NEW YORK LABOR & EMPLOYMENT LAW

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INTRODUCTION

Though perhaps untraditional, this "year's" New York Labor and Employment Law *Survey* article encompasses the two-year period from July 2021 – June 2023. As in years past, New York's legislature, state agencies, and courts were active during the *Survey* period, ushering in changes in many areas impacting employers and employees across the state. Addressed in greater detail below, some of the most notable changes in the law included increases to the minimum wage and minimum salary threshold in certain areas of the state, changes to Paid Family Leave, updates regarding the State's model sexual harassment policy, and the status of the law surrounding COVID-19 vaccination in certain industries.

I. NEW YORK WAGE AND HOUR DEVELOPMENTS

A. Increase to the State Minimum Wage

For each of the past several years, New York's minimum hourly wage has incrementally increased on December 31 of each year.[1] In

1. *See* N.Y. LAB. LAW § 652(1) (McKinney 2023); *New York State's Minimum Wage*, NEW YORK STATE, https://www.ny.gov/new-york-states-minimum-

contrast to New York's approach, which will ultimately result in a statewide minimum wage of $15.00 per hour, the federal minimum wage has remained steady at $7.25 per hour since 2009.[2] New York State is divided into three regions for minimum wage purposes: (1) New York City; (2) Nassau, Suffolk, and Westchester counties; and (3) the remainder of New York State (*i.e.*, "upstate" New York).[3] As increases to the minimum wage are made by region, the effective minimum wage rates differ by location.[4] It is the employee's location at the time that work is performed that determines the appliable minimum wage.[5] The minimum wage in New York City reached $15.00 per hour for employers of all sizes on December 31, 2019, and presently remains at that rate.[6] Effective December 31, 2021, the minimum wage in Nassau, Suffolk, and Westchester counties also reached $15.00 per hour.[7] The minimum wage for upstate New York—*i.e.*, everywhere other than New York City, Nassau, Suffolk, and Westchester counties—has not yet reached the $15.00 per hour target rate.[8] Effective December 31, 2022, the minimum wage for upstate New York is $14.20 per hour.[9] The minimum wage in upstate New York will continue to increase on an annual basis until it reaches $15.00, making the statewide minimum wage the same regardless of location.[10]

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wage/new-york-states-minimum-wage (last visited Dec. 19, 2022) [hereinafter *New York State's Minimum Wage*]; *Minimum Wage*, NEW YORK STATE, https://dol.ny.gov/minimum-wage-0 (last visited Dec. 3, 2023).

2. 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."); *see also* LAB. § 652(1)(a)–(c); *New York State's Minimum Wage*, *supra* note 1.

3. LAB. § 652(1)(a)–(c).

4. *See New York State's Minimum Wage*, *supra* note 1; LAB. § 652.

5. *See Minimum Wage Frequently Asked Questions*, NEW YORK STATE, https://dol.ny.gov/minimum-wage-frequently-asked-questions (last visited Mar. 11, 2024); LAB. § 652(1)(a)–(c).

6. 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 id.*

7. *History of the Minimum Wage in New York State*, NEW YORK STATE, https://dol.ny.gov/history-minimum-wage-new-york-state (last visited Dec. 3, 2023).

8. LAB. § 652(1)(a)–(b).

9. *New York State's Minimum Wage*, *supra* note 1.

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

B. Increase in the State Salary Threshold Minimums

On December 31, 2022, the New York State minimum salary thresholds were also increased for employees in upstate New York who are exempt under the executive and administrative exemptions.[11] Similar to the approach taken with respect to minimum wage rates, minimum salary threshold increases are made on a regional basis.[12] As of December 31, 2022, the minimum weekly salary threshold for the executive and administrative exemptions increased from $990 to $1064.25 per week (inclusive of board, lodging and other allowances and facilities) in upstate New York.[13] The salary threshold for exempt executive and administrative employees working in New York City and Nassau, Suffolk and Westchester counties, did not change and remains at $1,125 per week.[14] This has been the exempt salary threshold in New York City, Nassau, Suffolk and Westchester counties since December 31, 2021.[15]

While New York does not impose a minimum salary threshold for exempt professional employees, such as doctors, lawyers, and other professional positions, employers must comply with the salary threshold applicable under federal law, specifically the Fair Labor Standards Act (FLSA).[16] The minimum salary threshold under the FLSA is $684.00 per week.[17] Therefore, New York employees classified as exempt professionals must be paid on a salary basis and earn at least $684.00 per week.

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11. *See* 12 N.Y.C.R.R. § 142-2.14 4(i)(*e*)(3); *See also* 12 N.Y.C.R.R. § 142-2.14 4(ii)(*d*)(3); Subhash Viswanathan, *The New York Minimum Level to Qualify for the Executive and Administrative Exceptions Will Increase,* BOND, SCHOENECK & KING (Dec. 16, 2021), https://www.bsk.com/news-events-videos/the-new-york-minimum-salary-level-to-qualify-for-the-executive-and-administrative-exemptions-will-increase.

12. *Id.*

13. N.Y. COMP. CODES R. & REGS. tit. 12, § 141-3.2 (c)(1)(i)(*l*)(*ii*)(*3*) (2022).

14. N.Y. COMP. CODES R. & REGS. tit. 12, § 141-3.2 (c)(1)(i)(*l*)(*ii*)(*2*) (2022).

15. N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.14 (c)(4)(i)(*l*)(*ii*) (2022).

16. Subhash Viswanathan, *The New York Minimum Salary Level to Qualify for the Executive and Administrative Exemptions Will Increase,* BOND, SCHOENECK, & KING, (Dec. 16, 2021). https://www.bsk.com/news-events-videos/the-new-york-minimum-salary-level-to-qualify-for-the-executive-and-administrative-exemptions-will-increase.

17. Glenn S. Grindlinger, *U.S. Department of Labor Proposes Increases to Salary Thresholds for Overtime Exemptions*, FOX ROTHSCHILD, (Aug. 31, 2023). https://www.foxrothschild.com/publications/u-s-department-of-labor-proposes-increases-to-salary-thresholds-for-overtime-exemptions#:~:text=Thresholds%20Vary%20by%20State&text=For%20example%2C%20New%20York's%20salary,week%20(%2458%2C500%20per%20year).

Additionally, employers must be mindful that meeting the minimum salary thresholds under state and federal law is just one aspect of the analysis for determining whether an employee is properly classified as exempt from minimum wage and overtime requirements.[18] Though beyond the scope of this article, to be properly exempt, employees must also meet the applicable duties tests.[19]

II. THE MARIJUANA REGULATION AND TAXATION ACT – NEW YORK'S LEGALIZATION OF RECREATIONAL CANNABIS

By way of background, the New York Marijuana Regulation and Taxation Act (the MRTA) was enacted on March 31, 2021.[20] The MRTA legalized the licensed cultivation, distribution, and use of recreational cannabis in New York State.[21] Because of the MRTA, the use of recreational marijuana is a lawful activity for individuals older than twenty-one years of age.

The enactment of the MRTA was a significant change in state law and greatly expanded the lawful use of marijuana in New York. The MRTA is discussed in greater detail in the 2020-2021 Labor and Employment Law *Survey*.[22]

Crucially for employers, the MRTA amended New York Labor Law Section 201-d to provide that the lawful, off duty, off work premises, use of recreational marijuana is lawful recreational activity. Section 201-d provides in relevant part:

> 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

18. N.Y. DEP'T OF LABOR, EXECUTIVE EMPLOYEE OVERTIME EXEMPTION FREQUENTLY ASKED QUESTIONS (2021) (detailing duties test for executive employees).

19. *Id.*

20. N.Y. CANNABIS LAW § 1 (McKinney 2021).

21. N.Y. CANNABIS LAW § 2 (McKinney 2021).

22. *See* Shannon Knapp, et al., *New York Labor and Employment Law*, 72 SYR L. REV. 921 (2022).

> 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.[23]

This limits employers' ability to discipline employees for their lawful, off duty, off work premises use of recreational marijuana. However, employees' right to use recreational marijuana is not unlimited. Section 201-d carves out several, albeit limited, exceptions that allow employers to take disciplinary action in response to employee use of recreational marijuana.[24] For more information and a more extensive discussion of the recognized exceptions, please see the 2020-2021 Labor and Employment Law *Survey*.[25]

The enactment of the MRTA left open several questions for employers grappling with the impact of Section 201-d on the workplace. In October 2021, the New York State Department of Labor (NYSDOL) published guidance in the form of Frequently Asked Questions (FAQs) regarding the amendments to Section 201-d, specifically addressing "adult use cannabis and the workplace."[26] While the FAQs largely reiterated the contents of the amended Section 201-d, they shed some light on the NYSDOL's position with respect to employers' drug testing practices.

The FAQs begin with a reminder to employers that the primary purpose of the MRTA's amendments to Section 201-d are to prohibit discrimination against employees' lawful use of recreational cannabis "outside of the workplace, outside of work hours, and without use of the employer's equipment or property."[27] Thus, absent an explicit statutory exception, employment action (*i.e.*, discipline, termination, etc.) cannot be taken against an employee for lawfully using cannabis outside of work.[28]

The same is not true, however, when an employee's use of marijuana impacts the workplace. In other words, employees' protection from discipline is not absolute. In the FAQs, the NYSDOL explains that employers are not prohibited from imposing discipline or taking other action against employees who are impaired while working.[29]

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23. *Id.* at 927 (emphasis added).

24. NY LAB. LAW § 201-d(4-a) (McKinney 2023).

25. *See* Knapp, et al, *supra* note 22.

26. *Adult Use Cannabis and the Workplace*, N.Y. DEP'T OF LABOR, https://dol.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf (last visited Jan. 21, 2024).

27. *Id.*

28. *Id*.

29. *Id*.

Impaired means "the employee manifests specific articulable symptoms of impairment" that diminish their performance or interfere with an employer's obligation to provide a safe, hazard-free workplace.[30] One of employers' most pressing questions following the amendments to Section 201-d related to the meaning of "specific articulable symptoms." Despite lingering questions, the FAQs provided little clarity. Instead of defining "specific articulable symptoms," the FAQs merely state that: "[t]here is no dispositive and complete list of symptoms of impairment. Rather, articulable symptoms of impairment are objectively observable indications that the employee's performance of the duties of [] their position are decreased or lessened."[31] The NYSDOL also cautioned that articulable symptoms "may also be an indication that an employee has a disability protected by federal and state law (*e.g.,* the NYS Human Rights Law), even if such disability or condition is unknown to the employer."[32] To illustrate, the NYSDOL offered the example that "the operation of heavy machinery in an unsafe and reckless manner may be considered an articulable symptom of impairment."[33]

Providing further context, the NYSDOL also provided examples of what does *not* constitute articulable symptoms of impairment.[34] The FAQs state that "[o]nly symptoms that provide objectively observable indications that the employee's performance of the essential duties or tasks of their position are decreased or lessened may be cited."[35] Because there is no drug test capable of indicating present intoxication by marijuana (as compared to alcohol testing, for example), it is the NYSDOL's position that a positive test for marijuana cannot be used as a basis for articulable symptoms of impairment.[36] Similarly, the noticeable odor of marijuana, on its own, cannot be used as a basis for articulable symptoms of impairment.[37]

The FAQs also address employees' use and possession of marijuana during working hours, including meal breaks and rest periods.[38] Consistent with the language of Section 201-d, the FAQs reiterate that employers may prohibit the use of recreational marijuana during meal

30. *Id.*; *see also* N.Y. LAB. LAW § 201-d(4-a)(ii).
31. *Adult Use Cannabis and the Workplace*, *supra* note 26.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Adult Use of Cannabis and the Workplace*, *supra* note 26, at 2.
37. *Id.*
38. *Id.*

breaks and rest periods, including break periods during which employees are permitted to leave the physical workplace.[39] Employers may also prohibit employees from using or consuming recreational marijuana while they are on-call or "expected to be engaged in work."[40]

Employees may also be prohibited from possessing recreational marijuana in the workplace, including anywhere on the employer's premises (whether the property is owned or leased), employer-owned vehicles, and in spaces such as employee lockers and desks.[41]

Perhaps the most significant aspect of the FAQ guidance was the NYSDOL's position that drug testing is not permissible unless an employer falls within one of the limited exceptions outlined in Section 201-d(4-a)—upon suspicion of impairment based on articulable symptoms of impairment, employers subject to certain federal regulations that require employee drug testing, employers who risk the loss of federal contracts if they do not test, etc. Though the NYSDOL has taken the position that drug testing is generally disallowed absent one of these exceptions, that stance does not find support in the text of Section 201-d, as the statute itself does not address drug testing one way or the other.[42] Courts have not yet had the opportunity to address the question of marijuana testing in New York, so it remains to be seen how this inconsistency between the text of Section 201-d and the NYSDOL's interpretation of the statute will be resolved.

While the FAQs touched on bigger topics such as discipline, use, possession, and drug testing, they also addressed a myriad of other questions such as employee waiver, geographic scope, and more. With respect to the issue of waiver, employers may not require employees to waive the protections of Section 201-d as a condition of future or continued employment.[43] Addressing employee coverage, the NYSDOL confirmed that the protections of Section 201-d apply only to employees physically working within New York State.[44]

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39. *Id*.

40. *Id.*

41. *Adult Use of Cannabis and the Workplace*, *supra* note 26, at 2.

42. *Id*. at 3.; *see also* N.Y. LAB. LAW § 201-d(4-a)(ii) (McKinney 2023) (not discussing drug testing in any manner).

43. *Adult Use of Cannabis and the Workplace*, *supra* note 26, at 3.

44. *Id.* at 2.

III. AMENDMENTS TO NEW YORK PAID FAMILY LEAVE LAW

Since 2018, the New York Paid Family Leave Law (NYPFLL) has provided a system of paid, job-protected leave for eligible employees for the following reasons: (i) to care for a new child following birth, adoption, or placement in the home; (ii) to care for a family member with a serious health condition; or (iii) for qualifying exigencies related to military duty. Beginning January 1, 2021, and going forward, employees are eligible for up to twelve work weeks of leave in a fifty-two-week period at 67% of their average weekly wage, up to a cap set up by the state.[45]

Initially, the NYPFLL defined "family member[s]" to include an employee's spouse or domestic partner, child (including a biological, adopted or foster child, step-child or child of a domestic partner, legal ward or one to whom the employee stands in loco parentis), parent (including a biological, adoptive or foster parent, step-parent, legal guardian, or one who stood in loco parentis to the employee as a child), parent-in-law, grandparent, and grandchild.[46]

However, on November 1, 2021, New York State Governor Kathy Hochul signed a bill amending the NYPFLL, to include "siblings" in the definition of "family member[s]."[47] The term "siblings" is defined to include biological, adopted, step, and half-sibling(s).[48] This new definition of "immediate family members," with its inclusion of siblings became effective on January 1, 2023.[49]

IV. COVID-19 DEVELOPMENTS IN NEW YORK

A. COVID-19 Vaccination Issues

In August 2021, the New York State Department of Health (NYSDOH) implemented regulations that require covered healthcare entities, including general hospitals and diagnostic and treatment centers, to ensure that their employees are fully vaccinated against COVID-19.[50] Pursuant to 10 NYCRR Section 2.61—hereafter the "Regulation" —many healthcare workers and personnel were required

45. N.Y. WORKERS' COMP. LAW § 204(2)(a) (McKinney 2016).
46. N.Y. WORKERS' COMP. LAW § 201(20) (McKinney 2023).
47. *Id.* § 201(24).
48. *Id.*
49. *Id.* § 201.
50. S*ee* 10 N,Y.C.C.R. § 2.61 (2023).

to vaccinate against COVID-19.[51] Covered entities included "any facility or institution included in the definition of 'hospital' in section 2801 of the [New York] Public Health Law, including, but not limited to general hospitals, nursing homes, and diagnostic and treatment centers . . ."[52]

To combat the critical public health threat posed by COVID-19, the Regulation initially required covered entities to "require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021, for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities absent receipt of [a medical] exemption . . ."[53] The Regulation defined "personnel" as:

> [A]ll persons employed or affiliated with a covered entity, whether paid or unpaid, including but not limited to employees, members of the medical and nursing staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease.[54]

Under the Regulation, covered personnel could seek limited medical exemptions where "any licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to the health of [an employee], based upon a pre-existing health condition . . ."[55] This was the only exemption set forth in the Regulation, notably excluding religious exemptions.[56]

Shortly after the Regulation was announced, litigation was brought challenging the Regulation's lack of a religious exemption. On September 14, 2021, Judge David N. Hurd, United States District Court for the Northern District of New York, temporarily enjoined the Regulation.[57] However, in November 2021, the Second Circuit Court of Appeals reversed and vacated the injunction, thereby reinstating the Regulation.[58]

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51. *Id.* § 2.61(a)(2)

52. *Id.* § 2.61(a)(1)(i).

53. *Id.* § 2.61(3)(c).

54. *Id.* § 2.61(a)(2).

55. S*ee* 10 N.Y.C.C.R. § 2.61(d)(1) (2023).

56. *Id*.

57. A. v. Hochul, No. 1:21-CV-1009, 2021 WL 4189533, at *1 (N.D.N.Y. Sept. 14, 2021).

58. We The Patriots USA, Inc. v. Hochul, 17 F.4th 266, 273 (2d Cir.), *opinion clarified in* 17 F.4th 368 (2d Cir. 2021).

The Second Circuit specifically noted that the Regulation "bars an employer from granting a religious exemption from the vaccination requirement," but that "it does not prevent employees from seeking a religious accommodation allowing them to continue working consistent with the Rule, while avoiding the vaccination requirement."[59] In other words, the Second Circuit reasoned that the Regulation did not preclude employers from accommodating an employee's religious beliefs but it noted that any such accommodation could not include an exemption from the vaccination requirement.[60] Thus, employers could accommodate healthcare workers' religious objections to vaccination but could not, under any circumstances, allow unvaccinated personnel to work in violation of the Regulation by excusing them from the Regulation's vaccination requirement.[61]

The NYSDOH subsequently issued guidance, in the form of FAQs, consistent with the Second Circuit's interpretation of the Regulation. The FAQs provided that "there are no religious exemptions provided for through the regulation."[62] The FAQs further clarified that while covered healthcare entities are expected to comply with federal law, such as Title VII, and may consider requests for reasonable accommodations, "covered entities cannot permit unvaccinated individuals to continue in 'personnel' positions such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients, or residents to the disease."[63] Thus, the Regulation did not allow employees unvaccinated due to religious reasons to continue working in a role with exposure to patients and/or other personnel. As a result, healthcare employees working in any patient- or personnel-facing positions could not be accommodated by allowing an exception from the vaccine mandate.

In November 2021, the NYSDOH also issued a directive to all healthcare providers in light of the Second Circuit's decision. The NYSDOH directive, issued on November 15, 2021, imposed a November 22, 2021 deadline for all covered personnel to receive their

59. *Id.* at 292 (emphasis omitted).

60. *Id.*; *see also We The Patriots*, 17 F.4th at 370.

61. *See We The Patriots*, 17 F.4th at 370, ("To repeat: if a medically eligible employee's work assignments mean that she qualifies as 'personnel,' she is covered by the Rule and her employer must 'continuously require' that she is vaccinated against COVID-19.").

62. NEW YORK STATE, *Healthcare Worker Booster Requirement FAQS, Question 20,* https://coronavirus.health.ny.gov/system/files/documents/2022/01/healthcare-worker-booster-requirement-faqs_0.pdf.

63. *Id*. (citing 10 N.Y.C.R.R § 2.61).

first dose of the COVID-19 vaccination.[64] The Emergency Regulation was amended in January 2022 to require that personnel of covered healthcare entities receive "any booster or supplemental dose as recommended by the CDC."[65] From November 2021 until early 2023, the Regulation remained in effect.[66]

In January 2023, however, the Regulation came under legal attack again in New York Supreme Court, Onondaga County. On January 13, 2023, Onondaga County Supreme Court Justice Hon. Gerard J. Neri struck down the Regulation on the basis that the New York State Commissioner of Health, Governor Hochul, and the NYSDOH (collectively, the "Respondents") acted beyond the scope of their authority in enacting the Regulation.[67] Judge Neri agreed with the petitioners-plaintiffs, Medical Professionals for Informed Consent, an informed consent advocacy group, and two named physicians (collectively, the "Petitioners-Plaintiffs"), that the Regulation was *ultra vires* and, therefore, unenforceable.[68]

The Petitioners-Plaintiffs challenged the vaccine mandate and sought a declaration that the Regulation was promulgated in violation of the New York State Constitution and that the Legislature did not authorize the NYSDOH to enact it. They also brought an Article 78 proceeding, through which they claimed that (i) the Commissioner of Health and NYSDOH acted "in excess of their jurisdiction;" and (ii) the Regulation was "preempted by the New York State Human Rights Law, which requires reasonable religious accommodation absent a finding *by the employer* that the individual in question cannot be safely accommodated without posing a direct threat."[69]

Petitioners-Plaintiffs' request for declaratory relief was granted. The Court held that absent express legislative authority, the Commissioner of Health is prohibited from mandating vaccinations, such as the COVID-

64. Directive from Jennifer L. Tracy, Deputy Director, Office of Primary Care and Health Systems Management, N.Y. Dep't of Health, to Chief Executive Officers, Nursing Home Operators and Administrators, Adult Care Facility Administrators, and Home Care and Hospice Administrators (Nov. 15, 2021).

65. 10 N.Y.C.R.R. § 2.61(c) (eff. Jan. 21, 2022).

66. *Id.* § 2.61.

67. Decision and Order at 12, Med. Pro. for Informed Consent et al. v. Mary T. Bassett, et al., No. 008575/2022, NYSCEF Doc. No. 87 (Onondaga Cnty. Supreme Ct. Jan. 13, 2023).

68. *Id.*

69. Petition at 123, 125, Med. Pro.for Informed Consent et al. v. Mary T. Bassett, et al., No. 008575/2022, Petition, NYSCEF Doc. No. 1 (Onondaga Cnty. Supreme Ct. Oct. 20, 2022).

19 vaccine.[70] Though certain immunization programs have been legislatively authorized, such as for measles, mumps and rubella for children, the Public Health Law is silent as to COVID-19 or coronaviruses in general. Because mandatory immunization programs may only be implemented pursuant to specific provisions of the Public Health Law, and because the Public Health Law does not speak to COVID-19 vaccination, the Regulation's mandatory vaccination requirements were deemed "beyond the scope of Respondents' authority."[71] This weighed heavily in the Court's decision.

With respect to the Article 78 proceeding, the Court held that the Regulation was arbitrary and capricious.[72] The Court accepted Petitioners-Plaintiffs' argument that there is no rational basis for the vaccine mandate in light of the NYSDOH's acknowledgement that the mandate "fails to accomplish its stated goal— *i.e.*, prevent the spread of COVID-19."[73] The Court held that the Regulation's stated purpose of preventing transmission of COVID-19 was inconsistent with Respondents' public acknowledgement that "COVID-19 shots do not prevent transmission."[74]

The Regulation was also deemed arbitrary and capricious because the term "fully vaccinated" is defined as "determined by the Department in accordance with applicable federal guidelines and recommendations."[75] Because this definition is subject to change at the whim of the NYSDOH, it was held to be "no definition at all."[76] Judge Neri did not address the portion of Petitioners-Plaintiffs' Article 78 proceeding challenging the Regulation as preempted by the New York State Human Rights Law.

The Regulation was invalidated as a result of Judge Neri's decision, which stated that the Commissioner and NYSDOH are "prohibited from implementing or enforcing" the requirement that covered healthcare personnel continue to be fully vaccinated against COVID-19.[77]

On January 24, 2023, the Respondents filed a Notice of Appeal, appealing Judge Neri's decision in its entirety.[78] On January 27, 2023,

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70. *See* Decision and Order, *Med. Pro., supra* note 67 at 12.

71. *Id.* at 10.

72. *Id*. at 11.

73. *Id*. at 5.

74. *Id*. at 11.

75. Decision and Order, *Med. Pro., supra* note 67 at 11 (quoting 10 N.Y.C.R.R § 2.61).

76. *Id*.

77. *Id.* at 12.

78. *Id*.

Respondents moved for a stay pending appeal of Judge Neri's decision.[79] Several weeks later, on February 28, 2023, the Appellate Division Fourth Department, one of New York's intermediate appellate courts, granted Respondents' motion for a stay.[80] As a result of the Fourth Department's decision, the Regulation and its requirement that personnel of covered healthcare providers be fully vaccinated against COVID-19 remained pending the outcome of the State's appeal.

Before the Fourth Department could provide finality on the issue of the Regulation's validity, however, the Commissioner of Health issued a "Dear Administrator" letter, recommending the repeal of the Regulation.[81] This recommendation was made to the NYSDOH, subject to consideration by the Public Health and Health Planning Council.

Most crucially for healthcare employers, the Commissioner's Dear Administrator letter clarified that "[e]ffective immediately, the [NYSDOH] will cease citing providers for failing to comply with the requirements of 10 NYCRR Section 2.61 . . ." (*i.e.*, the Regulation).[82] Therefore, after years of contentious litigation and many legal challenges, the New York State vaccination mandate for personnel of covered healthcare employers is in the process of being repealed.

B. New York State Health and Essential Rights Act ("HERO Act") Developments

The New York Health and Essential Rights Act (the "HERO Act") was signed into law by Governor Cuomo on May 5, 2021.[83] The HERO Act imposed significant obligations on covered employers to provide and maintain a safe workplace in the face of the COVID-19 pandemic, and in the event of any future airborne infectious disease outbreak. The HERO Act amended the New York Labor Law by adding two new sections: Section 218-b (NYLL Section 218-b), which mandates that covered employers develop and adopt a written airborne

79. *Id*.

80. Decision and Order, *Med. Pro., supra* note 67 at 11 (quoting 10 NYCRR § 2.61).

81. Dear Admin. Letter from Eugene P. Heslin, First Deputy Comm'r and Chief Med. Officer to N.Y. Dept. of Health. (May 24, 2023) (on file with author).

82. *Id*.

83. N.Y. Senate Bill No.1034B. Reg. Sess. 2021-2022 (2021); The passage of the bill by Governor Cuomo was conditioned upon an agreement with the NYS Legislature to make certain technical changes to the bill. These technical changes are what constituted the proposed chapter amendments which were signed into law in June of 2021 by Governor Cuomo.

and infectious disease prevention policy, as well as Section 27-d (NYLL Section 27-d), which requires that covered employers permit the creation of workplace safety committees.[84]

1. New York Labor Law Section 218-b

On June 11, 2021 Governor Cuomo signed into law the proposed chapter amendments to the HERO Act.[85] These changes included modifications to employer liability under NYLL Section 218-b, which now provides for a thirty-day notice requirement and opportunity for the employer to cure an alleged violation, which would bar the employee from bringing the claim.[86] Additionally, the chapter amendments removed the provision providing for $20,000 of liquidated damages and added a six-month statute of limitations.[87] NYLL Section 218-b went into effect on July 4, 2021.[88]

On July 6, 2021, the New York State Department of Labor (NYSDOL) published its Airborne Infectious Disease Prevention Standard (the "Standard"), a general Model Airborne Infectious Disease Exposure Prevention Plan (the "Model Plan"), as well as several industry specific model prevention plans. Following the release of these documents, employers were given thirty days, or until August 5, 2021, to either adopt one of the model plans or develop an alternative plan that met or exceeded the requirements of the Standard.[89] Additionally, employers were required to provide a copy of their adopted plan to employees within thirty days of its adoption, or by September 4, 2021.[90]

Although employers were required to adopt a compliant airborne infectious disease exposure prevention plan, such plans would not go into effect until the New York State Commissioner of Health designated an airborne infectious disease as a "highly contagious communicable disease that presents a serious risk of harm to the public."[91]

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84. N.Y. LAB. LAW § 218-b (McKinney 2021); N.Y. LAB. LAW § 27-d (McKinney 2022).

85. N.Y. Senate Bill No. 6768. Reg. Sess. 2021-2022 (2021).

86. *Id.*

87. *Id.*

88. N.Y. LAB. LAW § 218-b.

89. N.Y. Senate Bill No. 6768. Reg. Sess. 2021-2022 (2021).

90. *Id.*

91. Press Release, N.Y. State Dep't of Health, NYS HERO Act, https://www.health.ny.gov/press/releases/2022/2022-03-18_hero_act.htm (last modified Mar. 2022).

On September 6, 2021, Governor Hochul directed the NYS Commissioner of Health to designate COVID-19 as a highly contagious communicable disease that presents serious risk of harm to the public health (the "COVID-19 Designation").[92] As a result of the COVID-19 Designation, employers were forced to activate their newly adopted infectious disease exposure prevention plans.

On September 23, 2021, the NYSDOL updated the Model Plan to loosen face covering requirements in workplaces where all employees were vaccinated, as well as changes to the "Physical Distancing" section. The first change was the revision of the section on face coverings to provide two guidance options pertaining to face coverings from which employers could choose: the NYS Department of Health or the Center for Disease Control and Prevention.[93] The second change was the removal of language stating that individuals should "use a face covering when physical distancing cannot be maintained," as well as a provision stating to "[a]void unnecessary gatherings and maintain a distance of at least six feet."[94] The updated Model Plan stated that, "[p]hysical distancing will be used, to the extent feasible, as advised by guidance from State Department of Health or the Centers for Disease Control, as applicable."[95]

The original COVID-19 Designation was extended for the first time on October 1, 2021. The COVID-19 Designation was subsequently extended again on October 31, 2021, December 15, 2021, January 15, 2022, and February 15, 2022, for the fifth and final time, lasting until March 17, 2022. Following the expiration of the COVID-19 Designation, employer's infectious disease exposure protection plans again went inactive. Even when there is no illness designated, the HERO Act requires that employers continue to have such plans in place.

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92. *See* Press Release, NYS Governor's Office, Governor Kathy Hochul Announces Designation of COVID-19 as an Airborne Infectious Disease Under New York State's HERO Act, https://www.governor.ny.gov/news/governor-kathy-hochul-announces-designation-covid-19-airborne-infectious-disease-under-new (last modified Sept. 6, 2021).

93. *See* Stephanie Fedorka, *NYSDOL Updates the NY HERO Act Model Plan*, BOND, SCHOENECK & KING (Sept. 28, 2021), https://www.bsk.com/news-events-videos/nysdol-updatehttps://www.bsk.com/news-events-videos/nysdol-updates-the-ny-hero-act-model-plans-the-ny-hero-act-model-plan.

94. *See id.*

95. *Id.*

2. New York Labor Law Section 27-d

On June 11, 2021, Governor Cuomo signed into law the proposed chapter amendments to the HERO Act.[96] The changes made to NYLL 27-d by the chapter amendments provided for one workplace safety committee per worksite, capped training requirements at four hours, and limited the length of quarterly meetings to two hours.[97] NYLL 27-d went into effect on November 1, 2021.

The NYSDOL published its proposed regulations relating to Section 27-d on December 22, 2021.[98] The proposed regulations contained additional clarifications and definitions with respect to the logistics of the formation, composition, and rights of the workplace safety committees.

A. Coverage and Applicability

With regard to the applicability of Section 27-d to employers with ten or more employees, the proposed regulations clarified that an employer's number of employees only takes into account those employees who are employed within New York State.[99] The proposed regulations further clarified that employees on leave, either paid or unpaid, sick leave, leaves of absence, or any other type of "temporary absence" must be counted as long as the employer has a reasonable expectation that the employee will return to active employment.[100] However, if there is no employment relationship (*e.g.*, if the employee is laid off or terminated, whether temporarily or permanently) the individual is not counted toward the ten-employeee threshold.[101] The proposed regulations also affirmed that part-time, newly hired, temporary, and seasonal employees must be counted.[102] Lastly, employees who are jointly employed by more than one employer are to be counted by each employer, whether or not they are on the employer's payroll records.[103]

96. N.Y. Senate Bill No. 6768. Reg. Sess. 2021-2022 (2021).
97. *Id.*
98. *See generally* 51 N.Y.S. Reg. 18 (Dec. 22, 2021).
99. *Id.* at 19.
100. *Id.*
101. *Id.*
102. *Id.*
103. 43 N.Y. Reg. 18 (Dec. 22, 2021).

B. Establishment of Workplace Safety Committees

NYLL 27-d provides "employers shall permit employees to establish and administer a joint labor-management workplace safety committee, but not more than one committee per worksite."[104] Accordingly, the law does not, by its plain meaning, impose an affirmative obligation on employers to create such committees, but rather an entitlement and protection for employees that wish to form such a committee in accordance with the new law. The regulations seem to have affirmed this interpretation.

In addition, NYLL 27-d provides that an employer that already has a workplace safety committee that is otherwise consistent with the requirements of the law and regulations, need not create an additional safety committee.[105] However, the law also provides that "committees representing geographically distinct worksites" may be formed "as necessary."[106]

The proposed regulations stated that "workplace safety committees may be established for each worksite following a written request for recognition by at least two non-supervisory employees who work at the worksite."[107] The proposed regulations defined "non-supervisory employee" as "any employee who does not perform supervisory responsibilities, which includes but is not limited to the authority to direct and/or control the work performance of other employees" and excludes "managerial and executive employees."[108] "Multiple requests" for committee recognition must be combined and treated as a single request to form a committee.[109]

Upon receipt of a request for recognitions, employers must "respond to the request with "reasonable promptness," however, the proposed regulations did not further define what will constitute "reasonable promptness."[110] The comments to the proposed regulations recognized that circumstances surrounding recognition may not align to a simple deadline, and therefore provide some flexibility for what may be "reasonable."

104. N.Y. LAB. LAW § 27-d (Consol. 2023).
105. *Id.*
106. *Id.* § 27-d(2).
107. 43 N.Y. Reg. 18 (Dec. 22, 2021).
108. *Id.*
109. *Id.*
110. *Id.*

The proposed regulations further provided that requests for committee recognition received *after* a committee has been recognized must be denied and referred to the committee itself.[111] In addition, requests for committee recognition where an employer already has a workplace safety committee that is otherwise consistent with the requirements of NYLL Section 27-d and the proposed regulations may also be denied and referred to the recognized committee.[112]

Under the proposed regulations, within five days of recognition of the workplace safety committee, the employer must provide "notice" to all employees at the worksite of the recognition.[113] The proposed regulations defined "notice" as "a written, posted, or electronic method of providing information to an individual that is reasonable calculated to provide actual notice but shall not require acknowledgment of receipt."[114] Accordingly, under the proposed regulations, it seems that employers have some flexibility with how exactly to comply with the notice requirement upon recognition of a workplace safety committee.

C. Selection and Composition of Workplace Safety Committee Members

NYLL 27-d was clear that employers are prohibited from interfering with the selection of non-supervisory employee members, however, the proposed regulations provided additional information and guidance in this regard.

Workplace safety committees must be comprised of at least two-thirds non-supervisory employees and have at least one employer representative.[115] The proposed regulations further clarified that the ratio of non-supervisory employees to employer representatives cannot be less than two non-supervisory employees to one employer representative at any given time.[116] The proposed regulations also set a maximum number of members of such committees of either twelve members (inclusive of non-supervisory and employer representatives), or one-third of the total number of employees at a

111. *Id.*
112. 43 N.Y. Reg. 18 (Dec. 22, 2021).
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*

worksite, whichever is fewer.[117] The proposed regulations also considered situations where a worksite has fewer than ten employees, in which case such workplace committee shall have three members.[118] The committees must be co-chaired by a non-supervisory employee and an employer representative.[119] The employer representative may be a non-supervisory employee, an officer, the employer or "other representative."[120]

In terms of selection of non-supervisory members, the proposed regulations provided that where there is a collective bargaining agreement in place, the non-supervisory members of the committee shall be selected by the employee representative, who may be any non-supervisory employee or employee covered by the collective bargaining agreement.[121] Where the worksite does not have a collective bargaining agreement in place, the non-supervisory employees must be selected by and amongst the non-supervisory employees of the employer.[122] The proposed regulations provided the following non-exhaustive list of examples of methods to select such non-supervisory employees: self-selection, nomination by co-workers and elections.[123]

The proposed regulations also limited non-supervisory employees to membership of one workplace safety committee for the same employer, in the event that the employer has more than one workplace safety committee for distinct worksites (as is permitted by the law and proposed regulations).[124]

D. Other Rules

The proposed regulations provided other "rules" that apply to the administration of such workplace safety committees, including that the workplace safety committee may "establish rules or bylaws, provided that such operating procedures are consistent with the [proposed regulations] and [New York Labor Law Section 27-d]."[125] Rules and bylaws may include, but are not limited to addressing issues such as selection of new members, terms of members and training of new

117. 43 N.Y. Reg. 18 (Dec. 22, 2021).
118. *Id.*
119. *Id.*
120. *Id.*
121. 51 N.Y. Reg. at 19.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

members. The proposed regulations were clear that bylaws that "exceed or conflict with tasks authorized under" NYLL Section 27-d(4) (which outlines a list of authorized duties of such committees), shall be considered *ultra vires*.[126]

The proposed regulations stated that workplace safety committees "may take action as a committee in a manner consistent with any rules or procedures adopted by the committee."[127] Where no rules or procedures are adopted by the committee, the committee can only act by a majority vote.[128]

E. Training

NYLL 27-d referenced training for committee members. The proposed regulations addressed this with additional detail. Under the proposed regulations, workplace safety committees may provide an "official training opportunity" for committee members, however, such training cannot exceed four hours in any calendar year for any member.[129] The proposed regulation confirmed that such "official training" must be without loss of pay for committee members.[130]

F. Meetings

The statute also discussed the right of committees to meet on a quarterly basis.[131] The proposed regulations provided that workplace safety committees must be scheduled in accordance with any rules adopted by the committee, or otherwise by agreement of the co-chairs.[132] Such meetings must be scheduled at times that do not unreasonably conflict with the employer's business operations.[133] Such quarterly meetings may be conducted for no longer than two work hours in total for all meetings *per quarter*.[134] Under the proposed regulations, time spent during work hours for any such meetings is considered "hours worked," which will essentially require payment for such time and counting such time towards overtime.[135] The proposed regulations further clarified that nothing therein "shall restrict a

126. 51 N.Y. Reg. at 19.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. 51 NYS Reg. at 19.
132. 43 N.Y. Reg. at 18.
133. *Id.*
134. *Id.*
135. *Id.*

workplace safety committee's ability to conduct additional meetings beyond the meeting or meetings that consist of two work hours in total per quarter," *but* any additional time or meetings outside of this two hour per quarter entitlement must be conducted outside of work hours and do not constitute hours worked, except where otherwise permitted by the employer.[136]

In addition, the proposed regulations provided that nothing therein shall be construed to "restrict an employer's ability to prohibit the performance of committee duties during the work hours, except during quarterly committee meetings," and that such committee work and matters, aside from the quarterly meetings, "may not interfere with the performance of their work responsibilities."[137]

G. Employer Obligations

In what appears to be an effort to clearly delineate an employer's obligations under this new law, the proposed regulations contained a section headed "employer obligations" and provide an enumerated list.[138]

After the establishment of a workplace safety committee, employers must respond, in writing, to each safety and health concern, hazard, complaint and other violations raised by the committee or one of its members within a reasonable period of time.[139] Employers must also respond to a request for policies or reports that relate to the duties of the workplace safety committee (as outlined in NYLL Section 27-d(4)) from a workplace safety committee or one of its members within a period of time as well.[140] Additionally, employers must provide notice, where "practicable" and where not otherwise prohibited by law, to the workplace safety committee and its members ahead of any visit at the worksite by a governmental agency enforcing safety and health standards.[141]

Employers must also appoint an "employer representative" to serve on the committee (as discussed above), permit members of the committee to attend the quarterly committee meeting(s), official training, and not interfere with the performance of the duties of the

136. *Id.*
137. 43 N.Y. Reg. at 18.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*

workplace safety committee or its members as specifically and explicitly authorized.[142]

Finally, the proposed regulation also made clear that employers are not required to disclose information or documentation to the workplace safety committee or committee member where such disclosure would be prohibited by law, contains personally identifiable information (as defined by the New York Labor Law, Section 203-d), and is outside of the scope of the information or documentation entitled to under the specific authorized duties provision in the law.[143]

C. Appellate Division Holds COVID Related Retaliation Claims Are Preempted by National Law

In February 2021, New York State Attorney General, Letitia James, commenced litigation against Amazon alleging that Amazon failed to adequately prioritize hygiene, sanitation, and social distancing at its fulfillment center and delivery station in New York City.[144] The Complaint additionally alleged that Amazon unlawfully discharged employees in its New York City operations for complaining about conditions they perceived to be unsafe.[145] The Complaint asserted causes of action under New York Labor Law Sections 200, 215, and 740, all of which "relate to the obligations of New York businesses to adequately protect the health and safety of employees and to refrain from discrimination or retaliation against employees who complain about potential NYLL violations."[146]

In response, Amazon moved to dismiss the Complaint arguing that the causes of action asserted were preempted by federal law, specifically the Occupational Safety and Health Act ("OSH Act") and the National Labor Relations Act (NLRA). Amazon argued that the N.Y. Labor Law Section 200 claims were preempted by the OSH Act and that the N.Y. Labor Law Section 215 and 740 claims were preempted by the NLRA.[147] The motion court disagreed and denied Amazon's motion to dismiss.[148]

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142. 43 N.Y. Reg. at 18.

143. *Id.*

144. People v. Amazon.com, No. 450362/2021, 2021 WL 4812480, at *4 (N.Y. Sup. Ct. Oct. 12, 2021).

145. *Id.*

146. *Id.*

147. *Id.* at *7, *14.

148. *Id.*

Amazon appealed the motion court's decision to the Appellate Division First Department, one of New York's intermediate courts of appeal.[149] The First Department unanimously reversed the lower court's decision. The First Department held that the claims pursuant to Section 215 and 740 *were* preempted by the National Labor Relations Act (NLRA) because the alleged retaliation was based on employees' participation in concerted activities—*i.e.* opposing working conditions.[150] Because opposing working conditions is protected concerted activity under the NLRA, the Court held that the National Labor Relations Board (NLRB), "and not the states, should serve as the forum for disputes arising out of the conduct."[151] Alternatively, the Appellate Division held that even if the conduct underlying the Section 215 and 740 claims was only "arguably protected" by the NLRA, dismissal on grounds of preemption was appropriate due to the fact that there was an NLRB Charge pending against Amazon which raised similar challenges.[152]

With respect to the State's claim Labor Law Section 200, that cause of action was dismissed as moot.[153] Because the Section 200 claim was premised on Amazon's alleged failure to adopt and implement COVID-19 policies that comported with expired guidance from New York State, the First Department held there was no longer a live controversy with respect to the Section 200 claim.[154]

V. EXPANSIONS TO NEW YORK WHISTLEBLOWER PROTECTIONS

On October 28, 2021, Governor Kathy Hochul signed legislation that significantly expanded the scope of New York Labor Law Section 740 (NYLL 740), the state's "whistleblower" protection law covering all private sector employees.[155] Several changes to the law went into effect

149. People v. Amazon.com, 169 N.Y.S.3d 27 (App. Div.1st Dep't May 10, 2022).

150. *Id*. at 29.

151. *Id.*

152. *Id.*; *see also* Hannah K. Redmond, *Appellate Division Holds General's COVID-19 Retaliation Claims are Preempted by Federal Law*, BOND, SCHOENECK & KING PLLC (May 17, 2022), https://www.bsk.com/news-events-videos/appellate-division-holds-attorney-general-rsquo-s-covid-19-retaliation-claims-are-preempted-by-federal-law.

153. *Amazon.com*, 169 N.Y.S.3d at 29.

154. *Id.*

155. N.Y. Senate Bill No. 4394A, 244th Sess. (2021). https://www.nysenate.gov/legislation/bills/2021/S4394.

on January 26, 2022.[156] Most notably, employees and independent contractors are now protected for reporting employer activity that they reasonably believe violates *any* law, regardless of whether the law relates to public safety or whether the activity was an actual violation.

In general, employee whistleblower protection laws like NYLL 740 prohibit employers from retaliating against employees who disclose illegal or improper actions by the employer. Prior to this amendment, NYLL 740 was relatively narrow. It protected only those employees who disclosed employer activity that violated a law relating to public health and safety or healthcare fraud. This means that an employee who disclosed any other form of unlawful activity — such as consumer fraud or tax evasion, for example — had no protection from retaliation under NYLL 740. The law prior to this legislation did not cover independent contractors. Courts also had held that NYLL 740 required proof of an actual violation of law in order for the employee to sustain a cause of action.

Under the revised law, the definition of "employee" now includes former employees and independent contractors.[157] Similarly, the definition of what constitutes a "law, rule, or regulation" has been expanded to include more governmental actions than under the prior law, such as executive orders and judicial or administrative decisions, rulings, and orders.[158]

Additionally, a greater number of employer actions are now considered "retaliatory." The revised law clarifies that for employer actions to be "retaliatory," they need not be "personnel" actions, likely because former employees and independent contractors are now covered. In addition to actions that would commonly be understood to constitute retaliation, such as actual or threatened termination, suspension or demotion, employers may not (1) take action that would harm a former employee's current or future employment, such as "blackballing" within an industry; or (2) report or threaten to report the immigration status of the employee or the employee's family member.[159]

Under the amendments, the scope of protected activity was also significantly broadened. Employees will now be protected if they disclose or threaten to disclose to a supervisor or public body an activity, policy or practice that the employee reasonably believes (1) violates a law, rule or regulation; or (2) poses a substantial and specific danger to public

156. *Id.*
157. N.Y. LAB. LAW § 740(1)(a) (McKinney 2022).
158. *Id.* § 740(1)(c).
159. *Id.* § 740(1)(e).

health and safety.[160] In the case of the former, the employee will not have to establish that the employer actually violated a law; the employee's reasonable belief is enough.[161] Employees will also be protected for disclosing an employer activity that presents a danger to public safety, even if that activity is not unlawful.[162]

Under the prior law, employees were required to first notify their employer of the alleged violation before reporting it to a public body. Under the revised law, an employee must only make a "good faith effort" to notify the employer, and that is only if no exception applies.[163] The employee will not have to make a good faith effort to notify the employer if the employee reasonably believes that there is: imminent danger to public safety; if the employee reasonably suspects that the employer will destroy evidence; if the employee reasonably believes physical harm would result; or if the employee reasonably believes the employer is already aware of the activity and will not correct it.[164] In practice, these exceptions will likely remove the employee notice requirement in most cases.

The revised law also increased the statute of limitations from one year to two years, providing employees with an additional year to file a lawsuit alleging a violation of NYLL 740. The parties are also entitled to a jury trial.[165] The amendments also provide employees with opportunities to obtain punitive damages and other new forms of relief. Employers may be liable for punitive damages if the violation was willful, malicious, or wanton, front pay, and the possibility of a civil penalty up to $10,000. Finally, the law now imposes new notice requirements upon employers.[166] Employers are now required to post a notice of employees' rights under the law in conspicuous places customarily frequented by employees and applicants for employment.[167]

Based on the law's significant expansion, New York is among the states that provide the broadest protection to workplace whistleblowers. Other states with similar laws, such as New Jersey, have seen a significant rise in related litigation. Several of the revisions, such as including

160. *Id.* § 740(2)(a).
161. *Id.*
162. LAB. LAW § 740(2)(a).
163. *Id.* § 740(3).
164. *Id.*
165. *Id.* § 740(4)(a)–(b).
166. *Id.* § 740(5)(f) – (g). *See also id.* § 740(8).
167. LAB. LAW § 740(8).

"executive orders" in the definition of "law," appear to have been in response to developments during the COVID-19 pandemic.

VI. NOTICE TO EMPLOYEES OF ELECTRONIC MONITORING

On November 8, 2021, Governor Kathy Hochul signed into law an amendment to the New York Civil Rights Law, that requires any private individual or entity with a place of business in the state to provide notice to employees for certain types of electronic monitoring.[168] The law went into effect on May 7, 2022, and forced employers to determine the scope of their electronic monitoring activities, update their policies, and issue notices to ensure compliance with the new law's requirements.

The law applies broadly to telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage "of or by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio, or electromagnetic, photoelectronic or photo-optical systems."[169] Employers that "monitor or otherwise intercept" their employees' telephone calls, email or internet access or usage as defined under the law must provide written notice to all employees upon hiring and post a notice of electronic monitoring in a "conspicuous place which is readily available for viewing" by affected employees.[170] The law requires that the written notice advise employees

> that any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means.[171]

The law further requires that new employees acknowledge receipt of this notice either in writing or electronically.[172]

The law does not, however, apply to processes where the monitoring activity (1) is designed to manage the type or volume of email, telephone, or internet usage; (2) is not targeted to monitor a particular employee; and

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168. N.Y. Senate Bill No. 2628. Reg. Sess. 2021-2022 (2021). https://www.nysenate.gov/legislation/bills/2021/S2628.

169. N.Y. CIV. RIGHTS LAW § 52-c.

170. *Id.*

171. *Id.*

172. *Id.*

(3) is performed solely for the purpose of computer system maintenance and/or protection.[173] The law does not provide for a private right of action but is enforced by the New York State attorney general. Failure to comply with the law could result in financial penalties of $500 for the first offense, $1,000 for the second offense and $3,000 for the third and each subsequent offense.[174]

Due to the law's broad definition, most employers in New York have been impacted by the new restrictions and requirements. The notice requirements under the law apply to Acceptable Use policies and Bring-Your-Own-Device (BYOD) programs and is not strictly limited to employees who are provided with employer-issued devices. Employers must provide notice to employees regardless of whether they participate in their employer's BYOD program or use a personal device to transmit email through a corporate email server or access the internet through the employer's internet connection.

In order to comply with the law, employers have been required to first determine whether their employee monitoring activities trigger the obligations under the law and identify newly hired employees that will be subject to electronic monitoring. Employers are required to draft notice language that conforms with the requirements contained in the law, promotes transparency and addresses employee relations concerns.

In the context of data privacy, New York's electronic monitoring law is another example of state legislation enacted to increase transparency and promote data privacy. The law was implemented in an attempt to strike a delicate balance between an employee's right to privacy and an employer's right to monitor employee activities. As a result, employers in New York must explicitly notify their employees of any electronic monitoring.

VII. AMENDMENTS TO STRENGTHEN SEXUAL HARASSMENT PROTECTIONS FOR EMPLOYEES

In March of 2022, New York passed significant legislation to further expand sexual harassment protections for employees.[175] This suite of

173. *Id.*

174. N.Y. CIV. RIGHTS LAW § 52-c.

175. GIANELLE DUBY, NEW YORK LEGISLATURE PASSES SIGNIFICANT AMENDMENTS TO STRENGTHEN SEXUAL HARASSMENT PROTECTIONS FOR EMPLOYEES, INFORMATION MEMO TO LABOR AND EMPLOYMENT LAW 1 (2022), www.bsk.com/uploads/03-09-22-New-York-Legislature-Passes-Significant-

legislation was intended to ensure that all public and private employees are treated in a fair manner and have the necessary resources available to seek accountability from their employers.[176] Some bills included in the legislative package became law, while others never made it to the governor's desk.

On March 16, 2022, Governor Kathy Hochul signed three bills into law that effectively amended the New York Human Rights Law (HRL) to increase sexual harassment protections for employees in New York. The amendments include the expansion of the definition of "employer," inclusion of the release of an employee's personnel file as possible retaliation, and the establishment of a toll-free confidential hotline for complainants of workplace sexual harassment. Each amendment is discussed in more detail below.

Assembly Bill A.2483B, originally introduced as S.3395A in the 2021 session, was signed into law on March 16, 2022, and took effect immediately upon the Governor's signature.[177] The law amended the definition of "employer" under the HRL. The definition now explicitly includes the State and all public employers as employers subject to the HRL.[178] The legislation further clarified that the State shall be considered the direct employer of elected and appointed officials and their staff for the purpose of the HRL and extends this provision to localities as well.[179]

Senate Bill S.5870 was signed into law on March 16, 2022 and took effect immediately upon the Governor's signature.[180] The law amended the HRL to include the release of an employee's personnel file to possibly constitute "retaliation" prohibited under law, except in cases where such release is necessary to respond to a complaint, civil or criminal action, or judicial or administrative proceeding.[181] The legislation clarified that prohibited retaliation includes disclosing an employee's personnel files because the employee opposed any practices forbidden under the HRL or because the employee filed a complaint, testified or assisted in any proceeding.[182] The legislation also provided additional recourse for victims

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Amendments-to-Strengthen-Sexual-Harassment-Protections-for-Employees-Labor-IMind.pdf.

176. *Id.*

177. N.Y. Assembly Bill No. 2483B. Reg. Sess. 2021–2022 (2021). https://www.nysenate.gov/legislation/bills/2021/A2483.

178. *Id.*

179. *Id.*

180. N.Y. Senate Bill No. 5870. Reg. Sess. 2021–2022 (2021). https://www.nysenate.gov/legislation/bills/2021/S5870.

181. *Id.*

182. *Id.*

of unlawful retaliation by allowing them to file a complaint with the Attorney General, who may then commence an action in state Supreme Court if the employer is found to be in violation of Section 296(7) of the HRL.[183]

Assembly Bill A.2035B, originally introduced as S.812A in the 2021 session, was signed into law on March 16, 2022 and took effect 120 days from the Governor's signature.[184] The law amended the HRL to establish a toll-free confidential hot line for complainants of workplace sexual harassment.[185] The legislation required the Division of Human Rights to establish a hotline intended to connect complainants with experienced pro-bono attorneys who will help make them aware of their legal rights and advise them on the specifics of their individual cases.[186] The legislation provided that the hotline is to be accessible, at a minimum, Monday through Friday from 9 a.m. to 5 p.m.[187] On July 20, 2022, the hotline become officially operational and can now be reached at 1-800-HARASS-3 (1-800-427-2773).[188]

Several pieces of legislation included as part of the package were not enacted during the survey period. Each bill is discussed in more detail below.

Senate Bill S.766 amends New York General Obligations Law to prohibit "no-rehire" clauses in settlement agreements for employees and independent contractors that have filed a claim against their employer.[189] Such clauses bar an aggrieved employee or contractor from ever applying or working for the defendant employer again. The legislation renders settlement agreements unenforceable if they contain a no-rehire clause.[190] The legislation, however, would not prohibit any termination of employment mutually agreed upon as part of a settlement, nor would it automatically require an employer to rehire an employee with whom it had previously settled a case against.[191] This bill was passed by the Senate on March 1, 2022.

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183. *Id.*

184. N.Y. Assembly Bill No. 2035B. Reg. Sess. 2021–2022 (2021). https://www.nysenate.gov/legislation/bills/2021/a2035.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Division of Human Rights Toll-Free Sexual Harassment Hotline*, NEW YORK STATE (last visited Jan. 12, 2024), https://dhr.ny.gov/sexual-harassment-hotline.

189. N.Y. Senate Bill No. 766, 244th Sess., (2021) (enacted).

190. *Id.*

191. *Id.*

Senate Bill S.849A amends the Civil Practice Law and Rules by extending the statute of limitations for actions based upon unlawful discriminatory practices in employment from three years to six years.[192] This would double the current amount of time an individual has to file a lawsuit in court alleging unlawful discrimination, including discrimination in the form of harassment. The bill was passed by the Senate on March 1, 2022.

Along the same lines, Senate Bill S.566A amends the HRL by extending the statute of limitations for filing complaints related to alleged unlawful discriminatory practices with the New York State Division of Human Rights (NYSDHR) from one year to three years following the alleged discriminatory practices.[193] The three-year statute of limitations is consistent with the current law for unlawful discriminatory practices that constitute sexual harassment in employment. Currently, the law provides a three-year statute of limitations for claims of sexual harassment to be brought before the DHR. As a result of the amendment, all unlawful discrimination claims could be brought before the DHR within three years. The bill was passed by the Senate on March 1, 2022.

Senate Bill S.738, the Let Survivors Speak Act, amends New York General Obligations Law, in relation to violations of non-disclosure agreements (NDA) in certain settlement agreements involving sexual harassment and discrimination.[194] NDAs are commonly included in settlement agreements involving workplace disputes, including issues such as sexual harassment and discrimination claims. Such agreements also frequently include provisions that require a complainant to pay liquidated damages if they violate the agreement by disclosing information covered by the NDA provision. The Let Survivors Speak Act prohibits any settlement or other resolution of a claim involving sexual harassment or any other form of unlawful discrimination from including any term or condition that requires a complainant to pay the defendant liquidated damages in the event the plaintiff violates an NDA.[195] The Let Survivors Speak Act was passed by the Senate on March 1, 2022.

192. N.Y. Senate Bill No. 849A, 244th Sess., (2021) (enacted).
193. *Id*.
194. N.Y. Senate Bill No. 738, 244th Sess., (2021) (enacted).
195. *Id.*

VIII. UPDATES TO NEW YORK STATE MODEL SEXUAL HARASSMENT POLICY

In a further effort to strengthen the protections against sexual harassment in the workplace, the NYSDOL and NYSDHR collectively published a revised sexual harassment prevention model policy.[196] The model policy revises the prior version of the State's model policy, which was released in 2018 when N.Y. Labor Law Section 201-g was enacted to require employers in New York to adopt the model policy or draft a policy of their own that met or exceeded the standards established in the state's policy. Section 201-g requires the DOL to revisit and revise its model policy every four years. Though the first review was scheduled to occur in 2022, the proposed revised model policy was not released until January 2023. The final version of the revised model sexual harassment policy was released on April 11, 2023.

At the outset, it is important to note that the underlying law in New York did not change. Though the state released an updated sexual harassment prevention policy, the legal standards applicable to sexual harassment in New York are unaffected. The new model policy is much lengthier than the prior version and includes a number of changes.[197] The most notable changes include: (i) a new focus on gender identity discrimination, including a discussion of the gender spectrum and the definitions of cisgender, transgender and non-binary;[198] (ii) expounding on bystander intervention, including five suggested methods for intervening in a situation involving sexual harassment; [199](iii) a more expansive discussion of discrimination in general, as opposed to focusing squarely on sexual harassment and retaliation;[200] (iv) providing additional illustrations of what constitutes sexual harassment and retaliation;[201] and (v) references to harassment in remote work settings.[202]

196. *Sexual Harassment Prevention Model Policy and Training*, NEW YORK STATE (last visited Mar. 10, 2024), https://dol.ny.gov/news/new-york-state-department-labor-unveils-strengthened-sexual-harassment-prevention-policy.

197. *See* NY STATE, MODEL PREVENTION POLICY (2023), https://www.ny.gov/combating-sexual-harassment-workplace/sexual-harassment-prevention-model-policy-and-training.

198. *Id.* at 3-4.

199. *Id.* at 8

200. Id at 2-3.

201. Id at 4, 6.

202. NY STATE, MODEL PREVENTION POLICY 6 (2004).

The revised policy also includes references to the State's hotline for reporting concerns related to sexual harassment.[203] Finally, the revised policy includes additional information about the external remedies available to employees who believe they have been subjected to unlawful harassment.[204] While much of this information was already contained in the prior version of the model policy, the revised version is more detailed and contains additional information to employees.

IX. ENJOINMENT OF EMPLOYEE REPRODUCTIVE RIGHTS NOTICE PROVISION

On March 29, 2022, a federal court in upstate New York permanently enjoined New York State from requiring employers to include a government-issued "notice" of workers' rights and remedies in their employee handbooks regarding reproductive health decisions.

The original law, New York Labor Law Section 203-e (NYLL Section 203-e), was enacted in November of 2019, and prohibits employers from discriminating or taking retaliatory action against employees based on their reproductive health decisions, including using or accessing a particular drug, device or medical service.[205] The law also required employers to post a notice of these employee rights and remedies in their employee handbooks.[206] Judge McAvoy of the Northern District of New York struck down this particular notice requirement in his Decision and Order on March 29, 2022.[207]

In a case captioned *CompassCare v. Cuomo*, several religious organizations sought injunctive relief against the state, claiming that the notice provision in NYLL Section 203-e violates the First Amendment of the United States Constitution.[208] These Plaintiffs contended that the struck-down requirement compelled them to convey a message with which they disagree (specifically, as it undermines their purpose as organizations opposed to abortion).[209] In response, the State of New York attorneys argued that the notice provision only requires inclusion of factual information in an employee handbook concerning the existence of rights under New York law.[210] Moreover, state representatives argued

203. *Id.* at 10.
204. *Id.* at 9-11.
205. N.Y. LAB. LAW § 203-e.
206. *Id.* § 203-e(6).
207. CompassCare v. Cuomo, 594 F. Supp. 3d 515, 517 (N.D.N.Y 2022).
208. *Id.*
209. *Id.* at 519.
210. *Id.* at 520.

that covered employers are not required to take a position on the statute or its protections, and the law does not even require employers to provide employees with written handbooks in the first place.[211]

The Court agreed with the Plaintiffs and found that the law's notice provision violates the First Amendment.[212] More specifically, the Court found that the notice requirement compelled the plaintiffs to deliver a message contrary to their religious beliefs as they relate to reproductive health decisions.[213] The Court reasoned that the Plaintiffs' employee handbooks contain rules that govern the workplace, the values of the organizations and the religious perspective that guides the organizations' operations.[214] Therefore, the Court held: "[R]equiring that Plaintiffs also include in those handbooks a statement that the law protects employees who engage in behavior contrary to that promoted by the Plaintiffs would compel them to promote a message about conduct contrary to their religious perspective."[215]

In applying "strict scrutiny" analysis of the Constitutional issue, the Court found that, although the state has a compelling interest in protecting employee privacy involving reproductive health decisions, state officials failed to demonstrate that the notice requirement was the least restrictive means of achieving that compelling interest.[216] In reaching this conclusion, the Court highlighted evidence showing that the state has previously offered information on workers' rights and remedies "in a variety of other ways," besides mandatory handbook postings.[217] These other ways included, according to the Court, "advertising the [statutory] provision generally, producing posters to be placed in workers' view at the job site, and in general statements of workers' rights provided by the [New York] Department [of Labor] itself."[218] As such, the Court found less restrictive methods were available that would not require the Plaintiffs to produce such speech themselves or include the speech in a handbook produced under the employer's endorsement.[219]

Notably, Judge McAvoy's ruling did not invalidate the law's protections for employees and their reproductive decisions—those anti-discrimination and anti-retaliation protections remain in place. And while

211. *Id.*
212. *CompassCare*, 594 F. Supp. 3d at 529.
213. *Id.* at 527.
214. *Id.*
215. *Id.*
216. *Id.* at 528.
217. *CompassCare*, 594 F. Supp. 3d at 529.
218. *Id.*
219. *Id.*

the statute's "notice" requirement was deemed to violate the First Amendment, the decision does not compel covered employers to remove any existing handbook language. The state appealed the court's decision on April 28, 2022.[220]

X. UPDATES TO NEW YORK LABOR LAW 206-C

On December 9, 2022, Governor Hochul signed Senate Bill S4844B into law, which amended New York Labor Law Section 206-c – "Rights of Nursing Employees to Express Breast Milk."[221] Section 206-c applies to all private and public employers in New York, regardless of size. As amended, the law requires employers to provide reasonable unpaid break time or permit employees to use paid break time or meal period to allow employees to express breast milk for nursing a child each time an employee has a reasonable need to express breastmilk for up to three years following childbirth.[222]

The amendments also set forth minimum requirements for lactation space and require employers to make such a space available to nursing employees.[223] The space provided must contain a chair, working surface, nearby access to clean running water, and an electrical outlet, if the workplace is one with electricity.[224] The space must be well lit, shielded from view, and free from intrusion of others.[225] If the room is not a dedicated lactation break room, it must also be available to nursing employees whenever needed.[226] If the workplace has access to a refrigerator, employers are required to allow employees access to the refrigerator for the purpose of storing expressed breast milk.[227]

The amendments to Section 206-c became effective on June 7, 2023, and require employers to establish and provide a written policy to all employees upon hire, annually, and upon employees' return from leave following the birth of a child.[228]

220. Notice of Appeal, April 28, 2022, 1:19-cv-01409 (TJM/DJS).
221. N.Y. LAB. Law § 206-c.
222. *Id*.
223. *Id*.
224. *Id*.
225. *Id.*
226. N.Y. LAB. Law § 206-c.
227. *Id*.
228. *Id*.

CONCLUSION

Throughout the past two years, the New York State Legislature, various state agencies, and the courts have enacted laws and issued decisions and guidance having a significant impact on both employees and employers. These notable changes are evidence of the continuous efforts to strengthen employee rights and protections across the state. The changes highlighted in this *Survey* represent only a selection of important developments. Employers should continue to engage with legal counsel to monitor any legal changes affecting their workplace to ensure full compliance with all applicable laws.