dep't of Labor, *supra* note 115.
136. *Id.*; *see* 331 U.S. 722, 730 (1947); United States v. Silk, 331 U.S. 704, 716 (1947).

The US DOL also noted that "[e]ncompassed within these factors is the worker's degree of independent organization and operation."[137] It further noted that other factors may be relevant, that the appropriate weight to be given to each factor depends on the facts, and that the determination must be made based on all of the circumstances.[138]

After examining the relevant factors, the US DOL reached the opinion that the service providers supplying services to consumers using the VMC are independent contractors. The US DOL noted that "as a matter of economic reality, [the service providers] are working for the consumer, not [the VMC]." The service providers' ability to "multi-app" and work for competitors also demonstrates that the VMC "has relinquished control over their external opportunities."[139]

The VMC was not found to exercise significant control over the service providers.[140] Service providers have the "flexibility to choose if, when, where, how and for whom they will work," and use the flexibility "to their own profit and personal advantage."[141] The relationship between the VMC and the service providers is also not the type of permanent working relationship "that would be indicative of an employee-employer relationship."[142] Even if service providers do maintain a lengthy relationship with the VMC, "they do so only on a 'project-by-project basis,'" which strongly indicates that the service providers were independent contractors.[143]

The VMC does not invest "in facilities, equipment or helpers" for its service providers, and the required that service providers purchase all tools, materials and equipment for the performance of their work.[144] It also declines to provide training for service providers, or to exercise managerial discretion over the performance of their work.[145] These factors also indicated an independent contractor relationship.[146]

Although the VMC sets a default price for a job, service providers are able to choose different jobs, to take as many different jobs as they

137. U.S. Dep't of Labor, *supra* note 115.

138. *Id.*; *see Silk*, 331 U.S. at 716.

139. *Id.*; *see* Saleem v. Corp. Transp. Grp., Ltd., 854 F.3d 131, 141–42 (2d Cir. 2017)).

140. *See* U.S. Dep't of Labor, *supra* note 115.

141. *Id.*

142. *Id.*

143. *Id.* (citing Parrish v. Premier Directional Drilling, L.P., 917 F.3d 369, 387 (5th Cir. 2019)).

144. *Id.*

145. *See* U.S. Dep't of Labor, *supra* note 115 (citing Saleem v. Corp. Transp. Grp., Ltd., 854 F.3d 131, 143–44 (2d Cir. 2017)).

146. *Id.*

want, and to negotiate the price of their jobs.[147] They also have the ability to use other competing virtual marketplaces.[148] As such, they had significant opportunity for profit.[149] They also bear the risk of loss if they cancel jobs, and the US DOL found that the service providers' "own managerial skill, not simply productivity" drives their opportunity for profit and loss.[150] The service providers' opportunities for profit and loss also weighed in favor of independent contractor status.[151]

The service providers are uninvolved with developing, maintaining or operating the platform, which itself is a finished product that the VMC offers to service providers.[152] Accordingly, the US DOL found that the service providers are not an "integral part" of the VMC, but, rather, are the "consumers" of the service provided by the VMC.[153] The primary purpose of the VMC is also not to provide services to the end-market consumer.[154] Instead, the purpose of the VMC is to connect service providers to the consumers.[155] This "lack of integration" was found to weigh in favor of independent contractor status as well.[156]

V. NEW YORK CITY DISCRIMINATION, HARASSMENT, AND CIVIL RIGHTS DEVELOPMENTS

A. NYCHRL Amended to Prohibit Discrimination Based on an Employees Sexual and Reproductive Health Decisions

In December 2018, the New York City Council prohibited discrimination based on employees' "sexual and other reproductive health decisions".[157] The bill amending the NYCHRL was subsequently enacted on January 20, 2019, and became effective May 20, 2019.[158]

Under the new amendments, employers subject to the NYCHRL are prohibited from discriminating against any person on the basis of an

147. *Id.*

148. *Id.* (citing *Saleem*, 854 F.3d at 144).

149. *Id.*

150. U.S. Dep't of Labor, *supra* note 115.

151. *Id.* (citing Chao v. Mid-Atl. Installation Servs., 16 F.App'x 104, 107 (4th Cir. 2001)).

152. *Id.*

153. *Id.* at 30.

154. *Id.* (quoting Werner v. Bell Family Med. Ctr., Inc., 529 Fed. App'x 541, 545 (6th Cir. 2013)).

155. U.S. Dep't of Labor, *supra* note 115, at 30 (quoting Werner v. Bell Family Med. Ctr., Inc., 529 Fed. App'x 541, 545 (6th Cir. 2013)).

156. *Id.* (citing Saleem v. Corp. Transp. Grp., Ltd., 854 F.3d 131, 142 (2d Cir. 2017)).

157. N.Y.C. ADMIN. CODE § 8-101 (2019).

158. *Id.*; *Amendments to NYC Human Rights Law*, NYC.GOV (Jan. 20, 2019), https://www1.nyc.gov/site/cchr/law/amendments.page.

employee's "decision to receive services, which are arranged for or offered or provided to individuals relat[ed] to . . . the reproductive system and its functions."[159] The amendments include a non-exhaustive list of examples of such decisions or services protected by the law, including, but not limited to: "fertility-related medical procedures; sexually transmitted disease prevention, testing, and treatment; and family planning services and counseling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing, and abortion."[160]

B. New York City Council Amends the NYCHRL to Require "Cooperative Dialogue" when an Employee Requests an Accommodation

As of October 15, 2018, the NYCHRL requires employers to engage in "cooperative dialogue" when an employee requests a workplace accommodation.[161] This obligation is broader than the requirements of the ADA or the NYHRL, which require employers to engage in an "interactive process" with disabled employees to determine if they can be accommodated.[162]

Under the NYCHRL, the obligation to engage in "cooperative dialogue" applies in the context of employee requests for accommodations related to their religious beliefs, disability, pregnancy and childbirth related conditions, or their status as a victim of domestic violence, sexual violence, or stalking.[163]

According to the definition set forth in the administrative code, "cooperative dialogue" means,

> . . . the process by which a covered entity and a person entitled to an accommodation, or who may be entitled to an accommodation under the law, engage in good faith in a written or oral dialogue concerning the person's accommodation needs; potential accommodations that may address the person's accommodation needs, including alternatives to a requested accommodation; and the difficulties that such accommodations may pose for the covered entity.[164]

Essentially, the employer's obligation is to engage in good faith discussions with the employee, either verbal or in writing, until the

159. ADMIN. CODE § 8-102.
160. *Id.*
161. *Id.* § 8-107(28).
162. *See* 29 C.F.R. § 1630.2 (2018).
163. ADMIN. CODE § 8-107(28)(a).
164. *Id.* § 8-102.

employer makes a determination as to what accommodation, if any, may be provided.[165] Upon completion of the cooperative dialogue, employers are required to provide the requesting employee with their final determination in writing.[166] Such determination is required to include and identify any accommodation that has been granted, or denied.[167]

In practice, before an employer determines that an accommodation is not possible, the employer must have actually engaged, or made a good-faith effort to engage, in a cooperative dialogue with the employee.[168] Failure to engage in the cooperative dialogue as required by the NYCHRL constitutes a standalone violation of the law.[169] Specifically, the law creates a cause of action against employers who "refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require such an accommodation."[170]

C. New York City Requires Greater Accommodations for Employees to Express Breastmilk

On November 18, 2018, the NYCHRL was amended to require employers with four or more employees to provide employees with designated lactation rooms, and implement a lactation room accommodation policy.[171] Previously, the NYCHRL prohibited discrimination on the basis of pregnancy, childbirth, and related conditions.[172] It also imposed on employers an obligation to provide reasonable accommodations for breastfeeding employees, which included allowing such employees with break time to express breast milk, among other accommodations.[173]

Effective March 18, 2019, employers covered by the NYCHRL now must provide employees with a "lactation room" defined by the NYCHRL as "a sanitary place, other than a restroom, that can be used to express breast milk shielded from view and free from intrusion and that includes at a minimum an electrical outlet, a chair, a surface on which to

165. *See id.* § 8-107(28)(d).
166. *Id.* § 8-107(28)(d).
167. *Id.*
168. ADMIN. CODE § 8-107(28)(e).
169. *Id.*
170. *Id.* § 8-107(28)(a).
171. *Id.* §§ 8-102, 8-107(22).
172. *Id.* § 8-107(22) (last effective May 20, 2019) (current version at N.Y.C. ADMIN CODE § 8-107(22) (2019)).
173. *Id.*

place a breast pump and other personal items, and a nearby access to running water."[174] In addition, the NYCHRL now requires that such lactation room be "in reasonable proximity to such employee's work area" as well as provide a "refrigerator suitable for breast milk storage in reasonable proximity to such employee's work area."[175] If the lactation room is also used for another purpose, the law requires that while the employee is using the room to express breast milk, the room's sole function shall be that of a lactation room.[176] Employers must provide notice to other employees that the room is given preference for use as a lactation room.[177]

If an employer is unable to provide a lactation room in compliance with the NYCHRL, the employer is required to engage in cooperative dialogue as defined earlier in this article and in the NYCHRL to determine a possible alternative accommodation.[178]

With respect to the lactation room accommodation policy requirement, the NYCHRL requires all covered employers to develop and implement a written policy regarding the provision of a lactation room.[179] The policy is required to include a statement that employees have a right to request a lactation room, and also set forth a process by which employees may make such a request.[180] Specifically, the process must: (1) specify the means by which an employee may request a lactation room; (2) require the employer to respond to such requests within a reasonable amount of time which may not exceed five business days; (3) provide a procedure for when two or more employees need to use the lactation room at the same time, including contact information for any follow up required; (4) state that the employer will provide reasonable break time for an employee to express breast milk (consistent with the New York State Labor Law requirements); and (5) state that if the request for a lactation room poses an undue hardship to the employer, the employer will engage in cooperative dialogue as set forth in the NYCHRL.[181] The policy must be distributed to employees upon hire.[182]

Employers are required to provide employees with a notice, in a form and manner determined by the commissioner, of the right to be free

174. ADMIN. CODE § 8-102.
175. *Id.* § 8-102(b)(i).
176. *Id.* § 8-102(b)(ii).
177. *Id.*
178. *Id.* § 8-102(b)(iii).
179. ADMIN. CODE § 8-107(c)(i).
180. *Id.*
181. *Id.* § 8-107(c)(i)(1)–(5).
182. *Id.* § 8-107(c)(i).

from discrimination on the basis of pregnancy, childbirth, and related conditions upon hire.[183] The notice may also be conspicuously posted at the employer's place of business.[184]

D. New York City Ends Pre-Employment Marijuana Testing

Although efforts to legalize the recreational use of marijuana statewide failed, New York City implemented new employment protections related to marijuana use.[185] The New York City Council added a new provision to New York City Administrative Code section 8-107 which, unless otherwise provided, makes it "an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to require a prospective employee to submit to testing for the presence of any tetrahydrocannabinols or marijuana in such prospective employee's system as a condition of employment."[186]

The provision does not apply to: (a) police officers; (b) certain construction-related positions governed by New York City Building Code section 3321 and N.Y. Labor Law 220-h; (c) positions requiring a commercial driver's license; (d) any position requiring the supervision or care of children, medical patients or other individuals defined as "vulnerable persons" under Social Services Law 488(15); and (e) positions "with the potential to significantly impact the health or safety of employees or members of the public."[187]

Moreover, drug testing is still permitted when required pursuant to: (a) federal Department of Transportation regulations; (b) any federal government contracts or grants; (c) any state or federal statute, regulation or order; or (d) where the employer is a party to a valid collecting bargaining agreement that specifically addresses pre-employment drug testing.[188]

E. New York City Commission on Human Rights Issues "Legal Enforcement Guidance on Race Discrimination on the Basis of Hair"

In February of 2019, the New York City Commission on Human Rights (Commission), issued guidance to employers regarding

183. *Id.* § 8-107(22)(b)(i).
184. ADMIN. CODE § 8-107(22)(b)(i).
185. *See id.* § 8-102(31)(a).
186. *Id.*
187. *Id.* § 8-107(31)(b)(A)–(E).
188. *Id.* § 8-107(2)(A)–(D).

discrimination on the basis of hairstyles associated with Black people.[189] The Commission outlined "the rights of New Yorkers to maintain natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities" as protected by the NYCHRL. "For Black people, this includes the right to maintain natural hair, treated or untreated hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state."[190] In its guidance, the Commission affirmed that "grooming or appearance policies that ban, limit, or otherwise restrict natural hair or hairstyles associated with Black people generally violate the NYCHRL's anti-discrimination provisions."[191]

The Commission outlined reasons why Black people might wish to wear their hair in such a style, including "as a 'protective style' intended to maintain hair health; [and] as part of a cultural identity associated with being Black."[192] The guidance also discussed the history of discrimination faced by Black people on the basis of their hair.[193]

The Commission opined that "Black hairstyles are protected racial characteristics under the NYCHRL because they are an inherent part of Black identity."[194] It noted the association between Black people and the hairstyles described in the guidance.[195] The guidance warned that "[c]overed employers that enact grooming or appearance policies that ban or require the alteration of natural hair or [the hairstyles described] may face liability under the NYCHRL because these policies subject Black employees to disparate treatment."[196] Employers were also warned that policies requiring that employees "maintain a 'neat and orderly' appearance" are applied in a discriminatory fashion where they prohibit hairstyles commonly associated with Black people on the basis that they "are inherently messy or disorderly."[197] The guidance explicitly states that policies that "force Black employees to straighten, relax or otherwise manipulate their hair to conform to employer expectations" are discriminatory.[198]

189. *Legal Enforcement Guidance on Race Discrimination on the Basis of Hair,* N.Y.C. COMM'N ON HUMAN RIGHTS (last visited Oct. 14, 2019), https://www1.nyc.gov/site/cchr/law/hair-discrimination-legal-guidance.page.

190. *Id.*

191. *Id.*

192. *Id.*

193. N.Y.C. COMM'N ON HUMAN RIGHTS, *supra* note 189.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. N.Y.C. COMM'N ON HUMAN RIGHTS, *supra* note 189.

The guidance also discusses how employers can violate the NYCHRL by "harassing, imposing unfair conditions, or otherwise discriminating against employees based on aspects of their appearance associated with their race."[199] Some examples given by the guidance of an employer engaging in discrimination were an employer telling Black employees that they cannot work in a role where they would interact with customers unless they change a protected hairstyle, or mandating that Black employees use a hat or visor to hide their hair.[200] The guidance also notes that "employers may not ban, limit, or otherwise restrict natural hair or hairstyles associated with Black communities to promote a certain corporate image, because of customer preference, or under the guise of speculative health or safety concerns."[201]

Employers that have legitimate health and safety concerns are instructed to "consider alternative ways to meet that concern prior to imposing a ban or restriction on employees' hairstyles."[202] The guidance gives examples of possible alternatives, "including the use of hair ties, hair nets, head coverings" and "alternative safety equipment that can accommodate various hair textures and hairstyles."[203] The Commission further notes that employers cannot impose such alternatives unless they are related to "actual and legitimate health or safety concerns."[204]

It should also be noted that the NYHRL was amended to add a subsection to the definition of race to include "traits historically associated with race, including but not limited to hair texture and protective hairstyles."[205] Thus, the Commission's guidance may be useful to employees outside of New York City as well.

VI. FEDERAL DEVELOPMENTS IN EMPLOYMENT LAW WITH POTENTIAL IMPLICATIONS FOR NEW YORK EMPLOYERS

A. Supreme Court Holds that the Plaintiff's Failure to Comply with Title VII's Administrative Exhaustion Requirement Is Not a

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. N.Y.C. COMM'N ON HUMAN RIGHTS, *supra* note 189.

204. *Id.*

205. *Governor Cuomo Signs S6209A/A7797A To Make Clear Civil Rights Laws Ban Discrimination Against Hair Styles Or Textures Associated With Race*, NEW YORK STATE, (July 12, 2019), https://www.governor.ny.gov/news/governor-cuomo-signs-s6209aa7797a-make-clear-civil-rights-laws-ban-discrimination-against-hair; N.Y. EXEC. LAW § 292(1)(37)–(38) (McKinney 2019) (amended Jul. 12, 2019).

Jurisdictional Rule

Title VII requires that plaintiffs file an administrative charge with the Equal Employment Opportunity Commission (EEOC) before filing an action in court.[206] The EEOC has the power to investigate the charge, to engage the parties in conciliation, and even to commence suit against the employer.[207] The plaintiff is entitled to a "right-to-sue" letter permitting him or her to commence a civil suit against the employer 180 days after filing the administrative charge.[208]

In *Fort Bend County v. Davis*, the plaintiff filed an EEOC charge against her employer alleging sexual harassment and retaliation.[209] While the EEOC charge was pending, the employer instructed the plaintiff to report to work on a Sunday.[210] The plaintiff informed her employer that she had a church commitment on Sunday, and offered to arrange for a co-worker to cover her shift.[211] The employer responded that she would be terminated if she failed to report.[212] On Sunday, the plaintiff went to church, and her employment was terminated.[213]

After she was terminated, the plaintiff attempted to supplement her EEOC charge by handwriting in "religion" on an intake form, and checking boxes for "discharge" and "reasonable accommodation."[214] A few months later, the plaintiff was notified of her right to sue, and she subsequently commenced a civil action in District Court alleging religious discrimination and retaliation relating to her report of sexual harassment.[215]

After years of litigation and with only plaintiff's religious discrimination claim remaining, the defendant-employer moved to dismiss, arguing that the plaintiff had not stated a religious discrimination claim in her EEOC charge.[216] The District Court granted the defendant's motion, but the Fifth Circuit reversed, holding that the requirement that plaintiffs must file a charge with the EEOC as a prerequisite to suit was not a jurisdictional rule, the violation of which could be raised at any

206. 42 U.S.C. § 2000e-5(e)(1) (2019).
207. *Id.* § 2000e-5(b).
208. 29 C.F.R. § 1601.28(a) (2018); *id.* § 2000e-5(f)(1).
209. 139 S. Ct. 1843, 1847 (2019).
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Davis*, 139 S. Ct. at 1847.
215. *Id*. at 1847–48.
216. *Id*. at 1848.

time.[217] The Fifth Circuit further held that the defendant forfeited a defense based on the plaintiff's failure to file a charge of religious discrimination with the EEOC due to its failure to raise it earlier in the litigation.[218]

After granting certiorari, the Supreme Court discussed the differences between jurisdictional rules and "nonjurisdictional claim-processing rules."[219] While challenges to a court's jurisdiction over the subject matter of a claim can be raised at any time, challenges based on a party's failure to comply with even mandatory claim-processing rules may be waived if the party raising the challenge waits too long.[220]

The Supreme Court unanimously held that "Title VII's charge-filing requirement is not of jurisdictional cast."[221] In so holding, Justice Ginsburg, writing for the Court, noted that the basis for federal courts' subject matter jurisdiction comes from two places: (1) general federal-question jurisdiction, and (2) from Title VII's jurisdictional provision.[222] Title VII's charge-filing requirement is contained in separate provisions which do not address the court's authority or jurisdiction, but rather address the plaintiff's procedural obligations.[223] Accordingly, the Supreme Court held that the charge-filing requirement is merely a mandatory claim-processing rule, rather than a jurisdictional rule that could be raised at any time.[224] In *Davis,* because the defendant failed to raise the plaintiff's failure to exhaust her administrative remedies earlier in the litigation, the defense was deemed waived, and the plaintiff's religious discrimination claim was allowed to proceed.[225]

Davis serves as a warning to employers defending against employment discrimination claims to raise any challenges to the plaintiff's compliance with Title VII's claim-processing rules immediately, or to risk waiving those defenses entirely.[226]

B. Supreme Court Holds that Ambiguous Arbitration Clause Is Not

217. *Id.*; *see also* Davis v. Fort Bend Cty., 893 F.3d 300, 302 (5th Cir. 2018).

218. *Davis*, 139 S. Ct. at 1848 (citing *Davis*, 893 F.3d 300, 307–08 (5th Cir. 2018)).

219. *Id.* at 1848–49.

220. *Id*. at 1849 (first quoting Gonzalez v. Thaler, 565 U.S. 134, 141 (2012); then quoting Eberhart v. United States, 546 U.S. 12, 15 (2005)).

221. *Id*. at 1850.

222. *Id*.

223. *Davis*, 139 S. Ct. at 1850–51 (first quoting EPA v. EME Homer City Generation, L.P., 572 U.S 489, 512 (2014); then quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 515 (2006)).

224. *Id.*

225. *Id*. at 1848.

226. *See id*. at 1851.

Sufficient to Demonstrate Consent to Class Arbitration

"The Federal Arbitration Act [(FAA)] requires courts to enforce covered arbitration agreements according to their terms."[227] The Supreme Court previously held that courts cannot compel class arbitration when an agreement is silent as to its availability.[228] Thus, pursuant to the FAA, a party to an arbitration agreement cannot be required to submit to class arbitration where they have not agreed to do so.[229] In *Varela,* the Supreme Court considered "whether the FAA similarly bars an order requiring class arbitration when an agreement is not silent, but rather 'ambiguous' about the availability of [class] arbitration."[230]

In *Varela*, the plaintiff's tax information had been disclosed when a hacker tricked an employee of Lamps Plus into disclosing the tax information of approximately 1,300 employees.[231] After a fraudulent federal tax return was filed in his name, the plaintiff brought suit in the Central District of California, asserting both state and federal claims on behalf of a proposed class of employees whose tax information had been disclosed.[232]

Lamps Plus moved in the District Court to compel arbitration on an individual basis.[233] The District court granted the motion to compel arbitration, but authorized arbitration on a class wide basis.[234]

On an appeal by Lamps Plus, the Ninth Circuit affirmed.[235] The Ninth Circuit held that the arbitration agreement at issue was ambiguous, with some phrases indicating "purely binary claims," and others appearing to be "capacious enough to include class arbitration."[236] Ultimately, the Ninth Circuit applied state contract law, which required that the contract be construed against Lamps Plus as the drafter, and affirmed the holding of the District Court.[237]

The Supreme Court disagreed. Although it deferred to the Ninth Circuit's interpretation and application of state law and accepted the court's finding that the agreement was ambiguous, the Supreme Court

227. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019) (citing 9 U.S.C. § 2 (2019)).
228. *Id.* (citing Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 664 (2010)).
229. *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 684).
230. *Id.*
231. *Id.*
232. *Varela*, 139 S. Ct. at 1412–13.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.* at 1413 (citing 701 Fed. Appx. 670, 672 (9th Cir. 2017)).
237. *Varela*, 139 S. Ct. at 1413.

held that the FAA "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a class wide basis."[238]

In its decision, the Supreme Court focused on the differences between ordinary arbitration and class arbitration. In class arbitration, the parties lose the advantages of speed, simplicity and inexpensiveness, and the arbitration much more closely resembles litigation. Additionally, it "raises serious due process concerns by adjudicating the rights of absent members of the plaintiff class . . . with only limited judicial review."[239]

"Because of these crucial differences between individual and class arbitration," the Supreme Court held that "like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice the principal advantage of arbitration.'"[240]

VII. LABOR RELATIONS

A. NLRB Reverses 2014 Decision, Returns to Traditional Common-Law Test for Determining Independent Contractor Status

On January 25, 2019, the National Labor Relations Board (NLRB) issued a decision in *SuperShuttle DFW, Inc.*, which reversed its 2014 decision in *FedEx Home Delivery* revising the test for determining whether workers are employees or independent contractors.[241] Prior to the *FedEx* decision, the NLRB analyzed whether common-law factors established by the Supreme Court in *NLRB v. United Insurance Company* indicated that the workers in question had significant entrepreneurial opportunity for profit or loss.[242] However, in *FedEx*, the NLRB held that entrepreneurial opportunity was part of a broader factor as to whether the worker was "rendering services as part of an independent business."[243] In addition to considering whether the worker had significant entrepreneurial opportunity, the NLRB held in *FedEx* that it would also consider whether the worker:

> (a) has a realistic ability to work for other companies; (b) has proprietary or ownership interest in her work; and (c) has control over important business decisions such as the scheduling of performance; the

238. *Id*. at 1415.

239. *Id*. at 1416.

240. *Id*. (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 347 (2011) (internal citations and quotations omitted).

241. 367 N.L.R.B. No. 75, 2019 N.L.R.B. LEXIS 15, 1, 3 (N.L.R.B. Jan. 25, 2019).

242. *Id.* at 4; 390 U.S. 254, 256–60 (1968).

243. *FedEx Home Delivery*, 361 N.L.R.B. 610, 610 (2014).

> hiring, selection and assignment of employees; the purchase and use of equipment; and the commitment of capital.[244]

The NLRB's new "independent business" test was rejected on appeal by the D.C. Circuit Court of Appeals, which applied the traditional, common-law approach.[245]

In *SuperShuttle*, the NLRB agreed with the D.C. Circuit Court of Appeals and returned to the traditional common-law approach to evaluate whether the workers in question were employees or independent contractors.[246] The factors considered were: (a) the extent of control the employer may exercise over the work; (b) whether or not the worker is engaged in a distinct occupation or business; (c) whether the kind of job is usually under the direction of an employer or by a specialist without supervision; (d) the skill required; (e) whether the instrumentalities, tools, and place of work are supplied by the employer or the worker; (f) the length of time the worker is employed; (g) whether payment is by time or by the job; (h) whether or not the work is part of the regular business of the employer; (i) whether or not the parties believe they have created an employer-employee relationship; and (j) whether the principal is or is not in business.[247]

The *SuperShuttle* workers drove passengers to and from the Dallas-Fort Worth Airport in shuttle vans pursuant to franchise agreements with SuperShuttle. SuperShuttle exercised some control over the work, the workers were not engaged in a district business, and they did not have any special training or skills.[248] They did, however, own their own vans and have nearly complete control over their work schedules.[249] They also retained all of the fares they collected, and paid a weekly franchise fee to SuperShuttle.[250] In weighing these factors, the NLRB ultimately determined that SuperShuttle's limited control over the work was outweighed by the workers' entrepreneurial opportunity for profit and loss, and that the workers were therefore independent contractors.[251]

B. NLRB Changes Position on Employers' Obligation to Allow Non-Employee Union Organizers to Solicit in Public Areas of the

244. *Id.* at 621.
245. *Id.* at 617–18, 621.
246. 2019 N.L.R.B. LEXIS 15, at *4.
247. *Id.* at *5.
248. *Id.* at *66.
249. *Id.* at *12–13.
250. *Id.* at *12.
251. 2019 N.L.R.B. LEXIS 15, at *59.

Employer's Property

In *UPMC and its Subsidiary, UPMC Presbyterian Shadyside* ("*UPMC")*, the NLRB reversed its long-standing precedent that employers were required to permit non-employee union organizers to engage in solicitation in public spaces within the employer's property, so long as they were not disruptive.[252] In its decision, the NLRB noted that its "approach ha[d] been soundly rejected by multiple circuit courts."[253]

The NLRB held that "an employer does not have a duty to allow the use of its facility by nonemployees for promotional or organizational activity."[254] The Board opined that employers are not required to allow nonemployees access to portions of the employer's private property for any purpose simply because they are generally open to the public.[255] Rather, the NLRB held that, "[a]bsent discrimination between nonemployee union representatives and other nonemployees . . . the employer may decide what types of activities, if any, it will allow by nonemployees on its property."[256]

In *UPMC*, two nonemployee representatives entered the employer's cafeteria and sat with employees during lunch and discussed matters relating to a union organizing campaign.[257] After they had been there for over an hour, a security employee approached them and asked them what their purpose for being there was.[258] When they replied that they were there to talk to employees about the union, the security employee instructed them to leave, as the cafeteria was only for use by the employees of UPMC, as well as its patients and their visitors.[259] When the union representatives refused to leave, the police were called to escort the representatives out of the cafeteria.[260]

The NLRB rejected the General Counsel's argument that the employer's activity was discriminatory because other nonemployees were allowed to use the cafeteria.[261] The employer introduced evidence showing that other nonemployees who had used the cafeteria for

252. 368 N.L.R.B. No. 2, 2019 N.L.R.B. LEXIS 346 at *32 (N.L.R.B. June 14, 2019).

253. *Id.* at *12–13 (first citing Oakwood Hosp. v. NLRB, 983 F.2d 698, 702–03 (6th Cir. 1993); then citing NLRB v. S. Md. Hosp. Ctr., 916 F.2d 932, 937 (4th Cir. 1990); and then citing Baptist Med. Sys. v. NLRB, 876 F.3d 661, 663–64 (8th Cir. 1989)).

254. *UPMC*, 2019 N.L.R.B. LEXIS 346, at *17.

255. *Id.*

256. *Id.*

257. *Id.* at *4.

258. *Id.* at *5.

259. *UPMC*, 2019 N.L.R.B. LEXIS 346, at *6–7.

260. *Id.* at *7.

261. *Id.* at *22.

solicitation or promotion were also asked to leave.[262] Accordingly, the Board held that the employer did not violate the NLRA by ejecting the nonemployee representatives from the cafeteria.[263]

C. NLRB Upholds Enforcement of Pre-Hire Arbitration Agreements

On May 22, 2019, the NLRB issued its decision in *Anheuser-Busch, LLC* finding that an employer may enforce a pre-employment arbitration agreement against a former union employee, despite never having provided the union with notice or other opportunity to bargain over the terms of that arbitration agreement.[264]

Prior to *Anheuser-Busch*, in 2018, the Supreme Court of the United States addressed the interaction between the National Labor Relations Act (NLRA) and the FAA. In *Epic Systems Corp. v. Lewis*, the Court looked at employment contracts which required employees to bring certain disputes through arbitration, and effectively waived their right to bring any collective litigation (class action) against their employer.[265] The Supreme Court held that the arbitration agreements could be enforced as written, and that neither the FAA's savings clause, nor the NLRA suggests otherwise.[266]

In *Anheuser-Busch*, the employer required all applicants for employment to agree to a Dispute Resolution Program.[267] Notably, the employer required employees, including those who would be members of a bargaining unit to agree to the same arbitration agreement, which differed from the grievance procedure set forth in the parties' collective bargaining agreement.[268] The union was never provided with an opportunity to bargain over whether the Dispute Resolution Program could apply to bargaining unit members, or any other form of notice.[269]

The case arose when an employee who was a member of the bargaining unit covered by the applicable collective bargaining agreement was terminated. Pursuant to the collective bargaining agreement, the union filed a grievance to challenge Anheuser-Busch's

262. *Id.* at *20–21.

263. *Id.* at *22.

264. *See generally* 367 N.L.R.B. No. 132, 2019 N.L.R.B. LEXIS 306 (N.L.R.B. May 22, 2019) (holding there was no violation of law where employer sought to enforce pre-employment arbitration agreement when employee's union did have the opportunity or notice to engage in negotiations over agreement terms).

265. *Epic Systems v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

266. *Id.* at 1632.

267. *Anheuser-Busch*, 2019 N.L.R.B. LEXIS 306, at *7.

268. *Id.* at *7–8.

269. *Id.* at *11.

action terminating the employee at issue.[270] The termination was upheld through the grievance process, and the union's grievance was dismissed prior to any arbitration.[271]

The employee then filed a civil action in federal district court against Anheuser-Busch on the basis of race discrimination and retaliation claims.[272] Anheuser-Busch filed a motion to compel the employee to arbitrate his dispute pursuant to the pre-employment arbitration agreement.[273] In response, the employee filed an unfair labor practice charge with the NLRB on the basis that the employer violated the NLRA when it tried to enforce the pre-employment arbitration agreement, which the employer implemented unilaterally.[274]

In response to the unfair labor practice charge, Anheuser-Busch argued that it did not violate the NLRA when it moved to compel arbitration subject to the pre-employment arbitration agreement because when the employee signed the agreement, he was not a member of the bargaining unit.[275] Therefore, the employer argued it had no obligation to negotiate the imposition of the pre-employment arbitration agreement.[276]

The Administrative Law Judge (ALJ) disagreed with the employer, holding that Anheuser-Busch violated the NLRA when it sought to compel arbitration because the pre-employment arbitration agreement was a unilateral change.[277] The NLRB overruled the ALJ's decision.[278] The NLRB held that the employer could lawfully compel arbitration pursuant to a pre-employment arbitration agreement even where the employee eventually became represented by a union.[279] The Board held that the employer, in filing the motion to compel arbitration, sought to apply a lawful provision and did not have an unlawful objective.[280] Moreover, the NLRB found that that the employer's decision to file a motion to compel arbitration was protected by the Petition Clause in the First Amendment and dismissed the charge.[281]

270. *Id.* at *8.
271. *Id.*
272. *Anheuser-Busch*, 2019 N.L.R.B. LEXIS 306, at *9.
273. *Id.* at *9–10.
274. *Id.* at *11.
275. *Id.* at *58–59.
276. *Anheuser-Busch*, 2019 N.L.R.B. LEXIS 306, at *60.
277. *Id.* at *68.
278. *Id.* at *27.
279. *Id.* at *17.
280. *Id.* at *20–21.
281. *Anheuser-Busch*, 2019 N.L.R.B. LEXIS 306, at *13.

In practice, this case supports an employer's ability to enforce pre-employment arbitration agreements that require some alternative dispute resolution. The Board did not indicate whether its decision applies to current employees as opposed to only former employees and applicants.

IV. CONCLUSION

The *Survey* year saw a multitude of changes, at both the state and federal levels, that will significantly affect employers in New York State. The changes highlighted in this *Survey* represent only a selection of important changes, and employers and their legal counsel should continue to monitor legal developments to ensure compliance with all applicable laws.