NEW YORK LABOR AND EMPLOYMENT LAW

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INTRODUCTION

This *Survey* year saw significant changes in several areas of the labor and employment law field. While it is difficult to predict which changes will have the most long-lasting or significant impact, this article is intended to review and summarize some of the most notable developments.

This *Survey* year saw several routine changes, such as increases to the minimum wage and minimum salary threshold, and changes to Paid Family Leave.[1] However, several changes were less routine. For example, in 2021, New York followed several other states in legalizing the recreational use of cannabis.[2] As several issues remain unsettled, only time will tell what impacts the legalization or recreational cannabis will have on employment relationships in New York.[3] Additionally, after last year's announcement regarding the enactment of New York's Paid Sick Leave, many New York employees are now entitled to paid sick leave.[4]

Not surprisingly, many developments also related to COVID-19, which continues to have a daily effect on New York employers and employees alike.[5] During this *Survey* year, discussion of vaccination

1. *See* Act of Apr. 30, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 58, at 518–19 (codified at N.Y. LAB. LAW § 652 (McKinney 2021)); 12 N.Y.C.R.R. § 142-2.14(4) (2021); *New York Paid Family Leave Updates for 2021*, NEW YORK STATE, https://paidfamilyleave.ny.gov/2021 (last visited Oct. 23, 2021).

2. *See* Act of Mar. 31, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 92, at § 1 (codified at N.Y. CANBS LAW (McKinney 2021)) (hereinafter the "MRTA"); NYSAC, THE MARIJUANA REGULATION AND TAXATION ACT: A SUMMARY 2 (2021), https://www.nysac.org/files/MRTA_Summary.pdf.

3. *See infra* Part II.

4. *See* Act of Apr. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 56, at 216–19 (codified at N.Y. LAB. LAW § 196-b (McKinney 2021)); *New York Paid Sick Leave*, NEW YORK STATE, https://www.ny.gov/programs/new-york-aid-sick-leave (last visited Oct. 23, 2021).

5. *See, e.g.*, N.Y. DEP'T OF HEALTH, INTERIM GUIDANCE FOR OFFICE-BASED WORK DURING THE COVID-19 PUBLIC HEALTH EMERGENCY (2021), https://www.governor.ny.gov/sites/default/files/atoms/files/offices-interim-guidance.pdf (detailing New York State social distancing, hygiene, and testing policies for office workplaces in response to the pandemic).

mandates at both the state and federal level have been an incredibly hot topic in both the private and public sectors.[6] New York's Covid-19 Sick Leave and Vaccination Leave Laws were two additional pieces of significant legislation which made their debut during this *Survey* year.[7] Last, but not least, the New York Health and Essential Rights Act, which requires the creation of a general model airborne disease exposure standard for all worksites, was also signed into law in response to COVID-19.[8]

I. NEW YORK WAGE AND HOUR DEVELOPMENTS

A. Increase to the State Minimum Wage

For the past several years, the New York minimum wage has incrementally increased on an annual basis, with the new minimum wage rate taking effect on December 31 of each year.[9] While the federal minimum wage has remained steady at $7.25 per hour since 2009,[10] New York has adopted a statewide wage increase scheme under which the state minimum wage will eventually reach $15.00 per hour in all regions of the state.[11] Under this approach, the state is divided into three regions—New York City; Long Island and Westchester (i.e. Nassau, Suffolk, and Westchester counties); and the remainder of New York State (i.e. "upstate" New York).[12] As increases to the minimum wage are made by region, the effective

6. *See, e.g.*, Nathan Layne, *U.S. Workers Face Job Losses as COVID-19 Vaccine Mandates Kick In*, REUTERS (Oct. 19, 2021, 7:33 PM), https://www.reuters.com/world/us/us-workers-face-layoffs-us-covid-19-vaccine-mandates-kick-s0sa-10-19/.

7. *See New Paid Leave for COVID-19*, NEW YORK STATE, https://paidfamilyleave.ny.gov/covid19 (last visited Oct. 24, 2021); Act of Apr. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 56, at 216–19 (codified at LAB. §§ 196-b, 196-c(1)).

8. *See* Act of May 5, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 105, at § 1 (codified at LAB. § 218-b(2)).

9. *See* LAB. § 652(1); *New York State's Minimum Wage*, NEW YORK STATE, https://www.ny.gov/new-york-states-minimum-wage/new-york-states-minimum-wage (last visited Oct. 23, 2021) [hereinafter *New York State's Minimum Wage*]; *Minimum Wage*, NEW YORK STATE, https://dol.ny.gov/minimum-wage-0 (last visited Oct. 24, 2021).

10. *See* 29 U.S.C. § 206(a)(1)(C) (2021); *Minimum Wage*, U.S. DEP'T OF LAB. https://www.dol.gov/general/topic/wages/minimumwage (last visited Oct. 24, 2021). ("Many states also have minimum wage laws. In cases where an employee is subject to both the state and federal minimum wage laws, the employee is entitled to the higher of the two minimum wages.").

11. *See* LAB. § 652(1)(a)–(c); *New York State's Minimum Wage*, *supra* note 9.

12. LAB. § 652(1)(a)–(c).

minimum wage rates differ by location.[13] It is the employee's location at the time the work is performed that determines the appliable minimum wage.[14] The minimum wage in New York City reached $15.00 per hour for employers of all sizes in 2020, and it remains steady at that rate.[15] Effective December 31, 2020, the minimum wage in Nassau, Suffolk, and Westchester counties is $14.00 per hour, and the minimum wage for the remainder of New York is $12.50 per hour.[16] Annual wage increases will be made in Long Island and Westchester, and upstate New York until the statewide minimum wage reaches $15.00 per hour regardless of location.[17] The Commissioner of Labor will make announcements regarding future annual increases on or before October 1, 2021.[18]

B. Increase in the State Salary Threshold Minimums

Effective December 31, 2020, the New York State minimum salary thresholds were also increased for employees exempt under the executive and administrative exemptions.[19] As with the State minimum wage, minimum salary threshold increases are also made on a regional basis.[20] For employers in Nassau, Suffolk, and Westchester counties, the salary threshold for executive and administrative employees is now $1,050 per week, which represents a weekly increase of $75.00.[21] In the remainder of New York State, the salary threshold for exempt employees is $937.50, which represents an increase of $52.50 per week.[22] The salary threshold for New York City employers did not increase, but remained stable at $1,125.00 per week.[23] It is important to keep in mind that the salary threshold is just one part of the analysis for determining whether an employee may be

13. *See New York State's Minimum Wage*, *supra* note 9; LAB. § 652.

14. *See New York State's Minimum Wage*, *supra* note 9; LAB. § 652(1)(a)–(c).

15. LAB. § 652(1)(a). In prior years, the applicable minimum wage differed depending on the size of the employer. That distinction has since been eliminated. *See Minimum Wage Frequently Asked Questions*, NEW YORK STATE, https://dol.ny.gov/minimum-wage-frequently-asked-questions (last visited Oct. 24, 2021).

16. LAB. § 652(1)(b), (c).

17. *See* LAB. § 652(1)(c); *New York's Minimum Wage*, *supra* note 9.

18. LAB. § 652(1)(c).

19. *See* 12 N.Y.C.R.R. § 142-2.14(c)(4)(i)–(ii) (2021).

20. *See id.*

21. *Id.* § 142-2.14(c)(4)(i)(e)(2), (ii)(d)(2).

22. *Id.* § 142-2.14(c)(4)(i)(e)(3), (ii)(d)(3).

23. *Id.* § 142-2.14(c)(4)(i)(e)(1), (ii)(d)(1).

properly considered exempt from the New York State minimum wage and overtime requirements.[24] Though beyond the scope of this article, to be properly exempt, employees must also meet the applicable duties tests.[25]

II. THE MARIHUANA REGULATION AND TAXATION ACT

A. New York's Legalization of Recreational Cannabis

On March 31, 2021, New York enacted the Marihuana Regulation and Taxation Act (the "MRTA").[26] The MRTA is expansive legislation which legalizes the licensed cultivation, distribution, and use of recreational cannabis in New York State.[27] Under the MRTA, the recreational use of marijuana is a lawful activity for individuals older than twenty-one (21) years of age.[28] Though medical use of marijuana has been legal in New York since the Compassionate Care Act was passed in 2014, the MRTA significantly expands the lawful use of marijuana in the state.[29]

24. *See* N.Y. DEP'T OF LABOR, EXECUTIVE EMPLOYEE OVERTIME EXEMPTION FREQUENTLY ASKED QUESTIONS (2021), https://www.dol.ny.gov/system/files/documents/2021/03/executive-employee-overtime-exemption-frequently-asked-questions.pdf (detailing duties test for executive employees); N.Y. DEP'T OF LABOR, PROFESSIONAL EMPLOYEE OVERTIME EXEMPTION FREQUENTLY ASKED QUESTIONS (2021), https://dol.ny.gov/system/files/documents/2021/03/professional-employee-overtime-exemption-frequently-asked-questions.pdf (detailing duties test for professional employees) [hereinafter PROFESSIONAL EMPLOYEE OVERTIME EXEMPTION].

25. *See* N.Y. DEP'T OF LABOR, EXECUTIVE EMPLOYEE OVERTIME EXEMPTION FREQUENTLY ASKED QUESTIONS, *supra* note 24; PROFESSIONAL EMPLOYEE OVERTIME EXEMPTION, *supra* note 24.

26. *See* Act of Mar. 31, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 92, at Art. 1, (codified at N.Y. CANBS. LAW (McKinney 2021)).

27. *See id.*

28. CANBS. § 3.

29. *See* Act of July 5, 2014, 2014 McKinney's Sess. Laws of N.Y., ch. 90, at 744–62 (codified at N.Y. PUB. HEALTH LAW §§ 3360–3369-e (McKinney 2014)); Liz Krueger, *Final Bill Introduced to Legalize, Tax, & Regulate Adult-Use Marijuana*, NEW YORK STATE SENATE (Mar. 27, 2021), https://www.nysenate.gov/newsroom/press-releases/liz-krueger/final-bill-introduced-legalize-tax-and-regulate-adult-use; *Legislation to Allow Adult Use, Cultivation of Recreational Marijuana Advances in Senate*, N.Y. STATE SENATE (March 30, 2021), https://www.nysenate.gov/newsroom/press-releases/legislation-allow-adult-use-cultivation-recreational-marijuana-advances.// Press Release, N.Y. State Senate, Marijuana Regulation and Taxation Act (MRTA) Ends Marijuana Prohibition, Establishes Regulated Market in New York (March 20, 2021).

In addition to creating a recreational marijuana program and establishing the cannabis control board and office of cannabis management, the MRTA amends the New York State Labor Law, in addition to making several other statutory amendments.[30] The MRTA specifically amends Labor Law Section 201-d, which protects employees' right to engage in certain recreational activities outside of work.[31]

Generally speaking, Section 201-d "prohibits employers from discriminating against, terminating, and refusing to hire, employ, or license individuals because of their legal use of consumable products or participation in legal recreational activities outside of work."[32] As amended by the MRTA, Section 201-d establishes that it is a lawful, recreational activity to use or consume marijuana for recreational purposes outside of work.[33] Outside of work means outside of an employee's work hours and off an employer's premises.[34] Under Section 201-d, "work hours" means "all time, including paid and unpaid breaks and meal periods, that the employee is suffered, permitted or expected to be engaged in work, and all time the employee is actually engaged in work."[35] Though an employee's off-duty, off-site use of recreational marijuana is now protected, an employee's use of recreational marijuana is protected only to the extent it occurs prior to the beginning, or after the completion, of an employee's work hours.[36] Stated differently, Section 201-d does not protect an employee's use of recreational marijuana during break times or rest periods, including meal periods, whether or not they are paid during that time.[37]

Most importantly for employers, the amendments to Section 201-d limit employers' freedom and ability to discipline employees for their lawful, off-duty, off-premises use of recreational marijuana.[38]

30. *See* S. 854-A, 244th Leg., Reg. Sess. (N.Y. 2021).

31. *See* Act of Mar. 31, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 92, at §§ 9-a, 9-b (codified at N.Y. LAB. LAW § 201-d (McKinney 2021)).

32. Hannah Redmond, *What the Legalization of Recreational Marijuana Means for New York Employers*, BOND SCHOENECK & KING (Apr. 1, 2021), https://www.bsk.com/news-events-videos/what-the-legalization-of-recreational-marijuana-means-for-new-york-employers. *See* LAB. § 201-d(2).

33. LAB. § 201-d(2)(c).

34. *Id.*

35. *Id.* § 201-d(1)(c).

36. *See id.*

37. *Id.*

38. *See* LAB. § 201-d(2)(b)–(c).

With respect to recreational marijuana, Labor Law 201-d now provides:

> Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of . . . an individual's legal use of consumable products, including cannabis in accordance with state law, prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property; [or] an individual's legal recreational activities, including cannabis in accordance with state law, outside work hours, off of the employer's premises and without use of the employer's equipment or other property.[39]

There are, however, important exceptions to this general prohibition against recreational marijuana related discrimination.[40] Rather, there are three situations in which employers will not violate Section Labor Law 201-d as amended, when they take action in light of an employee's use of recreational marijuana.[41]

First, Section 201-d provides that an employer will not be in violation where its "actions were required by state or federal statute, regulation, ordinance, or other state or federal governmental mandate."[42] This is an important exception and one that is particularly relevant for employers that are regulated under federal law given the fact that marijuana remains illegal at the federal level.[43] One thing to note with respect to this exception, however, is the use of the word "required."[44] Though no court has yet weighed in to interpret this language, it remains possible that the use of the word "required" will limit the scope of this exception so that only where federal law *requires* an employer to take action is it free to do so. Employers subject to the United States Department of Transportation regulations

39. *Id.*

40. *See id.* § 201-d(4-a).

41. *See id.*

42. *Id.* § 201-d(4-a)(i).

43. *See* 21 U.S.C. § 812(c)(c)(10) (under the Controlled Substances Act of 1970, marijuana continues to be an illegal controlled substance) (see Controlled Substances Act of 1970, Pub. L. No. 91-190, § 292(c)(c)(10), 84 Stat. 1249 (1970)).

44. N.Y. LAB. LAW § 201-d(4-a)(i) (McKinney 2021).

clearly fall within this exception.[45] The question is less settled, however, with respect to employers subject to the Drug Free Workplace Act because while the Drug Free Workplace Act requires testing, it does not *require* employers to impose discipline when an employee tests positive for consumption of marijuana.[46]

Second, Section 201-d provides that employers may take action where "the employee is impaired by the use of cannabis."[47] For purposes of Section 201-d "impairment" means (i) "the employee manifests *specific articulable symptoms* while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position," or (ii) "such *specific articulable symptoms* interfere with an employer's obligation to provide a safe and healthy work place, free from recognized hazards, as required by state and federal occupational safety and health law."[48] It is important to note that because marijuana can remain in a user's system for varying lengths of time, a positive drug test will not necessarily indicate present impairment, let alone the level of impairment necessary to allow an employer to take disciplinary action pursuant to this exception under Section 201-d.[49] Demonstrating impairment under this standard may prove to be challenging for employers. This is particularly true given that the statute does not define "specific articulable symptoms."[50]

45. *See* Employees Who Must Be Tested, *14 C.F.R. § 120.105 (2021); Substances for Which Testing Must Be Conducted, 14 C.F.R. § 120.107 (2021); Types of Drug Testing Required, 12 C.F.R. §120.109 (2021)*. It is important to note that not all employees of a DOT-regulated employer are DOT regulated. Therefore, a DOT-regulated employer may only refuse to hire or discipline DOT-regulated employees because of their use of recreational marijuana. For example, a trucking company may refuse to hire CDL-holding truck drivers for testing positive for recreational marijuana use, but it may not be able to do the same with respect to its clerical employees who do not fall within the purview of the DOT regulations. With respect to DOT/FAA regulated employees, *New York's recreational marijuana law does not require any change to* pre-employment or reasonable suspicion drug testing. *See* LAB. *§* 201-d(4-a)(i).

46. *See* Drug Free Workplace Act of 1988 § 5152, 41 U.S.C. § 701 (2021).

47. LAB. § 201-d(4-a)(ii).

48. *Id.* (emphasis added).

49. *See* Zawn Villines, *How Long Can You Detect Marijuana in the Body*, MEDICAL NEWS TODAY (Jan. 29, 2019), https://www.medicalnewstoday.com/articles/324315 (finding marijuana can "stay in the body for several days or even weeks").

50. LAB. § 201-d(4-a)(ii).

Though New York has not defined what constitutes "specific articulable symptoms" or rises to a level sufficient to constitute "impairment," the Illinois Cannabis Regulation and Taxation Act, which New York's law is said to be modeled after, does.[51] The Illinois Cannabis Regulation and Taxation Act defines "specific articulable symptoms" as the following: changes in the

> employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property; disruption of a production or manufacturing process; or carelessness that results in any injury to the employee or others.[52]

Finally, the third and last exception under Section 201-d allows employers to act where its "actions would require such employer to commit any act that would cause the employer to be in violation of federal law or would result in the loss of a federal contract or federal funding."[53] As with the first exception, the contours of this exception remain untested. Employers, such as higher education institutions and other entities which contract with or receive funding from the federal government, may fall within this exception where their receipt of such contracts or funding is made conditional upon compliance with federal law.

B. The MRTA's Impact on Medical Marijuana in New York

The MRTA also impacted the use of medical marijuana in New York. The Compassionate Care Act legalized the medical use of marijuana in 2014.[54] The fundamental aspects of the Compassionate Care Act fall outside the scope of this *Survey* as it became law in 2014. However, to understand how the MRTA interacts with and amends the protections provided by the Compassionate Care Act, some discussion of its basic provisions is necessary.

Under the Compassionate Care Act, certified patients suffering from specified "severe[,] debilitating, or life-threatening conditions"

51. *See* 410 ILL. COMP. STAT. 705/10-50(d) (2021).

52. *Id.*

53. N.Y. LAB. LAW § 201-d(4-a)(iii) (McKinney 2021).

54. *See* Act of July 5, 2014, 2014 McKinney's Sess. Laws of N.Y., ch. 90, at 747 (codified at N.Y. PUB. HEALTH LAW § 3362 (McKinney 2021)).

may lawfully acquire, possess, and use medical marijuana.[55] To lawfully use medical marijuana pursuant to the program created by the Compassionate Care Act, individuals must obtain a certification from a qualifying medical practitioner.[56] Upon approval of one's certification, the New York Department of Health will issue a "registry identification card," which must be carried by an individual whenever they are in possession of medical marijuana.[57]

The Compassionate Care Act also established several protections for employees who lawfully possess or use medical marijuana under its provisions.[58] Similar to the new protections of the MRTA, the Compassionate Care Act prohibits employers from taking disciplinary action against employees who lawfully use and consume medical marijuana.[59] The Compassionate Care Act also expressly provides that certified patients "shall be deemed to be having a 'disability' under article fifteen of the executive law (human rights law)."[60] As a result, employers who discipline and/or terminate employees for their lawful use of medical marijuana expose themselves to liability for disability discrimination under the New York State Human Rights Law ("NYSHRL").[61] This also means that employers must engage in the interactive process with certified patients and consider reasonable accommodations for employees use of medical marijuana as needed.[62] Even so, the Compassionate Care Act does "not bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance."[63]

At the time it was enacted in 2014, the Compassionate Care Act prohibited all smokable forms of marijuana.[64] In other words, "[a] certified medical use d[id] not include smoking."[65] Therefore, employees who were otherwise certified patients eligible to lawfully

55. PUB. HEALTH §§ 3360(7)(a).

56. *See* PUB. HEALTH §§ 3361(1), 3362(1)(c), 3363.

57. *Id.* §§ 3362(2)(b), 3363(1).

58. *See* PUB. HEALTH § 3369.

59. *See id.*

60. *Id.* § 3369(2) (citing N.Y. CIV. RIGHTS LAW § 40-c (McKinney 2021)).

61. *See* CIV. RIGHTS § 40-c.

62. *See* N.Y. EXEC. LAW APP. HUM. RIGHTS RULES § 466.11(a) (McKinney 2021); N.Y. EXEC LAW. § 262(21) (McKinney 2021); N.Y. EXEC. LAW § 296(22)(c)(3) (McKinney 2021).

63. PUB. HEALTH LAW § 3369(2).

64. PUB. HEALTH § 3362(2)(a).

65. *Id.* ("possession of medical marihuana shall not be lawful under this title if it is smoked"); *see also* PUB. HEALTH § 3360(1).

use medical marijuana were prohibited from smoking marijuana.[66] Because smoking marijuana was outside the scope of employment (and other legal) protection, employers were not precluded from imposing discipline or other corrective action upon an employee found to be smoking marijuana in the workplace.[67]

The MRTA, however, eliminated the restriction on smokable medical marijuana "and allows for a greater selection of medical cannabis products."[68] This will have an important impact on employers' ability to discipline employees caught smoking marijuana in the workplace.[69] However, the MRTA also provides that "[n]othing in this act is intended to limit the authority of . . . employers to enact and enforce policies pertaining to cannabis in the workplace, . . . [or] to allow smoking cannabis in any location where smoking tobacco is prohibited."[70] Given that the MRTA is still in its infancy, however, it is unclear how these provisions will interact and whether an employee's certification for the use of smokable medical marijuana or an employer's anti-smoking policy will be given priority. Nevertheless, it appears that employees may continue to be prohibited from smoking and/or vaping marijuana at their place of employment just as under the Compassionate Care Act.[71]

C. Employment Discrimination Against Certified Medical Marijuana

66. *See, e.g.*, *What Every Employer Needs to Know About the New Compassionate Care Act (AKA the 'Medical Marijuana Law')*, HODGSON RUSS LLP (Feb. 4, 2015), https://www.hodgsonruss.com/newsroom-publications-9507.html (advising employers that "smoking marijuana is prohibited" under Compassionate Care Act).

67. *See id.*

68. *Legislation to Allow Adult Use, Cultivation of Recreational Marijuana Advances in Senate*, *supra* note 29.

69. *See* Act of Mar. 31, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 92, at § 5-a (codified at N.Y. PUB. HEALTH LAW § 1399-q (McKinney 2021)) (rendering "[s]moking and vaping restrictions [of cannabis] inapplicable" except in settings enumerated under the statute).

70. N.Y. CANBS. LAW § 2 (McKinney 2021).

71. *See* N.Y. DEP'T OF LABOR, ADULT USE CANNABIS AND THE WORKPLACE (2021), https://dol.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf (providing that "[a]n employer is not prohibited from taking employment action against an employee if the employee is impaired by cannabis while working" and finding that impairment includes symptoms that "[d]ecrease or lessen the performance of . . . duties or tasks" or "[i]nterfere with an employer's obligation to provide a safe and healthy workplace, free from recognized hazards").

Users

In a January 2021 decision, Gordon v. Consolidated Edison, Inc., the New York State Appellate Division, First Department, declined to dismiss employment discrimination claims brought by a former employee who was terminated for using marijuana when she was not medically authorized to do so.[72] In Gordon, the plaintiff "suffered from irritable bowel disease (IBD), one of the conditions covered by the Compassionate Care Act."[73] The plaintiff contacted a physician and inquired as to whether medical marijuana could help alleviate her symptoms.[74] The plaintiff was told "that she would be a suitable medical marijuana patient" and "on December 17, 2016, [she] tried marijuana to see if it would alleviate her IBD symptoms."[75] Plaintiff claimed that the marijuana "worked 'instantaneously' to relieve her symptoms."[76] When plaintiff tried marijuana on December 17, 2016, she was not a "certified patient" as defined by the Compassionate Care Act.[77] The following day, on December 18, 2016, the plaintiff contacted a registered physician and made an appointment with the alleged intention of obtaining a patient certification and registry identification card which would authorize her use of medical marijuana.[78] The plaintiff's appointment was scheduled for December 27, 2016.[79]

In the interim, that is before plaintiff's appointment, but after she scheduled it, the plaintiff was selected for a random drug screening in accordance with her employer's pre-existing drug testing policy.[80] As she had "tried" marijuana on December 17, the plaintiff's test came

72. 190 A.D.3d 639, 640, 140 N.Y.S.3d 512, 515 (1st Dep't 2021) (first citing Jacobsen v. N.Y.C. Health & Hosps. Corp., 22 N.Y.3d 824, 834, 11 N.E.3d 159, 167, 988 N.Y.S.2d 86, 94 (2014); then citing Phillips v. City of N. Y., 66 A.D.3d 170, 176, 884 N.Y.S.2d 369, 373 (1st Dep't 2009)).

73. *Id.* at 639, 140 N.Y.S.3d at 514 (citing N.Y. PUB. HEALTH LAW §§ 3360–3369-e (McKinney 2021)).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Gordon*, 190 A.D.3d at 640, 140 N.Y.S.3d at 515; *see* PUB. HEALTH § 3360(3) (citing PUB. HEALTH § 3361) ("'Certified patient' means a patient who is a resident of New York state or receiving care and treatment in New York state as determined by the commissioner in regulation, and is certified under section thirty-three hundred sixty-one of this title.").

78. *Id.* at 639–40, 140 N.Y.S.3d at 514–15.

79. *Id.*

80. *Id.* at 640, 140 N.Y.S.3d at 515.

back positive for marijuana.[81] The plaintiff told her employer that she was a medical marijuana patient and explained that her use of marijuana had been an attempt to treat her IBD symptoms.[82] Having ascertained that when the plaintiff used marijuana she was not yet a certified patient, the plaintiff's employer concluded that her use of marijuana violated its drug use policies.[83] As a result, it determined that she was not eligible for a reasonable accommodation and her employment was terminated.[84]

After her termination, the plaintiff commenced a lawsuit against her employer, Consolidated Edison, Inc. ("Con. Ed."), alleging that she was discriminated against on the basis of her disability and that Con. Ed. failed to reasonably accommodate her disability in violation of the NYSHRL and the New York City Human Rights Law.[85]

Even though the plaintiff's use of marijuana on December 17, 2016 was not protected as she was not yet a certified patient under the Compassionate Care Act, the trial court denied Con. Ed.'s motion for summary judgment.[86] In affirming the lower court's holding with respect to plaintiff's disability discrimination claims, the First Department held that several issues of fact precluded dismissal.[87] Namely, there was a question of fact as to whether the Con. Ed. adequately engaged in the interactive process to assess whether it could reasonably accommodate the plaintiff's "status as a medical marijuana patient," particularly "in light of her contemporaneously acquired status as a medical marijuana patient."[88] The First Department also found an issue of fact as to whether Con. Ed.'s stated reason for terminating plaintiff was pretextual.[89]

81. *Id.*

82. *Gordon,* 190 A.D.3d at 640, 140 N.Y.S.2d at 515.

83. *Id.*

84. *Id.*

85. Gordon v. Consol. Edison, Inc., No. 152614/2017, 2020 N.Y. Slip Op. 30979(U), at 2 (Sup. Ct. New York Cnty. Jan. 28, 2021) (first citing PUB. HEALTH § 3369; then citing N.Y. EXEC LAW. § 292 (McKinney 2021); and then citing N.Y. CITY, N.Y., CODE § 8-502(a) (2021)).

86. *Id.* at 13.

87. *Gordon,* 190 A.D.3d at 641–42, 140 N.Y.S.2d at 516 (first citing Uwoghiren v. City of N.Y., 148 A.D.3d 457, 457–58, 49 N.Y.S.3d 117, 118 (1st Dep't 2017); then citing Bennett v. Health Mgt. Sys., Inc., 92 A.D.3d 29, 36, 936 N.Y.S.2d 112, 117 (1st Dep't 2011)).

88. *Gordon,* 190 A.D.3d at 640–41, 140 N.Y.S.2d at 515 (citing McInery v. Landi, 84 N.Y.2d 554, 560, 644 N.E.2d 1019,1023, 620 N.Y.S.2d 328, 331 (1994)).

89. *Id.* at 641–42, 140 N.Y.S.3d at 516 (first citing *Uwoghiren,*148 A.D.3d at 457–58, 49 N.Y.S.3d at 118; then citing *Bennett,* 92 A.D.3d at 36, 936 N.Y.S.2d at 117).

Gordon has potentially significant consequences for New York State employers as it suggests employers may have a legal obligation to engage in the interactive process with an employee despite the employee's failure to abide by the precise certification requirements of the Compassionate Care Act.

III. CHANGES TO AND IMPLEMENTATION OF PAID LEAVE LAWS IN NEW YORK

A. New York Paid Family Leave[90]

Under New York's Paid Family Leave ("PFL") law, eligible employees are eligible for "job protected, paid time off to bond with a new child, care for a family member with a serious health condition, or to assist loved ones when a family member is deployed abroad on active military service."[91]

In 2021, PFL saw several changes—including in the amount of leave available to eligible employees, and in the amount of the wage replacement benefit available.[92] Under the amended PFL law, eligible employees may take up to twelve weeks of paid, job-protected leave for a qualifying reason.[93] Employees may take this time in a single continuous period, or they may take it in full-day increments.[94] In 2020, employees were entitled to 10 weeks of PFL.[95]

The PFL wage replacement benefit also increased in 2021. "In 2021, employees taking Paid Family Leave will receive 67% of their average weekly wage, up to a cap of 67% of the current Statewide Average Weekly Wage of $1,450.17."[96] Thus, the "maximum weekly [PFL] benefit for 2021 is $971.61."[97] This represents a significant increase as compared to the weekly PFL benefit in 2020, which was

90. As with other topics addressed in this *Survey*, a comprehensive discussion of PFL is beyond the scope of this article.

91. *New York Paid Family Leave Updates for 2021*, NEW YORK STATE, https://paidfamilyleave.ny.gov/2021 (last visited Aug. 16, 2021).

92. *See id*; Act of Apr. 30, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 58, at 518–19 (codified at N.Y. LAB. LAW § 652 (McKinney 2021))

93. *New York Paid Family Leave Updates for 2021*, *supra* note 91; 12 N.Y.C.R.R. §§ 380-2.1–2.3 (2021).

94. *New York Paid Family Leave Updates for 2021*, *supra* note 91.

95. *Id.*

96. *Id.*

97. *Id.*

60% of the lesser of an employee's average weekly wage or the 2020 Statewide Average Weekly Wage, which was $1,401.17.[98]

B. New York Paid Sick Leave

Effective September 30, 2020, all private-sector employers in New York State are now required to provide their employees with a certain amount of sick leave per year, and the amount of leave and whether it is required to be paid or not is based upon the size of the employer.[99] For "employers with four or fewer employees in any calendar year," and where the net income of the employer was one million dollars or *less* in the previous tax year, "each employee shall be provided with up to forty hours of *unpaid* sick leave" per calendar year (emphasis added).[100] For "employers with four or fewer employees in any calendar year," and where the net income of the employer was one million dollars or *more* in the previous tax year, each employee must be provided with "up to forty hours of *paid* sick leave" per calendar year (emphasis added).[101] "For employers with between five and ninety-nine employees in any calendar year, each employee shall be provided with up to forty hours of *paid* sick leave in each calendar year" (emphasis added).[102] "For employers with one hundred or more employees in any calendar year, each employee shall be provided with up to fifty-six hours of paid sick leave each calendar year."[103] Employees receiving paid sick leave must be paid at their regular rate of pay they would normally receive if actually working.[104]

"For the purposes of determining the number of employees" an employer has, a "calendar year" is defined to mean "the twelve-month period from January first through December thirty-first."[105] All

98. *Id.*; *Paid Family Leave 2020 Wage Benefit Calculator*, NEW YORK STATE, https://paidfamilyleave.ny.gov/PFLbenefitscalculator2020 (last visited Oct. 24, 2021).

99. *See* Act of Apr. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 56, at 216–20 (codified at N.Y. LAB. LAW § 196-b (McKinney 2021); *New York Paid Sick Leave: Amount of Leave*, NEW YORK STATE, https://www.ny.gov/new-york-paid-sick-leave/new-york-paid-sick-leave#top (last visited Oct. 24, 2021).

100. LAB. § 196-b(1)(a).

101. *Id.*

102. *Id.* § 196-b(1)(b).

103. *Id.* § 196-b(1)(c).

104. *Id.* § 196-b(5)(a), (b).

105. LAB. § 196-b(1)(c).

employers are still entitled provide their employees with a more generous sick leave policy than what is specified in Section 196-b.[106]

Employees accrue one hour of leave sick leave for every thirty hours worked.[107] Alternatively, an employer may elect to provide its employees with their required amount of sick time at the beginning of each calendar year; however, an employer may not "reduce or revoke" the amount of sick leave provided based upon "the number of hours actually worked" by the employee.[108]

Employees are entitled to use their accrued sick leave for "a mental or physical illness, injury, or health condition" of the employee or a family member of the employee, as well as "the diagnosis, care, or treatment of a mental or physical illness" of the employee or a family member of the employee.[109]

Employees are also entitled to use their accrued sick leave when the employee or the employee's family member has been the victim of domestic violence, a family offense, a sexual offense, stalking, or human trafficking in order "to obtain services from a domestic violence shelter, rape crisis center, or other services program," to take "actions to increase the safety of the employee or employee's family members," "to meet with an attorney or other social services provider" and prepare for a legal proceeding, to file a complaint or domestic incident report with law enforcement, "to meet with a district attorney's office," "to enroll children in a new school," or "to take any other actions necessary to ensure the health or safety of the employee or employee's family member or to protect those who associate or work with the employee."[110]

"Family member" is defined to mean the "employee's child, spouse, domestic partner, parent, sibling, grandchild or grandparent; and the child or parent of an employee's spouse or domestic partner."[111] "Parent" is defined as "a biological, foster, step- or adoptive parent, or a legal guardian of an employee, or a person who stood in loco parentis when the employee was a minor child."[112]

106. *Id.* § 196-b(2).
107. *Id.* § 196-b(3).
108. *Id.* § 196-b(2).
109. *Id.* § 196-b(4)(a)(i)–(ii).
110. LAB. § 196-b(4)(a)(iii)(a)–(g).
111. *Id.* § 196-b(4)(b).
112. *Id.*

"Child" is defined as "a biological, adopted or foster child, a legal ward, or a child of an employee standing in loco parentis."[113]

An employer is entitled to set a minimum increment for the usage of sick leave, which is not to exceed four hours.[114] Employees are entitled to roll over their unused sick leave to the following calendar year, however, employers with less than one hundred employees may limit the use of sick leave to forty hours per calendar year, and employers with one hundred employees or more may limit the use of sick leave to fifty-six hours per calendar year.[115] If an employer does implement any limitations related to employees' usage of sick leave, it must inform its employees in writing or by posting a notice in the workplace.[116] Employers are not required to pay an employee for unused sick leave upon termination, resignation, retirement, or other separation from employment.[117]

Employers are not allowed to retaliate or discriminate against their employees for use of their accrued sick leave, and employees must be returned to their same position of employment held prior to use of the leave upon their return to work at the same rate of pay and other terms of conditions of employment.[118]

New York City's Paid Sick Leave Law is essentially identical to New York's Paid Sick Leave Law, other than a requirement that New York City employers with one hundred or more employees and employers of domestic workers are required to provide employees with a Notice of Employee Rights under its Sick Leave Law.[119]

C. COVID-19 Paid Sick Leave

On March 18, 2020, Governor Cuomo signed into law a statewide COVID-19 response bill (the Bill) that immediately provided

113. *Id.*

114. *Id.* § 196-b(5)(b).

115. LAB. § 196-b(6).

116. *Permitted Uses*, NEW YORK PAID SICK LEAVE (Oct. 22, 2021, 2:55 PM), https://www.ny.gov/new-york-paid-sick-leave/new-york-paid-sick-leave.

117. LAB. § 196-b(6).

118. *Id.* § 196-b(7), (10).

119. *See* N.Y. CITY, N.Y., CODE §§ 20-913–20-914, 20-919(a)(1) (2021); Paula Day, *New York State and New York City Safe and Sick Leave Requirements Beginning Jan. 1, 2021*, LOCKTON (Oct. 22, 2021,3:09 PM), https://www.lockton.com/insights/post/new-york-state-and-new-york-city-safe-and-sick-leave-requirements-beginning; for a copy of a sample notice form, see CONSUMER AND WORKER PROTECTION, NOTICE OF EMPLOYEE RIGHTS: SAFE AND SICK LEAVE (2020), https://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSafeSickLeave-MandatoryNotice-English.pdf.

employees with sick leave and job protection in the event that they needed to stay home due to a quarantine order.[120]

Private employers with ten or fewer employees and who reported less than one million dollars in net income in the previous tax year must provide unpaid, job-protected sick leave to any employee who is subject to a mandatory or precautionary quarantine order issued by the State through the termination date of the order.[121] Private employers with ten or fewer employees and who reported more than one million dollars in net income in the previous tax year, as well as employers with eleven to ninety-nine employees must provide at least five days of job-protected paid sick leave, followed by unpaid leave until the termination of the quarantine order.[122] Employees encompassed by either of these categories are also eligible for New York Paid Family Leave benefits and New York statutory disability benefits during the quarantine period.[123] These employees may be eligible to collect up to $840.70 per week in paid family leave and up to $2,043.92 per week in disability benefits.[124] If an employee collects both paid family leave benefits and disability benefits, the paid family leave benefits will potentially offset in the amount of disability payments the employee is eligible for, capping the total amount of weekly benefits at the disability threshold of $2,043.92.[125]

Employers with one hundred or more employees, as well as most public employers, are required to provide at least fourteen days of job-protected paid sick leave throughout the duration of the quarantine order.[126]

Leave provided for any of the categories of employees described above shall be provided without loss of any of the employee's previously accrued sick leave.[127] The Bill also includes an anti-retaliation or discrimination provisions for taking leave provided under the Bill, and also requires that an employer restores the employee to the same position, rate of pay, and other terms of

120. Act of Mar. 18, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 25, at 43.

121. *Id.* at § 1.1.(a); *Employee's Own Quarantine/Isolation*, COVID 19 PAID LEAVE: GUIDANCE FOR EMPLOYERS (Nov. 7, 2021, 11:20 AM), https://paidfamilyleave.ny.gov/covid-19-paid-leave-guidance-employers at 43–44.

122. Act of Mar. 18, 2020 § 1.1.(a)–(b).

123. *Id.*

124. *Id.* § 9.

125. *Id.* § 10.

126. *Id*. § 1.1.(c).

127. Act of Mar. 18, 2020 § 1.1(e).

employment that the employee had prior to taking leave.[128] It should also be noted that employees who are asymptomatic or not diagnosed with any medical condition while in quarantine and are physically able to work through remote access or other similar means are not eligible for the leave provided under this Bill.[129]

The New York State Department of Labor issued additional guidance to supplement COVID-19 Sick Leave on January 20, 2021, providing four main points of clarification.[130] First, an employee who returns to work following a period of mandatory quarantine or isolation does not need to be tested before returning to work, other than nursing home staff.[131] However, if an employee subsequently receives a positive diagnostic test result for COVID-19, they must not report to work, and shall be deemed subject to a mandatory of isolation from the Department of Health, and again entitled to leave under the COVID-19 Sick Leave Law.[132] If an employee does test positive after a mandatory quarantine, they are required to submit documentation of the positive test from a licensed medical provider or testing facility in order to be eligible for the second leave.[133]

Second, the guidance recommends that it is not recommended that an employee be tested to discontinue isolation or quarantine.[134]

Third, "[i]f an employer mandates that an employee who is not otherwise subject to a mandatory or precautionary order of quarantine or isolation to remain out of work due to exposure or potential exposure to COVID-19 . . . the employer shall continue to pay the employee at [their] regular rate of pay" until they are allowed to return to work, or become "subject to a mandatory or precautionary order of quarantine" from the Department of Health, where the COVID-19 Sick Leave provisions would then apply.[135]

Fourth, and finally, the guidance states that in no event shall an employee be eligible to qualify for COVID-19 Sick Leave for more than three orders of quarantine or isolation.[136]

128. *Id.* §§ 2, 3.

129. *Id.* § 13.

130. *See* N.Y STATE DEP'T OF LAB., GUIDANCE ON USE OF COVID-19 SICK LEAVE (2020), https://dol.ny.gov/system/files/documents/2021/01/covid-19-sick-leave-guidance_1.pdf [hereinafter GUIDANCE ON USE OF COVID-19 SICK LEAVE].

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. GUIDANCE ON USE OF COVID-19 SICK LEAVE, *supra* note 130.

136. *Id.*

D. COVID-19 Vaccine Leave

On March 12, 2021, Governor Cuomo signed into law two new provisions which grant paid sick leave for private and public employees to receive both doses of the COVID-19 vaccine.[137] Both provisions essentially mirror each other, and state that both private and public employees are entitled to up to four hours of paid leave per vaccine injection (unless additional leave is authorized by the employer or collective bargaining agreement), that the leave provided shall be "paid at the employee's regular rate of pay and shall not be charged against any other leave such employee is otherwise entitled to," and shall not interfere with the provisions of previously existing collective bargaining agreements.[138]

The only main difference between the two statutes is that in Section 196-c, it is explicitly stated that the provisions of that Section may be waived by a collective bargaining agreement, and in order to be valid, it must explicitly reference Section 196-c.[139] There is not such an explicitly stated waiver provision in Section 159-c.[140] Both statutes are presently set to expire and to be deemed repealed on December 31, 2022.[141]

On May 27, 2021, the Department of Labor released additional guidance which provides that employees are also allowed to use their leave accrued pursuant to New York State Paid Sick Leave (Section 196-b) to take time off for vaccine-related symptoms/sickness.[142]

IV. NEW YORK'S PASSAGE OF THE HEALTH AND ESSENTIAL RIGHTS ACT (NY HERO ACT)

Signed into law on May 5, 2021, and effective June 4, 2021, the HERO Act required the Department of Labor, in consultation with the Department of Health, to create and publish, in English and in Spanish,

137. *See* Act of Mar. 12, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 77, at §§ 1–2 (codified at N.Y. LAB. LAW § 196-c (McKinney 2021); N.Y. CIV. SERV. LAW § 159-c (McKinney 2021)).

138. *See* LAB. § 196-c; CIV. SERV. § 159-c.

139. LAB. § 196-c(3).

140. *See* CIV. SERV. § 159-c.

141. *See* LAB. § 196-c; CIV. SERV. § 159-c.

142. N.Y. DEP'T OF LAB., GUIDANCE ON USE OF PAID SICK LEAVE FOR COVID-19 VACCINE RECOVERY TIME (2021), https://dol.ny.gov/system/files/documents/2021/09/psl-and-vaccine-recovery-guidance-9-22-21.pdf (citing LAB. § 196-c).

a general model airborne disease exposure standard for all worksites, and where appropriate, differentiated by industry.[143]

The standard developed by the Department of Labor was required to establish requirements on procedures and methods for "[e]mployee health screenings," "face coverings," "required personal protective equipment," "accessible workplace hand hygiene stations," "[r]egular cleaning and disinfecting of shared equipment and frequently touched surfaces," "social distancing policies for employees and . . . customers," "compliance with mandatory or precautionary orders of isolation or quarantine . . . issued to employees," "compliance with applicable engineering controls such as proper air flow or exhaust ventilation," "[d]esignation of one or more supervisory employees to enforce compliance with the airborne infectious disease exposure prevention plan," "[c]ompliance with any applicable laws, . . . regulations, or guidance on notification to employees and relevant . . . agencies of exposure to airborne infections disease at the work site," and for "[v]erbal review of the infections disease standard, employer policies and employee rights" under the model standard.[144]

The model standard also was required to include anti-retaliation provisions for employees who report employers who do not comply with the model standard.[145] Within thirty days after the publication of the model standard and industry-specific standards (designated to be August 5, 2021), all employers are required to establish an airborne infectious disease prevention plan by either adopting the model standard relevant to their industry or by establishing an alternative plan that equals or exceeds the minimum standards provided by the model standard.[146] Within thirty days after the adoption of its airborne disease exposure prevention plan, employers are required to provide a copy of the plan to its employees in the primary language of each employee, and to newly-hired employees upon hire, and employers

143. *See* Act of May 5, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 105, at § 1 (codified at N.Y. LAB. LAW § 218-b(2) (McKinney 2021)); for sample model plans *see Model Airborne Infectious Disease Exposure Prevention Plan*, N.Y. DEP'T OF LAB. (Sept. 2021), https://dol.ny.gov/system/files/documents/2021/09/p765-ny-hero-act-model-airborne-infectious-disease-exposure-prevention-plan-09-21_0.pdf; for sample standard plans *see also The Airborne Infectious Disease Exposure Prevention Standard*, N.Y. DEP'T OF LAB. (Aug. 2021), https://dol.ny.gov/system/files/documents/2021/08/p764.pdf.

144. LAB. § 218-b(2)(a)–(k).

145. *Id*. § 218-b(3).

146. *Id.* § 218-b(4)(a).

also are required to post a copy of their plan in a visible and prominent location within each of their worksites.[147]

Failure to adopt an airborne infectious disease exposure prevention plan may result in a fine of at least fifty dollars per day, and failure to abide by and adopted airborne infections disease exposure prevention plan may result in a fine of at least one thousand dollars per day.[148] The HERO Act also creates a civil right of action for injunctive relief for any employee who alleges that their employer has violated the airborne infectious disease exposure prevention plan.[149]

In relation to Section 218-b, New York Labor Law Section 27-d creates the right for employees to establish and administer joint-labor-management safety committees that may review workplace policies related to occupational safety and health.[150] Employers must allow committee members to "attend trainings of no longer than four hours, without suffering a loss of pay, on the function of worker safety committees," employee rights, and "an introduction to occupational safety and health."[151] Similar to Section 218-b, Section 27-d also includes an anti-retaliation provision for employees who participate in workplace safety committees.[152]

On September 6, 2021, Governor Hochul announced the designation of Covid-19 as an airborne infectious disease under the HERO Act, which now requires all employers to activate and implement workplace safety plans related to Covid-19.[153]

V. NEW YORK'S AMENDMENT TO THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION (WARN) ACT

At the end of 2020, Governor Cuomo signed an amendment to the New York State Worker Adjustment and Retraining Notification Act ("NY WARN Act") to expand the notice requirements under the

147. *Id.* § 218-b(5), (6).

148. *Id.* § 218-b(10)(a).

149. LAB. § 218-b(10)(b).

150. N.Y. LAB. LAW § 27-d(2), (4) (McKinney 2021).

151. *Id.* § 27-d(5).

152. *Id.* § 27-d(6).

153. *Governor Kathy Hochul Announces Designation of COVID-19 as an Airborne Infectious Disease Under New York State's HERO Act*, NEW YORK STATE (Sept. 6, 2021), https://www.governor.ny.gov/news/governor-kathy-hochul-announces-designation-covid-19-airborne-infectious-disease-under-new; *Health & Safety Precautions for Worksites*, DEP'T OF LABOR, https://dol.ny.gov/ny-hero-act (last visited Feb. 19, 2022).

law.[154] As way of background, there is both the Federal WARN Act[155] as well as the NY WARN Act.[156] Generally, the NY WARN Act contains some requirements that are different than its Federal counterpart, and also applies to smaller employers.[157] The NY WARN Act requires private-industry employers with fifty or more employees to provide at least 90 days' notice to their employees and to certain government entities if the employer intends to carry out mass layoffs, a site closure, or before carrying out large reductions in employee hours or relocations.[158] Before the Amendment, employers experiencing a WARN-triggering event would have to provide notice to 1) the affected employees and/or their representatives; 2) the New York Department of Labor; and 3) the relevant local Workforce Investment Board.[159]

Now, under the Amendment, employers will have to provide advanced written notice to the three groups listed above, as well as 1) the chief elected official of the unit, or units, of local government in which the WARN event will occur; 2) the chief elected official of the school districts in which the WARN triggering event will occur; and 3) each locality which provides police, firefighting, emergency medical or ambulance services or other emergency services to the site of employment subject to WARN event.[160]

In a Memorandum in Support of Legislation, the New York State Assembly pointed to the closing of the Doral Arrowwood Resort in the Village of Rye Brook (the "Resort") as an example to justify these

154. *See* Act of Nov. 11, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 86, at § 1 (codified at LAB. § 860-b); Act of Nov. 11, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 265, at § 1 (codified at LAB. § 860-b).

155. Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. §§ 2101–2109.

156. LAB. §§ 860–860-I.

157. *See* 13A SHARON P. STILLER, NEW YORK PRACTICE, EMPLOYMENT LAW IN NEW YORK § 7:385 (2d ed. 2021); *compare* LAB. § 860-a(3), *with* 29 U.S.C. § 2101(a)(1)(A)–(B) (New York's WARN Act applies to employers of fifty or more whereas Federal WARN Act applies to employers of one hundred or more); LAB. § 860-b, *with* 29 U.S.C. § 2102(a) (New York requires employers to give ninety days' notice of mass layoffs, whereas the federal government only requires sixty days' notice).

158. LAB. § 860-b(1).

159. *Id.* § 860-b(1)(a)–(c) (McKinney 2009).

160. Act of Nov. 11, 2020, 2021 McKinney's Sess. Laws of N.Y., ch. 86, at § 1 (codified at LAB. § 860-b(1)(a)–(d)).

NY WARN amendments.[161] On December 23, 2018, the Resort notified the Department of Labor and the Village of Rye Brook that it would be shutting down only 20 days later, on January 12, 2020.[162] The next day, on Christmas Eve, the Resort notified around 275 employees that it would be closing.[163] Although the Resort made the notices due to its federal WARN Act requirements, the New York Assembly noted that many officials from other communities deeply affected by the closure did not find out about the closing until the media reported it.[164] Of note, the surrounding communities and the local school district relied on nearly $2,000,000 in tax revenue from the Resort, and the Resort provided other services to the surrounding area.[165]

Based on this event, the legislature decided to change the NY WARN Act to require notice to affected communities due to the far-reaching effects of these situations on local communities.[166] Specifically, the legislature noted that the lack of notice caused health and safety dangers with respect to large, abandoned property as well as loss of revenue causing immediate budgetary concerns.[167] With this change, the legislature notes that:

> [r]eceiving notice of these situations at the same time as other WARN Act notice recipients will enable these communities to react sooner and more effectively to manage situations such as the closing of the Doral Arrowwood that have a significant impact on the well-being of their residents, essential service obligations, and revenue.[168]

The amendments to the NY WARN act serve as a reminder to businesses that there are certain obligations that must be fulfilled when considering mass layoffs, closings, or other large employment shifts.

VI. SECOND CIRCUIT DECIDES CASE OF FIRST IMPRESSION CONCERNING THE FAIR LABOR STANDARDS ACT (FLSA) STATUTE OF

161. Legislative Memorandum of Assemb. Otis, *reprinted in* 2020 McKinney's Sess. Laws of N.Y., LM 265, at 1705 [hereinafter Memo].

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Memo, *supra* note 161, at 1706.

167. *Id.* at 1705–06.

168. *Id.* at 1706.

LIMITATIONS

In *Whiteside v. Hover-Davis, Inc.*, the plaintiff brought suit against the defendants alleging that they violated the Fair Labor Standards Act ("FLSA") by failing to pay him overtime wages from January 2012 through January 26, 2016.[169] Importantly, he furthered alleged that the defendants willfully violated the FLSA, meaning that the defendants had knowledge that, or a reckless disregard as to whether, the FLSA prohibited their conduct.[170]

Generally, claims for unpaid overtime compensation under the FLSA are subject to a two-year statute of limitations.[171] However, claims for unpaid overtime compensation arising out of an employer's willful violation of the FLSA are subject to a three-year statute of limitations.[172] The district court dismissed the plaintiff's FLSA claim as barred by the two-year statute of limitation period because he failed to allege plausibly that defendants willfully violated the FLSA.[173] As an issue of first impression, the Second Circuit had to decide whether a plaintiff at the pleadings stage must allege facts that give rise to a plausible inference of willfulness for the three-year exception to the FLSA's usual two-year statute of limitations to apply.[174]

The plaintiff argued that the Second Circuit should follow the Tenth's Circuit lead and rule that a plaintiff merely needs to plead willfulness generally, and not plead it plausibly per *Iqbal*, because the statute of limitations is an affirmative defense that a plaintiff need not anticipate.[175] However, on the other hand, the defendants argued that the court should follow the lead of the Sixth Circuit, which found that a plaintiff "must do more than make a conclusory assertion that a

169. Whiteside v. Hover-Davis, Inc., 995 F.3d 315, 318 (2d Cir. 2021) (citing Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended in scattered sections of 29 U.S.C.)).

170. *Whiteside*, 995 F.3d at 318 (citing 29 U.S.C. § 255(a)).

171. *Id.* (citing 29 U.S.C. § 255(a)).

172. *Id.* (citing 29 U.S.C. § 255(a)).

173. *Id.* (citing 29 U.S.C. § 255(a)).

174. *Id.* (citing 29 U.S.C. § 255(a)).

175. *Whiteside*, 995 F.3d at 320. (first citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); then citing Ashcroft v. Iqbal, 556 U.S. 662 (2009); and then citing 29 U.S.C. § 255(a); and then citing Fernandez v. Clean House, LLC, 883 F.3d 1296,1298–99 (10th Cir. 2018)).

defendant acted willfully to invoke a three year statute of limitation."[176]

The Second Circuit disagreed with the Tenth Circuit and held that FLSA plaintiffs must plausibly allege willfulness to secure the benefit of a three-year statute exception at the pleading stage.[177] Following the *Iqbal* and *Twombly* frameworks, a court does not need to accept as true a plaintiff's conclusory allegation that a defendant willfully violated the FLSA.[178] The Court noted that the "willful" standard is precisely the sort of legal conclusion that the Iqbal-Twombly standard requires to be supported by factual allegations at the pleading stage.[179] Based on the legislative history of the FLSA, the Court determined that extending the statute of limitations for a willful violation served as a "punitive measure" for employers, which requires FLSA plaintiffs to plausibly plead willfulness, even though generally, plaintiffs are not required to plead facts to avoid a defendant's affirmative defense.[180]

VII. COVID-19 VACCINATION MANDATES[181]

A. EEOC COVID-19 Guidance

On December 16, 2020 the Equal Employment Opportunity Commission ("EEOC") released its first guidance for employers regarding COVID-19 vaccinations.[182] This guidance concentrated on

176. *Id.* (first quoting Crugher v. Prelesnik, 761 F.3d 610, 617 (6th Cir. 2014); then quoting Katoula v. Detroit Ent., LLC, 557 F. App'x 496, 498 (6th Cir. 2014)) (citing Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2021)).

177. *Id.* (citing 29 U.S.C.1060 § 255(a)).

178. *Whiteside*, 995 F.3d at 321 (quoting *Iqbal*, 556 U.S. at 678–79) (first citing *Iqbal*, 556 U.S. at 678–80, 686–87; then citing *Twombly*, 550 U.S. at 555; and then citing Hayden v. Paterson, 594 F.3d 150, 161 (2d Cir. 2010); and then citing Biro v. Conde Nast, 807 F.3d 541, 544–45 (2d Cir. 2015)).

179. *Id.* (first citing *Iqbal*, 556 U.S. 662; then citing *Twombly*, 550 U.S. at 544).

180. *Id.* (first quoting McLaughlin v. Richland Shoe Co., 486 U.S. 128, 132–33 (1988); then quoting Reich v. S. New Eng. Telecomm. Corp., 121 F.3d 58, 70–71 (2d Cir. 1997); and then quoting Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 907 (3d Cir. 1991); and then quoting Brock v. Richland Shoe Co., 799 F.2d 80, 84 (3d Cir. 1986), *aff'd*, *McLaughlin*, 486 U.S. 128 (1988)) (first citing *McLaughlin*, 486 U.S. at 131–33; then citing 29 U.S.C. § 255(a); and then citing Portal to Portal Act of 1947 § 11, 29 U.S.C. § 260 (2021)).

181. The vaccination landscape is a rapidly developing area of the law. This section is based off of the law at the time of writing.

182. *See* Michelle S. Strowhiro, *The EEOC Releases First Guidance on Covid-19 Vaccination for Employees*, MCDERMOTT WILL & EMERY (Dec. 16, 2020), https://www.mwe.com/insights/the-eeoc-releases-first-guidance-on-covid-19-

the implications of a vaccination mandate on federal equal employment opportunity ("EEO") laws, including the Americans with Disabilities Act (ADA), the Rehabilitation Act, and Title VII of the Civil Rights Act.[183] The guidance stated that if an employer did choose to mandate the COVID-19 vaccination, it should advise its employees to notify them if they are unable to obtain a vaccination for disability or religious reasons.[184]

Thereafter, in order to protect all employees, employers must engage in an individualized risk assessment to determine if the employee who could not be vaccinated for disability or religious reasons would constitute a "direct threat."[185] A "direct threat" means that the lack of a vaccination would constitute a "significant risk of substantial harm to the health or safety of the [employee] or others."[186] The factors that employers must consider in evaluating whether an unvaccinated employee poses a direct threat are: "(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the

vaccination-for-employers/; U.S. EQUAL EMP. OPPORTUNITY COMM'N, WHAT YOU SHOULD KNOW ABOUT COVID-19 AND THE ADA, THE REHABILITATION ACT, AND OTHER EEO LAWS (October 13, 2021) https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (last updated October 13, 2021).

183. *See* Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213; Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.); Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716,78 Stat. 241, 253 (codified as amended in scattered sections of 42 U.S.C.); U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 182, at ¶ K. The EEOC in the guidance stated that:

> [t]he availability of COVID-19 vaccinations raises questions under the federal equal employment opportunity (EEO) laws, including the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act, as amended, inter alia, by the Pregnancy Discrimination Act (Title VII). . . . The EEOC has received many inquiries from employers and employees about the type of authorization granted by the U.S. Department of Health and Human Services (HHS) Food and Drug Administration (FDA) for the administration of three COVID-19 vaccines.

184. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 182, at ¶ K.7.

S.

185. *Id*.

186. Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, 29 C.F.R. § 1630.2(r) (2021)); U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 182, at ¶ G.4.

likelihood that the potential harm will occur; and (4) the imminence of the potential harm."[187]

If the employer determines that the employees pose a direct threat, the next step is for the employer to determine if they can provide a reasonable accommodation that would eliminate or reduce the risk identified in the assessment.[188] Such accommodations, including allowing the employee to work remotely, must be provided unless it would cause the employer an undue hardship.[189] Similarly, if the employee could not obtain the vaccination due to sincerely held religious beliefs, a reasonable accommodation must be given unless it causes the employer an undue hardship, like if the inability to be vaccinated was due to a disability.[190] However, the threshold for what is an undue hardship with respect to religious accommodation is significantly lower than establishing an undue hardship with respect to a disability accommodation.[191]

On May 28, 2021, the EEOC issued revised guidance regarding COVID-19.[192] Of significant importance, the new EEOC guidance explicitly stated that, "[t]he federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated against COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations"; principles that apply if an employee gets the vaccine in the community or from the employer.[193]

This was the first clear statement by the EEOC giving employers the go-ahead to mandate vaccinations in the workplace. Further, as expected, the EEOC reiterated that the mandatory vaccination policies could have a disparate impact on certain demographic groups that may face greater barriers receiving a COVID-19 vaccination, and that it would be unlawful to apply a vaccination requirement in such a way

187. 29 C.F.R. § 1630.2(r)(1)–(4). *See also* Nicholas P. Jacobson & Nolan T. Kokkoris, *EEOC Issues COVID-19 Vaccination Guidance* (Dec. 18, 2020), https://www.bsk.com/news-events-videos/eeoc-issues-covid-19-vaccination-guidance.

188. *See* 29 C.F.R. § 1630.2(r); U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 182, at ¶ G.4.

189. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 182, at ¶ G.4.

190. *Id.* at ¶ K.1.

191. *Id.* at ¶ K.12.

192. *Id.* at ¶ K.2.

193. *Id.* at ¶ K.1. (first citing Civil Rights Act of 1964 §§ 701–716; then citing Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213).

that it treats employees differently on the basis of race, sex, religion, or any other protected category under federal law.[194]

B. DOJ COVID-19 Vaccine Mandate Guidance

Since the EEOC answered one important question about vaccine mandates, specifically that such authorizations do not violate Federal EEO laws as long as reasonable accommodations are given, the next inquiry is what, if any, effect the three COVID-19 vaccines only having FDA Emergency Use Authorization ("EUA") has on employer's ability to mandate the vaccine.[195] On July 6, 2021 the Department of Justice ("DOJ") issued an opinion letter concerning mandatory vaccinations.[196] This opinion letter, although not binding, offered insight into the DOJ's understanding of the history of EUAs and the legality of mandatory vaccinations.[197]

1. EUA Background

Specifically, the DOJ first discussed the background of EUAs.[198] The Emergency Use Authorization process is statutorily governed.[199] As way of background, in 2003 Congress and President George W. Bush realized that there may be a problem where

> the American people may be placed at risk of exposure to biological, chemical, radiological, or nuclear agents, and the diseases caused by such agents," but where, "[u]nfortunately, there may not be approved or available countermeasures to treat diseases or conditions caused by such agents," even

194. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 182, at ¶ K.1.

195. *See id.* at ¶ K.; Aaron Siri, *Federal Law Prohibits Employers and Others from Requiring Vaccination with a Covid-19 Vaccine Distributed Under an EUA*, STAT (Feb. 23, 2021), https://www.statnews.com/2021/02/23/federal-law-prohibits-employers-and-others-from-requiring-vaccination-with-a-covid-19-vaccine-distributed-under-an-eua/(At the time of writing, the three COVID-19 vaccines manufactured by Pfizer, Moderna, and Janssen had received Emergency Use Authorization from the agency).

196. Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization, 45 Op. Att'y Gen. 1 (July 6, 2021).

197. *Id.* at 1 (citing 21 U.S.C. § 360bbb-3(e) (2021)).

198. *Id.* at 1–2 (citing 21 U.S.C. § 360bbb-3(e)).

199. *See id.*; 21 U.S.C. § 360bbb-3(c)).

> though "a drug, biologic, or device is highly promising in treating [such] a disease or condition.[200]

At the time, the only alternative to full FDA approval was 21 U.S.C. § 355(i), which authorized the FDA to exempt drugs from the ordinary approval process for investigational use by experts.[201] This did not allow for the widespread dissemination of the drug for general public use if needed in an emergency.[202] As a result, President Bush at his 2003 State of the Union Address proposed Project BioShield, which was a legislative initiative to make vaccines and treatments available for certain agents such as Ebola or anthrax.[203]

Congress enacted a version of the Project BioShield legislation's EUA provision in the National Defense Authorization Act for Fiscal Year 2004.[204] Of significant importance, in section 564, it states that with respect to EUAs, the Secretary can establish conditions on the authorization as the Secretary finds necessary to protect the public health.[205] Specifically,

> section 564(e)(1)(A)(ii)(III) directs FDA to impose conditions on an EUA "designed to ensure that individuals to whom the product is administered are informed . . . of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks."[206]

The FDA, when it granted the EUAs for the three COVID-19 vaccines, implemented the option to accept or refuse section by mandating that a fact sheet be made available to potential vaccine recipients.[207] In that factsheet, it states that the potential recipient has

200. 45 Op. Att'y Gen., *supra* note 196, at 3. (quoting H.R. REP. NO. 108-147, pt. 1, at 2 (2003)).

201. *Id.* at 4 (citing H.R. REP. NO. 108-147, pt. 1, at 2 (2003)).

202. *Id.*

203. *Id.* at 3 (citing George W. Bush, U.S. President, Address Before a Joint Session of the Congress on the State of the Union (Jan. 28, 2003), *in* 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE W. BUSH, at 86 (2007)).

204. 45 Op. Att'y Gen., *supra* note 196, at 4 (citing Food, Drug, and Cosmetic Act § 564, Pub. L. No. 108-136, § 1603(a), 117 Stat. 1392, 1684 (2003) (codified at 21 U.S.C. § 360bbb-3)).

205. *Id.* at 5 (quoting 21 U.S.C. § 360bbb-3(e)(1)(A)).

206. *Id.* at 6 (quoting 21 U.S.C.S. § 360bbb-3(e)(1)(A)(ii)(III)).

207. *Id.* at 7 (citing Letter from Denise M. Hinton, Chief Scientist, Food & Drug Admin., to Pfizer, Inc. 6, 9 (May 10, 2021), https://www.fda.gov/media/144412/download).

the ability to accept or refuse the vaccination, and that refusal will not change the person's standard medical care.[208] This section concerning the ability to refuse administration of vaccine has become the heart of the issue concerning vaccine mandates for COVID-19 and subject to increasing caselaw.[209]

2. DOJ Vaccine Mandate Conclusion

Concerning whether entities can mandate the COVID-19 vaccine, the DOJ concluded that:

> section 564(e)(1)(A)(ii)(III) concerns only the provision of information to potential vaccine recipients and does not prohibit public or private entities from imposing vaccination requirements for vaccines that are subject to EUAs. By its terms, the provision directs only that potential vaccine recipients be "informed" of certain information, including "the option to accept or refuse administration of the product." FDCA § 564(e)(1)(A)(ii)(III).[210]

Specifically, DOJ noted that Congress was only regulating the entities providing the vaccine to ensure that the recipients had a type of "informed consent," and that there is no evidence from the legislative history or the statutory scheme that Congress intended to limit employers and school's ability to mandate the vaccine.[211] DOJ points to the fact that if they wanted to limit entities in such ways, they could have just stated that entities are not entitled to mandate others to receive the vaccine.[212]

208. *Id.* (quoting PFIZER, FACT SHEET FOR RECIPIENTS AND CAREGIVERS 5 (2021) https://www.mamkschools.org/uploaded/Communications/Coronavirus/English_Pfizer_fact_sheet.pdf?1629391685606).

209. *See* discussion *infra* Section C.

210. 45 Op. Att'y Gen., *supra* note 196, at 8 (quoting 21 U.S.C. 360bbb-3(e)(1)(A)(ii)(III)).

211. *See id.* at 9, (first citing Bridges v. Hous. Methodist Hosp., No. H-21-1774, 2021 U.S. Dist. LEXIS 110382, 5 (S.D. Tex. 2021) (explaining that section 564 "confers certain powers and responsibilities to the Secretary of [HHS] in an emergency" but that it "neither expands nor restricts the responsibilities of private employers")); then citing *id.* at 12 & n.11 (discussing Congress's view of "informed consent" in 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III) in terms of 21 U.S.C. § 355(i)(4)).

212. *Id.* at 11 (first quoting Kloeckner v. Solis, 568 U.S. 41, 52 (2012) (rejecting a statutory interpretation positing that Congress took a "round-about way" and an "obscure path" to reach "a simple result"); then quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes")).

Some people argue that entities mandating the vaccine takes away the option for individuals. However, DOJ states that virtually all people continue to have the choice about whether they want to take the vaccine since there is no direct legal consequences for not getting the vaccine.[213] DOJ cited Wen W. Shen, who stated that, ". . . . vaccination mandates—as they are typically structured—generally do not interfere with . . . an individual's right to refuse in that context. Rather, they impose secondary consequences—often in the form of exclusion from certain desirable activities, such as schools or employment—in the event of refusal."[214]

As way of counterargument, DOJ pointed to 2005, when the FDA gave Emergency Use Authorization for a vaccine for individuals deemed by the Department of Defense (DOD) to be at heightened risk of exposure due to an attack with anthrax.[215] As a condition of that authorization, individuals had to be informed of the ability to accept or refuse the vaccine.[216] Further, the authorization stated that the individuals had the right to refuse the vaccination and could not be punished.[217] However, DOJ stated that such history did not change their conclusion about the ability to mandate vaccinations, since the 2005 EUA and later guidance never gave an actual legal interpretation

213. *Id.* at 12–13. (first quoting *Bridges*, 2021 U.S. Dist. LEXIS 110382, at 7 (noting that an employer's vaccination policy was not "coercive" because an employee "can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else"); then quoting WEN W. SHEN, CONG. RESEARCH SERV., R46745, STATE AND FEDERAL AUTHORITY TO MANDATE COVID-19 VACCINATION 5 (2021); and then quoting *Option*, BLACK'S LAW DICTIONARY (7th ed. 1999); and then quoting 12 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III)) (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1235 (4th ed. 2000)).

214. *Id.* at 13 (first quoting SHEN, R46745, *supra* note 213, at 5 ("[E]xisting vaccination mandates—as they are typically structured—generally do not interfere with . . . an individual's right to refuse in that context. Rather, they impose secondary consequences—often in the form of exclusion from certain desirable activities, such as schools or employment—in the event of refusal." (footnote omitted); then quoting *Option*, BLACK'S LAW DICTIONARY, *supra* note 213; and then quoting 12 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III)) (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 213, at 1235).

215. 45 Op. Att'y Gen., *supra* note 196, at 15–16 (quoting Authorization of Emergency Use of Anthrax Vaccine Adsorbed for Prevention of Inhalation Anthrax by Individuals at Heightened Risk of Exposure Due to Attack With Anthrax; Availability, 70 Fed. Reg. 5452, 5455 (Feb. 2, 2005)).

216. *Id.*

217. *Id.*

of section 564(e)(1)(A)(ii)(III)'s text and because the courts had enjoined mandating the vaccine due to a different statutory text, not applicable to general EUAs.[218]

3. Case Law Concerning Vaccine Mandates

A. Jacobson v. Massachusetts

One of the primary cases mentioned in the vaccine mandate debate is a case from 1905, *Jacobson v. Massachusetts*.[219] The case concerned Cambridge, Massachusetts passing a state law regulation requiring individuals over the age of twenty-one (21) to receive the smallpox vaccination.[220] Henning Jacobson refused to get the vaccine and, as a result, was tried, convicted and ordered to pay a $5 fine.[221] He decided to appeal the decision, and the case ultimately made it all the way to the Supreme Court.[222] He argued, like many today, that he has a right to personal liberty under the Constitution to decide whether to receive a vaccination or not.[223]

The Supreme Court rejected Jacobson's challenge.[224] Addressing the individual liberty argument, Justice John Marshal Harlan wrote that "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."[225] However, the primary justification the Supreme Court relied on is the state's "police power."[226] Essentially, the Court stated that the police power is "power

218. *Id.* at 16 (first citing Doe v. Rumsfeld, 341 F. Supp. 2d 1, 16 (D.D.C. 2004); then citing 10 U.S.C. § 1107; and then citing Doe v. Rumsfeld, 297 F. Supp. 2d 119, 135 (D.D.C. 2003); and then citing Authorization of Emergency Use of Anthrax Vaccine Adsorbed for Prevention of Inhalation Anthrax by Individuals and Heightened Risk of Exposure Due to Attack With Anthrax; Extension; Availability, 70 Fed. Reg. 44,657, 44,660 (Aug. 3, 2005); and then citing Authorization of Emergency Use of Anthrax Vaccine Adsorbed for Prevention of Inhalation Anthrax by Individuals at Heightened Risk of Exposure Due to Attack With Anthrax; Availability, 70 Fed. Reg. at 5454; and then citing 45 Op. Att'y Gen. *supra* note 196, at 17 n.15; and then citing 10 U.S.C. § 1107(f)).

219. 197 U.S. 11 (1905).

220. *See id.* at 22 (citing Revised Laws of Massachusetts ch. 75 § 137 (1902)).

221. *Id.* at 26; *see* Revised Laws of Massachusetts § 137.

222. *See Jacobson*, 197 U.S. at 26.

223. *See id.*

224. *See id.*

225. *Id.*

226. *Id.* at 24–25.

which the State did not surrender when becoming a member of the Union under the Constitution."[227] The Court determined that under this police power, states could enact compulsory vaccinations.[228] Further, the court stated that it was for the legislature, not the courts, to determine whether vaccinations were the best way to stop smallpox and to protect the public.[229]

The Jacobson case, although important, points more to the settled area of state's plenary power to protect the public health, compared to the more limited powers of the federal government.[230] Therefore, the Biden administration cannot rely on this precedent as justification for a nationwide vaccination mandate. However, as mentioned below, the Jacobson case sets a precedent for state actors and private employers to be able to mandate vaccinations.[231]

B. Current Case Law

There are numerous challenges to vaccine mandates currently before various federal and state courts.[232] Two important cases that have been decided so far, and have upheld the vaccine mandate, are *Bridges v. Houston Methodist Hospital*[233] and *Klaassen v. Trustees of Indiana University.*[234]

1. Bridges v. Houston Methodist Hospital

In *Bridges*, 117 hospital workers sued for an injunction to block the hospital's mandatory vaccination policy as well as the hospital's policy that it would terminate any employee unwilling to comply with

227. *Jacobson*, 197 U.S. at 25.

228. *Id.*

229. *Id.* at 27–28.

230. *Id.* at 24–25.

231. *See infra* Part IV.B.3.B.

232. *See, e.g.*, Dan Mangan, *Supreme Court Will Hear Challenge to Biden Covid Vaccine Mandates*, CNBC (Dec. 22, 2021, 6:46 PM), https://www.cnbc.com/2021/12/22/supreme-court-will-hear-challenge-to-biden-covid-vaccine-mandates.html (citing challenges to federal vaccine mandate by "27 states, . . . private businesses, religious groups, and national industry associations); Mary Beth Morrissey et al., *Challenges to State and Local Vaccine Mandates in New York*, NYSBA (Dec. 10, 2021), https://nysba.org/challenges-to-state-and-local-vaccine-mandates-in-new-york/ (citing challenges to state and local vaccine mandates in New York).

233. No. H-21-1774, 2021 U.S. Dist. LEXIS 110382 (S.D. Tex. June 12, 2021).

234. 7 F.4th 592 (7th Cir. 2021).

the vaccine mandate.[235] Specifically, the employees asserted that the vaccine mandate would result in wrongful termination in violation of the public policy of the state of Texas and federal law.[236] The Southern District of Texas rejected these arguments and upheld the hospital's vaccine mandate.[237] Concerning Texas law, the court noted that Texas law only protects employees from being terminated for refusing to commit an act carrying criminal penalties.[238] Since receiving the COVID-19 vaccination is not an illegal act and does not carry a criminal penalty, the Texas law is inapplicable.[239] Further, the court noted that the Plaintiff's public policy argument fails since Texas law does not recognize violation of public policy as an exemption to at-will employment.[240]

Concerning the Plaintiffs' federal law claims, the court first notes that the statute granting powers to the Food and Drug Administration to grant EUAs does not create a private right of action for citizens to sue their employers.[241] The court also dismissed Plaintiffs' argument that the vaccine mandate violated federal law that protects the rights of human subjects since the employees are not participating in a human trial, but are just subject to a vaccine requirement that they can refuse.[242] In addition, the judge dismissed the Plaintiffs' reliance on the Nuremberg Code.[243] The Code is inapplicable since it does not apply to private employers.[244] Lastly, the court explained that the vaccine mandate is part of the bargain of at-will employment and is not coercion since the defendant is just trying to do their job and that

235. *Bridges*, 2021 U.S. Dist. LEXIS 110382, at 3.

236. *See id.* at 4, 5.

237. *Id.* at 7–8.

238. *Id.* at 3 & n.1 (citing Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985)).

239. *Id*. at 4.

240. *Bridges*, 2021 U.S. Dist. LEXIS 110382, at 4.

241. *Id*. at 5 & nn.4–6 (citing 21 U.S.C. § 360bbb-3).

242. *Id.* at 6 & nn.7–8 (citing General Requirements for Informed Consent, 45 C.F.R. § 46.116 (2021)).

243. *See* Judgment of July 19, 1947, *in* 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 181–183 (1949).

244. *Bridges*, 2021 U.S. Dist. LEXIS 110382 at 7 (citing 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, *supra* note 227, at 181–83). The court also stated that "equating the injection requirement to medical experimentation in concentration camps is reprehensible. Nazi doctors conducted medical experiments on victims that caused pain, mutilation, permanent disability, and in many cases, death."

the employees "can freely choose to accept or refuse a COVID-19 vaccine; however, if [they] refuse, [they] will simply need to work somewhere else. . . . Every employment includes limits on the worker's behavior in exchange for his remuneration. That is all part of the bargain."[245]

2. Klaassen v. Trustees of Indiana University

In *Klaassen,* a group of students at Indiana University brought suit against the University concerning their vaccination mandate.[246] The University's mandate required faculty, students and staff to be vaccinated unless they qualify for an exemption.[247] The students argued that the mandate violated their constitutional rights to "bodily integrity, autonomy and medical choice" and that it was not justified since the likelihood of serious illness and death for college students from COVID-19 was "close to zero."[248] However, the group did acknowledge that the University including exemptions for religious, ethical and medical reasons "virtually guaranteed" that anyone who sought an exemption would receive it.[249]

Both the district court and a three-judge panel for the 7th Circuit refused to grant the Plaintiffs' request to put the mandate on hold during litigation of the lawsuit.[250] Specifically, the 7th Circuit stated that the mandate was clearly within the right of the University under *Jacobson v. Massachusetts*.[251] The panel stated that "[e]ach university may decide what is necessary to keep other students safe in a congregate setting," and also noted that medical exams and

245. *Id.* at 7

246. Klaassen v. Trs. of Ind. Univ., No. 21-CV-238, 2021 U.S. Dist. LEXIS 133300, at 3 (N.D. Ind. July 18, 2021); *Klaassen*, 7 F.4th at 592 (citing U.S. CONST. amend. XIV).

247. *Klaassen*, 2021 U.S. Dist. LEXIS, at 15–16; *Klaassen*, 7 F.4th at 592.

248. Adam Liptak, *The Supreme Court Won't Block Indiana University's Vaccine Mandate*, N.Y. TIMES//(Aug. 12, 2021 11:36 PM), https://www.nytimes.com/2021/08/12/us/supreme-court-indiana-university-covid-vaccine-mandate.html; Anne Dennon, *University Vaccine Mandate Stand*, BEST COLLEGES (Aug. 16, 2021), https://www.bestcolleges.com/news/analysis/2021/08/16/supreme-court-upholds-indiana-university-vaccine-mandate/.

249. Liptak, *supra* note 248.

250. *Klaassen*, 2021 U.S. Dist. LEXIS 133300, at 125 (citing U.S. CONST. amend. XIV); *Klaassen*, 7 F.4th at 594.

251. *Klaassen*, 7 F.4th at 593 (citing *Jacobson*, 197 U.S. at 39).

vaccinations against diseases are routine requirements to attend college.[252]

The students attempted to appeal the decision to the Supreme Court for an emergency hearing.[253] However, Justice Amy Coney Barret, who oversees the federal appeals court in question, turned down the students' request for emergency relief without comment.[254] She did not refer the application to the full court or ask the university for a response to the student's petition.[255] As of the writing of this article, the Supreme Court has yet to take a case concerning vaccination mandates.

Overall, the debate surrounding vaccination mandates for COVID-19 is politically heated.[256] However, to date, the EEOC, DOJ, and Courts have all stated that the law does not prohibit employers from mandating vaccinations.[257]

CONCLUSION

The *Survey* year saw a multitude of changes, primarily concerning the legalization of marijuana for recreational use, the implementation and changes to numerous state leave laws, the passage of NY HERO Act, as well as continued litigation and activity concerning COVID-19 vaccination mandates.[258] All of these changes will significantly affect employers and employees in New York State. The changes highlighted in this *Survey* represent only a selection of important changes; employers and their legal counsel should continue

252. *Id*.

253. *See* Liptak, *supra* note 248.

254. *Id.*

255. *Id.*

256. *See, e.g*., Carrie Johnson, *A Legal Debate Has Followed Biden's Vaccine Mandates*, NPR (Sept. 20, 2021, 4:21 PM), https://www.npr.org/2021/09/20/1039071102/a-legal-debate-has-followed-bidens-vaccine-mandates; Theresa Waldrop, *New York Faces a Showdown Over Vaccine Mandates in Schools, Courts and Healthcare*, CNN (Sept. 27, 2021, 10:09 PM), https://www.cnn.com/2021/09/27/us/new-york-vaccine-mandate-explainer/index.html.

257. *See supra* Part IV.

258. *See, e.g.*, Act of Mar. 31, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 92, at § 1 (codified at N.Y. CANBS. LAW § 2 (McKinney 2021)); Act of Apr. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 56, at 216–19 (codified at N.Y. LAB. LAW §§ 196-b (McKinney 2021)); Act of May 5, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 105, at § 1 (codified at N.Y. LAB. LAW § 218-b(2) (McKinney 2021)); Klaassen v. Trs. of Ind. Univ., 7 F.4th 592, 592 (2021).

to monitor legal developments to ensure compliance with all applicable laws.