NEW YORK LABOR AND EMPLOYMENT LAW

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INTRODUCTION

This year's New York Labor and Employment Law *Survey* article encompasses the one-year period from July 2023 through June 2024. In typical fashion, New York's legislature, state agencies, and courts were active during the *Survey* period, implementing 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, amendments further strengthening employees' rights in the workplace, repealing of industry-specific COVID-19 mandatory vaccination laws and state-wide paid COVID-19 leave, and impactful litigation occurring in both the Second Circuit and New York State courts.

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.[1] However, the federal minimum wage has remained at $7.25 per hour since 2009.[2] New York State is divided into three regions for minimum wage purposes—New York City; Nassau, Suffolk, and Westchester counties; and the remainder of New York State (i.e., "upstate" New York).[3] As increases to minimum wage are made by region, the effective minimum wage rates differ by location.[4] It is the employee's location at the time the work is

1. *New York State's Minimum Wage*, N.Y. STATE, https://www.ny.gov/new-york-states-minimum-wage/new-york-states-minimum-wage (last visited Oct. 29, 2024).

2. *Minimum Wage*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/whd/minimum-wage (last visited Oct. 29, 2024).

3. *See* N.Y. LAB. LAW § 652(1-a) (McKinney 2023); N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.1 (2022).

4. *See* LAB. § 652(1-a).

performed that determines the applicable minimum wage.[5] Effective January 1, 2024, the minimum hourly wage in New York increased from $15 to $16 in downstate New York, and from $14.20 to $15 in upstate New York.[6] In all regions of New York, the minimum wage will increase by $0.50 on January 1, 2025, and by another $0.50 on January 1, 2026.[7]

B. Increase to New York Exempt Salary Levels

Effective January 1, 2024, the New York State Department of Labor ("NYSDOL") adopted the proposed regulations in the State Register, raising the minimum weekly salary to qualify for the executive and administrative exemptions. On January 1, 2024, the minimum base weekly salary in downstate New York increased to $1,200.[8] On January 1, 2025, it will increase to $1,237.50, and to $1,275 on January 1, 2026.[9] The minimum base salary in upstate New York will increase to $1,124.20, $1,161.65, and $1,199.10 in each of the next three years, respectively.[10] The salary thresholds will be updated every three years to reflect current earnings data, beginning July 1, 2027.[11]

The NYSDOL's final regulations also include increases to the hourly tip credits that employers in the hospitality industry may use for compensation of food service workers and service employees, effective January 1, 2024.[12] In downstate New York, food service workers' tip credit is $5.35 with a $10.65 minimum wage, and for service employees, it is a $2.65 tip credit and a $13.35 minimum wage.[13] In upstate New York, food service workers tip credit is $5.00 and $10.00 minimum wage, and for service employees, it is a $2.50 tip credit and a $12.50 minimum wage.[14] The NYSDOL's final regulations also provide for increases to the hourly tip credits in the hospitality industry when the minimum wage increases again in both 2025 and 2026.[15]

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5. *See id.*
6. *See id.*
7. *See id.*
8. N.Y. COMP. CODES R. & REGS. tit. 12, §141-3.2(c)(1)(i)(e)(1)–(2) (2023).
9. *Id.*
10. *Id.* § 141-3.2(c)(1)(i)(e)(3).
11. N.Y. LAB. LAW § 652(1-b) (McKinney 2023).
12. N.Y. COMP. CODES R. & REGS. tit. 12, § 146-1.3(a)–(b) (2023).
13. *Id.* §146-1.3(b)(1)–(2); *Id.* § 146-1.3(a)(1)(i)-(ii), § 146-1.3 (a)(2)(i)–(ii).
14. *Id.* § 146-1.3(b)(3), 146-1.3(a)(1)(iii), 146-1.3(a)(2)(iii).
15. *Id.* §146-1.3(a)–(b).

II. COVID-19 DEVELOPMENTS IN NEW YORK

A. Repeal of Mandatory Vaccination for Healthcare Workers

In August 2021, the New York State Department of Health ("NYSDOH") implemented regulations that required covered healthcare entities, including general hospitals and diagnostic and treatment centers, to ensure that their employees were fully vaccinated against COVID-19.[16] Pursuant to 10 NYCRR § 2.61—hereafter the "Regulation"—many healthcare workers and personnel were required to vaccinate against COVID-19. 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 . . . ."[17]

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, absent receipt of [a medical] exemption . . . [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."[18] The Regulation defined "personnel" as

> all 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.[19]

Under the Regulation, covered personnel could seek limited medical exemptions where "any licensed physician, physician assistant, 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 . . . ."[20] This was the only exemption set forth in the Regulation, notably excluding religious exemptions.[21]

16. *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 2.61 (2021).
17. *Id.* § 2.61(a)(1)(i).
18. *Id.* § 2.61(c)–(d).
19. *Id.* § 2.61(a)(2).
20. *Id.* § 2.61(d)(1).
21. *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 2.61 (2021).

Since its enactment in 2021, the Regulation has faced legal challenges in both federal and state court.[22]

On May 24, 2023, the NYSDOH announced that it would begin the process of repealing the COVID-19 vaccine requirement for workers at regulated health care facilities.[23] The NYSDOH stated that it would not commence any new enforcement actions of the Regulation; however, the NYSDOH still recommended that facilities "continue implement[ing] their own internal policies regarding the COVID-19 vaccination."[24]

On September 18, 2023, the NYSDOH filed a Notice of Adoption to repeal the Regulation and set the repeal to go into effect on October 4, 2023.[25] On October 4, 2023, the repeal became effective and the COVID-19 vaccine mandate for health care workers in New York was no longer in effect.[26]

The Regulation was repealed, in part, due to a letter from the Commissioner of the NYSDOH who recommended that the Regulation and related provisions should be repealed, subject to consideration by the Public Health and Health Planning Council.[27] Additionally within the letter, the Commissioner of the NYSDOH stated that the Department would immediately cease citing providers for failing to comply with the requirements of the Regulation.[28]

Although the NYSDOH has reportedly not enforced the Regulation since May 24, 2023, whether it will continue to pursue pre-existing violations remains to be seen.

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22. *See* A. v. Hochul, No. 1:21-CV-1009, 2021 U.S. Dist. LEXIS 177761, at *2 (N.D.N.Y. Sept. 14, 2021), *injunction granted*, 567 F. Supp. 3d 362 (2021), *injunction denied*, 586 F. Supp. 3d 136 (2022); We The Patriots USA, Inc. v. Hochul, 17 F.4th 266, 272 (2d Cir. 2021), *opinion clarified* in 17 F.4th 368 (2d Cir. 2021); Med. Pros. for Informed Consent v. Bassett, 185 N.Y.S.3d 578 (Sup. Ct.), *stay granted*, 2023 N.Y. App. Div. LEXIS 5205 (4th Dep't. 2023), *appeal dismissed*, 2023 N.Y App. Div. LEXIS 5205 (4th Dep't 2023).

23. Press Release, New York State Dep't of Health, New York State Department of Health Statement on Repealing the COVID-19 Healthcare Worker Vaccine Requirement (May 24, 2023), https://www.health.ny.gov/press/releases/2023/2023-05-24_statement.htm.

24. *See id.*

25. 38 N.Y. Reg. HLT-26-23-00001-A (Oct. 4, 2023).

26. *See id.*

27. Dear Admin. Letter from Eugene P. Heslin, First Deputy Comm'r and Chief Med. Officer to N.Y. Dep't of Health. (May 24, 2023).

28. *Id.*

B. Sunset of New York's Paid COVID-19 Leave

Included in the New York State Fiscal Year 2025 Budget Bill, which Governor Hochul signed into law on April 20, 2024, is the sunset of New York's COVID-19 Paid Emergency Leave ("Paid COVID-19 Leave").[29] Beginning on July 31, 2025, employers will no longer be required to provide employees with separate paid COVID-19 leave.[30]

As a reminder, under the Paid COVID-19 Leave Law, New York employers are required to provide employees with sick leave and job protection in the event that they need to stay home due to a quarantine order.[31] 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 employees who are subject to a mandatory or precautionary quarantine order issued by the State through the termination date of the order.[32] 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.[33] 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.[34] 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.[35] 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.[36]

Employers with one hundred or more employees, as well as most public employers, are required to provide at least fourteen days of job-

29. N.Y. Senate Bill No. 8305, 247th Sess. (2024); N.Y. Senate Bill No. 8306, 247th Sess. (2024).

30. N.Y. Senate Bill No. 8306.

31. N.Y. Senate Bill No. 8091, 243d Sess. (2020); Act of Mar. 18, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 25, at 43.

31. N.Y. Senate Bill No. 8091, 243d Sess. (2020); Act of Mar. 18, 2020, 2020 McKinney's Sess. Laws

32. *Id.* § 1(1)(a).

33. *Id.* § 1(1)(a)–(b).

34. *Id.*

35. *Id.* § 9.

36. *Id.* § (10).

protected paid sick leave throughout the duration of the quarantine order.[37]

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.[38] The law also includes anti-retaliation or anti-discrimination provisions for taking leave provided under the law, and also requires that an employer restores the employee to the same position, rate of pay, and other terms of employment that the employee had prior to taking leave.[39] 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 though remote access or other similar means are not eligible for the leave provided under this law.[40] Employees are also only eligible for leave up to three orders of quarantine.[41]

After July 31, 2025, at which time the Paid COVID-19 Leave Law will no longer be in effect, employees will need to use existing paid leave regimes to take time off to manage, care, or isolate for COVID-19. Until then, employers are required to provide Paid COVID-19 Leave to eligible employees in full compliance with the law.

III. EXTENSION OF STATUTE OF LIMITATIONS ON UNLAWFUL DISCRIMINATION CLAIMS

On November 17, 2023, Governor Hochul signed a bill amending Section 297 of the New York Executive Law.[42] The amendment, which took effect on February 15, 2024, extended the statute of limitations for filing complaints of unlawful discrimination with the Division of Human Rights ("DHR") to three years, and applies to all unlawful discriminatory practice claims that arise on or after the effective date.[43] Before the amendment, the New York State Human Rights Law

37. "An act providing requirements for sick leave and the provision of certain employee benefits when such employee is subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19." N.Y. Senate Bill No. 8091, 243d Sess. (2020); Act of Mar. 18, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 25, at 43 (definitions of "public employers" are included in the Bill).

38. *Id.* § 1.1(e).

39. *Id.* §§ 2, 3.

40. *Id.* § 13.

41. N.Y. STATE DEP'T OF LABOR, GUIDANCE ON USE OF COVID-19 SICK LEAVE (2021), https://coronavirus.health.ny.gov/system/files/documents/2021/01/guidanceonuseofcovid-19sickleave_0.pdf.

42. *See* N.Y. Senate Bill No. 3255, 246th Sess. (2023).

43. *Id*.

("NYSHRL") contained a one-year statute of limitations for all administrative claims of discrimination other than sexual harassment, which was three years.[44] As of February 15, 2024, the new statute of limitations for all claims filed with the DHR is three years.[45] Such claims include discrimination based on race, color, creed, national origin, citizenship or immigration status, age, sexual orientation, disability, military status, and other protected classes, as well as claims of unlawful retaliation under the NYSHRL.[46] The three-year statute of limitations is now consistent with the current law for unlawful discriminatory practices that constitute sexual harassment in employment.[47]

IV. NON-DISCLOSURE AGREEMENT RESTRICTIONS

On November 17, 2023, New York General Obligations Law 5-336 was amended to further restrict employers' use of non-disclosure or confidentiality provisions in settlement agreements when the factual foundation involves discrimination, harassment, or retaliation.[48] The amendment broadened the law's scope to include all harassment claims, all retaliation claims, as well as all discrimination claims, and applies to all agreements entered into after the effective date.[49] The amendment also extended the law's coverage to protect independent contractors.[50] The law was originally enacted to restrict certain terms from being included in release agreements involving claims of discrimination, harassment, or retaliation.[51] Further, it was intended to limit the use of confidentiality agreements that prevent victims of sexual harassment from disclosing the harassing conduct in a way that might prevent future harassment.[52] Section 5-336 continues to generally prohibit employers from requiring a non-disclosure provision in a release agreement involving claims of discrimination, unless confidentiality is the employee's preference.[53]

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44. N.Y. EXEC. LAW § 297(5) (McKinney 2022).
45. N.Y. EXEC. LAW § 297(5) (McKinney 2024).
46. *Id*. § 297(4)(c); *see also* N.Y. EXEC. LAW §§ 292, 296(1)(a), (3-a) (McKinney 2024).
47. EXEC § 297(4)(c).
48. *See* N.Y. GEN. OBLIG. LAW § 5-336(1)(a) (McKinney 2024).
49. *Id*. § 5-336(3).
50. *Id.* § 5-336(2).
51. *See id.* § 5-336(1)(a).
52. *See id*. § 5-336(2).
53. *See* GEN. OBLIG. LAW § 5-336.

Prior to the amendment, the restrictions regarding the use of non-disclosure agreements only applied to claims of unlawful discrimination. Now, employers are also prohibited from including them in settlements, agreements, and other resolutions involving claims of harassment or retaliation in violation of laws prohibiting discrimination.[54] In addition, settlements, agreements, and other resolutions involving claims of unlawful discrimination may not include provisions that require a complainant to make an affirmative statement or disclaimer that the complainant was not subject to unlawful discrimination; pay liquidated damages for violation of a non-disclosure or non-disparagement clause; or forfeit all or part of the consideration for the agreement for violation of a non-disclosure clause or non-disparagement clause.[55] In addition, the twenty-one-day period to consider the inclusion of a confidentiality provision in a pre-litigation settlement agreement is now waivable.[56]

V. VETO OF NON-COMPETE BILL

On December 26, 2023, Governor Hochul vetoed Senate Bill S3100, blocking the legislature's attempt to ban non-compete agreements across the State.[57] The proposed legislation sought to prohibit non-compete agreements and certain restrictive covenants and authorized covered individuals to bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated such prohibition.[58] The proposed legislation would ban essentially all non-compete agreements throughout New York State.[59] While Governor Hochul has been vocal about her support in banning non-compete agreements for low and middle-income workers, the proposed legislation was far too sweeping, and an agreement regarding an acceptable salary threshold could not be made.[60]

Presently, non-compete agreements are permissible in New York State, so long as they are reasonable in scope and no broader than necessary to protect a legitimate interest recognized by law, such as the protection of confidential and/or trade secret information, customer

54. *Id.* § 5-336(1)(a).
55. *Id*. § 5-336(3).
56. *Id*. § 5-336(1)(b).
57. *See* N.Y. Senate Bill No. 3100, 246th Sess., Veto 133 (2023).
58. *See id.*
59. *See id.*
60. *See id*.

relationships and goodwill.[61] While Senate Bill S3100 passed the New York State Senate on June 7, 2023, and passed the New York State Assembly on June 20, 2023, since an acceptable salary threshold could not be agreed upon, Governor Hochul ultimately vetoed the Bill.[62] The Legislature will now likely need to narrow the scope of the proposed legislation should it expect Governor Hochul to sign it.

VI. AMENDMENTS TO NY WARN REGULATIONS

Similar to its federal counterpart of the same name,[63] New York's Worker Adjustment and Retraining Notification ("WARN") Act[64] requires employers to provide early warnings of closures and layoffs to affected employees.[65] New York's WARN Act, which originally became effective in 2009, applies to private sector employers in New York State that employ fifty or more full time employees.[66] The Act is triggered if there is a closing affecting twenty-five or more employees, a layoff affecting at least 33% of full-time employees (affecting a minimum of twenty-five employees), a mass layoff affecting 250 full-time employees from a single employment site, or certain other relocations and covered reductions in work hours.[67] If any of these situations occur, the employer must provide affected employees and their representatives with a WARN notice ninety days prior to the closure or layoff.[68] In addition to affected employees and their representatives, employers must also provide notice to the following: "[t]he [New York State] Commissioner of Labor;" "[t]he local board where the site of employment is located;" "[t]he chief elected official of the unit or units of local government where the site of employment is located;" "[t]he school district or districts where the site of employment is located;" "[t]he locality that provide(s) police, firefighting, emergency medical or ambulance services, or other emergency services to the locale where the site of employment is located;" and "[a]ny other

61. *See* Letitia James, *Non-Compete Agreements in New York State*, N.Y. STATE ATT'Y GEN., (Feb. 2022), https://ag.ny.gov/sites/default/files/non-competes.pdf.

62. *See* N.Y. Senate Bill No. 3100, 246th Leg. Sess., Veto 133 (2023).

63. 29 U.S.C.A. § 2102.

64. N.Y. LAB. LAW § 860 (McKinney 2024).

65. *Worker Adjustment and Retraining Notification (WARN)*, N.Y. DEP'T OF LABOR, https://dol.ny.gov/worker-adjustment-and-retraining-notification-warn%29%3A (last visited Nov. 3, 2024).

66. *See* N.Y. COMP. CODES R. & REGS. tit. 12, § 921-1.1(e)(1) (effective June 21, 2023).

67. *Id.* § 921-1.1(f).

68. *Id.* § 921-2.2(a), (d).

individual or entity identified in the [WARN] Act."[69] If an employer fails to comply with the statute, the Commissioner of Labor may enforce a civil penalty of up to $500 per day of violation and require the employers to provide back pay and other benefits for sixty days of the violation.[70]

In the wake of the COVID-19 pandemic, the New York State Department of Labor issued new regulations, which became effective in June of 2023, making sweeping changes to New York's WARN Act.[71] The two most significant COVID-related changes to the regulations were the inclusion of full-time remote-workers in the total count of employees at the employment site that they are based[72] and the inclusion of a public health emergency as a potential unforeseeable business circumstance that may, in some situations, alleviate the employer of its notice requirement.[73] Additionally, the regulations added a potential exception for situations in which a terrorist attack directly affects operations.[74] Other important developments contained in the regulations included: revisions to the content of WARN notices;[75] details

69. *Id.* § 921-2.2(d).

70. *See* N.Y. COMP. CODES R. & REGS. tit. 12, §§ 921-7.2(a), 921-7.3(b) (2025).

71. *See* N.Y. COMP. CODES R. & REGS. tit. 12, §§ 921-1.1, 921-8.1 (2025); 45 N.Y. Reg 26 (June 21, 2023).

72. *See* COMP. CODES R. & REGS. tit. 12, § 921-1.1(e)(7)(i).

73. *See* N.Y. COMP. CODES R. & REGS. tit. 12, § 921-6.3(a) (2025).

74. *Id.*

75. *See* N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.3(a) (2025) (The following must be included in a WARN notice to the Commissioner of Labor: "(1) The complete legal business name, and any business names used in the operation of the business, and address of the employment site(s) where the plant closing, mass layoff, relocation or covered reduction in work hours will occur; (2) The name, business address and telephone number, and email address(es) of the agent of the employer to contact for further information; (3) The name, business address and telephone number, and email address(es) of an employee representative to contact for further information, including the name of each employee representative of such affected employees, and the name, business address, telephone number, and email address of the chief elected officer of such employee representative; (4) The name, business address and telephone number, and email address(es) of the employer's liaison with the department for purposes of providing rapid response services to affected employees; (5) The name, address (including home address), personal telephone number(s), personal email address(es) (if known), job title, and work locations of each employee to be laid off. For each employee, notice must also identify whether the employee is paid on an hourly, salary, or commission basis, whether the employee is part-time or full time, and any affiliation to an employee representative; (6) The expected date of the first separation of each employee and the anticipated schedule of any additional separations; (7) A statement as to whether bumping rights exist; (8) A statement as to whether the planned action is expected to be permanent or temporary, and whether the entire plant is to be closed. If the planned action is expected to affect identifiable units of employees differently, e.g. should the

about who is responsible for providing notice when a business is sold;[76] a change to the faltering business exception to include plant closings only, not mass layoffs, relocations, or covered reductions in work hours;[77] and a list of eligibility requirements for the exceptions.[78]

VII. AMENDMENTS TO NURSING MOTHERS IN THE WORKPLACE ACT

In recent years, there has been legislation, both in New York and at the federal level, focused on strengthening protections for mothers in the workplace.[79] New York Labor Law § 206-c was amended in both 2022 and 2024 to expand protections for the expression of breast milk in the workplace.[80]

Section 206-c was originally added to New York's Labor Law in 2007, requiring employers to provide reasonable unpaid break time or allow an employee to use paid break time each day to express breast milk for a nursing child up to three years following childbirth.[81] Furthermore, the employer was required to make reasonable efforts to provide a room or other location, close to the work area, where an

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employer expect a layoff of one unit to be temporary and the layoff of another unit to be permanent, the notice shall so indicate; (9) A statement as to whether the other notices required under the Act and this Part have been given, including the date notices were sent; (10) a statement as to the means of delivery utilized to deliver notice to affected employees; (11) A sample of the notice provided to employees and to employee representative(s); (12) The total number of full-time employees in New York State and at each affected site, as well as the number affected employees at each affected site; (13) The total number of part-time employees in New York State and at each affected site, as well as the number affected employees at each affected site; and (14) Any additional information required by the Commissioner."); *see also id.* § 921-2.3(b) (notice to affected employee); *id.* § 921-2.3(c) (notice to employee representatives); *id.* § 921-2.3(d) (notice to the local board and other individuals or entities identified in the Act).

76. *See* N.Y. COMP. CODES R. & REGS. tit. 12, § 921-2.1(b) (2025) (the following language was added to the regulation: "[i]f the transfer of employees is a good faith condition of the purchase agreement, and that condition is not upheld by the purchasing employer, the purchasing employer is obligated to provide notice and the selling employer is relieved of such obligation.").

77. N.Y. COMP. CODES R. & REGS. tit. 12, § 921-6.2(a) (2025) ("This exception applies only to plant closings as defined under the act.").

78. *See* N.Y. COMP. CODES R. & REGS. tit. 12, § 921-6.6 (2025).

79. *See* Pregnant Workers Fairness Act, 42 U.S.C.A. § 2000gg (West 2023); *see also* Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), 29 U.S.C. § 218d; N.Y. LAB. LAW § 206-c (McKinney 2024).

80. *See* LAB. LAW § 206-c; Act of Dec. 9, 2022, 2022 McKinney's Sess. Laws of N.Y., ch. 672 (codified at N.Y. State Law § 206-c (McKinney 2022)); Act of June 19, 2024, 2024 McKinney's Sess. Laws of N.Y., ch. 56 (codified at N.Y. State Law § 206-c (McKinney 2024)).

81. *See* Act of Aug. 15, 2007, 2007 McKinney's Sess. Laws of N.Y., ch. 574 (codified at N.Y. State Law § 206-c (McKinney 2007)).

employee could express breast milk in private.[82] Finally, the law prohibited employers from discriminating in any way against an employee who chose to express breast milk in the workplace.[83]

In 2022, New York made significant changes to Section 206-c, which became effective in June of 2023.[84] Following that amendment, employers are now required to designate an area for an employee to use to express breast milk upon request, rather than just make "reasonable efforts" to designate an area.[85] Furthermore, the amendment specifically requires the designated area be: "(i) in close proximity to the work area; (ii) well lit; (iii) shielded from view; and (iv) free from intrusion from other[s] . . . ."[86] Additionally, the designated area cannot be a restroom or toilet stall, and it must "provide, at minimum, a chair, a working surface, nearby access to clean running water and, if the workplace is supplied with electricity, an electrical outlet."[87] Finally, the employer is required to allow the employee to refrigerate expressed milk if there is access to refrigeration in the workplace.[88]

The 2022 changes also require the Commissioner of Labor to develop a written policy outlining employee rights under the law.[89] Employers are required to provide this policy to each employee upon hire and annually thereafter, as well as to employees that return to the office after the birth of their child.[90]

As part of the New York State Fiscal Year 2025 Budget Bill, signed into law by Governor Hochul on April 20, 2024, yet another significant change was made to Section 206-c. Effective June 19, 2024, public and private employers in New York are required to provide paid break time for employees to express breastmilk.[91] Since becoming effective in June of 2024, employers are now required to provide nursing employees with thirty minutes of paid break time to allow them to express breast milk.[92]

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82. *Id.*

83. *Id.*

84. Act of Dec. 9, 2022, 2022 McKinney's Sess. Laws of N.Y., ch. 672 (codified at N.Y. State Law § 206-c (McKinney 2022)).

85. *Id.*; *see* LAB. § 206-c(2)(a).

86. LAB. § 206-c(2)(a).

87. *Id.*

88. *Id.* § 206-c(2)(d).

89. *See* Act of Dec. 9, 2022, 2022 McKinney's Sess. Laws of N.Y., ch. 672 (codified at N.Y. LAB. LAW § 206-c (McKinney 2022)).

90. *Id.*

91. Act of June 19, 2024, 2024 McKinney's Sess. Laws of N.Y., ch. 56 (codified at N.Y. LAB. LAW § 206-c (McKinney 2024)).

92. *See* LAB. § 206-c(1).

Since the enactment of the amendment, the New York State Department of Labor has issued guidance in the form of Frequently Asked Questions on the amended law.[93] NYSDOL's guidance provides that paid break time must be permitted as often as an employee reasonably needs to express breast milk.[94] Employees must also be permitted to use existing paid break or meal time if they need additional time for breast milk expression beyond the paid thirty minutes, and employers may not require employees to make up this missed work time.[95] Additionally, employees are entitled to paid breaks for breastmilk expression for up to three years following childbirth.[96]

Employers are required to inform all employees about their right to take thirty-minute paid breaks during the workday for the purpose of pumping breast milk when an employee is hired, once a year after hiring, and whenever an employee returns to work following the birth of a child.[97] Additionally, employers must inform employees of this right by providing a copy of the New York State Department of Labor Policy on Breast Milk Expression in the Workplace.[98] Employees are required to provide their employer with reasonable advance notice of their need for lactation breaks.[99] As a reminder, employers must continue to provide a room or other location to express breast milk once an employee submits a written request to their direct supervisor or an individual designated by the employer to process lactation room requests in compliance with the law's requirements discussed above.[100]

VIII. NEW YORK'S ROADWAY EXCAVATION QUALITY ASSURANCE ACT

On August 16, 2023, Governor Hochul signed into law the Roadway Excavation Quality Assurance Act (the "Act"), thereby amending New York Labor Law by adding Section 224-f.[101] The Act went into effect on September 15, 2023, and guarantees prevailing wages to

93. *Breast Milk Expression in the Workplace*, N.Y. DEP'T OF LABOR, https://dol.ny.gov/expressing-breast-milk-workplace#:~:text=A:%20New%20York%20State%20Labor,or%20nature%20of%20their%20business (last visited June 19, 2024).

94. *See id.*

95. *See id.*

96. *See* LAB. § 206-c(1).

97. *See* N.Y. DEP'T OF LABOR, *supra* note 93.

98. *See id.*

99. *See id.*

100. *See id.*

101. Act of Aug. 16, 2023, 2023 McKinney's Sess. Laws of N.Y., ch. 278 (codified at N.Y. LAB. LAW § 224-f (McKinney 2024)).

construction workers on covered excavation projects.[102] A "covered excavation project" is defined by the Act as "construction work for which a permit may be issued to a contractor or subcontractor of a utility company by the state, a county or a municipality to use, excavate, or open a street."[103]

The Act requires each laborer, worker, or mechanic employed by a contractor or subcontractor on a covered excavation project to be "pa[id] not less than the prevailing rate of wage in the same trade or occupation in the locality within the state where such covered excavation project is situated . . . ."[104] To ensure compliance with the Act, no permit will be issued for such a project until an agreement verifying the contractually-mandated payment of required wages is filed with the department where the permit is sought.[105]

IX. NEW NOTICE OF ELIGIBILITY REQUIREMENT FOR UNEMPLOYMENT BENEFITS

On September 14, 2023, Governor Hochul signed into law new legislation that amended New York Labor Law Section 590, requiring employers to provide notice of eligibility for unemployment benefits to employees who have been subject to a range of adverse employment actions.[106] The new requirement went into effect on November 13, 2023, and applies to all employers liable for unemployment contributions.[107]

The notice must inform employees of their right to file an application for unemployment insurance benefits and must be "given at the time of each permanent or indefinite separation from employment, reduction in hours, temporary separation, and any other interruption of continued employment that results in total or partial unemployment."[108] Additionally, the required notice must be in writing and be provided on a form issued or approved by the New York State Department of Labor.[109] The contents of the form must include: "[1] the employer's name and registration number; [2] the address of the employer to which a request for renumeration and employment

102. LAB. § 224-f.
103. *Id.* § 224-f(1)(a).
104. *Id.* § 224-f(2).
105. *Id.*
106. *See* Act of Sept. 14, 2023, 2023 McKinney's Sess. Laws of N.Y., ch. 366, at 398-A (codified at N.Y. LAB. LAW § 590 (McKinney 2024)).
107. *See id.*
108. LAB. § 590(2).
109. *Id*.

information with respect to such employee must be directed; and [3] such other information as is required by the commissioner."[110]

X. PROHIBITION ON COMPELLED DISCLOSURE OF PERSONAL ACCOUNT INFORMATION

New legislation intended to protect employees' personal account information on electronic devices was passed on September 14, 2023, and became effective on March 12, 2024.[111] The law, which is codified as New York Labor Law § 201-i (the "Law"), prohibits employers from requesting, requiring or coercing employees or job applicants to:

> [1] disclose any username and password, password, or any or other authentication information for accessing a personal account through an electronic communications device; [2] access the employee's or applicant's personal account in the presence of the employer; or [3] reproduce in any manner photographs, video, or other information contained within a personal account obtained by the means prohibited [above].[112]

Furthermore, an employer is prohibited from threatening, discharging, disciplining, refusing to hire, or penalizing in any way an employee or applicant who refuses to disclose such information.[113] It is worth noting that "access," as defined by the Law, does not include an employee's or applicant's voluntary addition of the employer or its agent to their list of contacts associated with a personal internet account.[114]

The Law, however, provides numerous exceptions. For example, an employer may require access information to an account that was provided by the employer for business use as long as the employee was given prior notice of the employer's right to require or request such information.[115] Likewise, if the employer has knowledge that an account is being used for business purposes, the employer may request or require the employee to provide access information to the account.[116] Additionally, an employer may require disclosure of personal information in order to access nonpersonal accounts that allow access

110. *Id*.

111. Act of Sept. 14, 2023, 2023 N.Y. Sess. Laws ch. 367, at 836 (codified at N.Y. LAB. LAW § 201-i (McKinney 2024)).

112. LAB. § 201-i(2)(a).

113. *Id.* § 201-i(3).

114. *See id.* § 201-i(2)(c).

115. *Id.* § 201-i(5)(a)(i).

116. *Id.* § 201-i(5)(a)(ii).

to the employer's internal computer or information systems.[117] Furthermore, if the employer pays for an electronic communications device, in full or in part, where the payment of such was conditioned on the express agreement that the employer has the right to access electronic communications on the device, then the employer may access those electronic communications.[118] However, this condition does not permit the employer to access any personal accounts on the device.[119] Additionally, the Law does not prohibit an employer from restricting an employee's access to certain websites while using the employer's network or a device paid for, in whole or in part, by the employer, as long as the employer provides prior notice and receives explicit agreement to such conditions.[120] Finally, nothing in this law prohibits employers from accessing, viewing, or relying on any information obtained through the public domain.[121]

The Law also contains some practical limitations. For example, it does not apply to "law enforcement agenc[ies] . . . fire department[s] or . . . department[s] of corrections and community supervision."[122] Moreover, it provides an affirmative defense to an action brought under the Law if the employer's actions were due to compliance with the requirements of federal, state or local law.[123] Thus, an employer's duty to screen employees or applicants prior to hiring or monitor employee communications, as mandated by law, is not prohibited or restricted by the Law.[124] Finally, the Law does not restrict the employer's ability to comply with a court order.[125]

XI. NEW NOTICE REQUIREMENTS FOR UNEMPLOYMENT INSURANCE APPLICANTS

New York Labor Law Section 540 was amended on September 14, 2023 to add the supplemental nutritional assistance program ("SNAP") and the special supplemental nutrition program for women, infants and children ("WIC") to the list of programs whose

117. LAB. § 201-i(2)(b).
118. *Id.* § 201-i(5)(a)(iii).
119. *Id.*
120. *Id.* § 201-i(5)(a)(v).
121. *Id.* § 201-i(5)(c).
122. LAB. § 201-i(6).
123. *Id.* § 201-i(4).
124. *Id.* § 201-i(5)(b).
125. *Id.* § 201-i(5)(a)(iv).

information must be provided to unemployment insurance applicants.[126] This amendment went into effect on January 12, 2024.[127] Section 540 requires the New York State Commissioner of Labor to establish procedures for providing information about various programs to each person who files a claim for unemployment insurance.[128] Following this recent amendment, unemployment insurance applicants must be provided with information about SNAP, WIC, as well as the utility assistance and rental and mortgage assistance programs.[129]

XII. NEW YORK INVALIDATES CERTAIN INTELLECTUAL PROPERTY PROVISIONS

On September 15, 2023, Governor Hochul signed an amendment to a New York Labor Law that invalidates certain intellectual property provisions in employment agreements, effective immediately.[130] Under New York Labor Law Section 203-f, provisions in an employment agreement that require employees to assign the rights of an invention to their employer will now be unenforceable if the invention was developed by the employee using the employee's own property and time.[131] The creation of Section 203-f has significant implications for employers wishing to secure patent protection of inventions made by employees while under an employment contract.

Section 203-f of the amendment is limited in two ways. Employment agreement provisions requiring an employee to assign their rights to an invention will not apply to inventions that: "(a) relate at the time of conception or reduction to practice of the invention to the employer's business, or actual or demonstrably anticipated research or development of the employer; or (b) result from any work performed by the employee for the employer."[132]

Under Section 203-f(1)(a), employment agreements may require employees to assign over rights to inventions if the invention "relates" to the employer's business, any ongoing research and development ("R&D"), or any anticipated R&D.[133] Whether an invention "relates"

126. *See* Act of Sept. 14, 2023, 2023 McKinney's Sess. Laws of N.Y., ch. 369 (codified at N.Y. LAB. LAW § 540 (McKinney 2024)).

127. *See* LAB. § 540.

128. *Id.*

129. *Id.*

130. *See* Act of Sept. 15, 2023, 2023 McKinney's Sess. Laws of N.Y., ch. 434 (codified at N.Y. LAB. LAW § 203-f (McKinney 2024)).

131. LAB. § 203-f.

132. *Id.* § 203-f(1).

133. *Id.* § 203-f(1)(a).

to one of these categories is judged based on the time of the invention's conception or its reduction to practice.[134] "Conception" generally refers to when an invention reaches a certain level of definiteness in the mind of the inventor, whereas "reduction to practice" generally refers to the physical construction of the invention.[135] However, "[t]he filing of a patent application [for an invention] serves as conception and constructive reduction to practice . . . ."[136]

Under Section 203-f(1)(b), employees may still be required to assign over rights to inventions if the invention "results from" work performed by the employee for the employer.[137] Unlike the first exception, this exception is not judged based on when the invention was conceived or reduced to practice.[138]

It is important to note that New York courts have yet to determine the exact bounds of this newly enacted law and what constitutes "relating to" and "resulting from."

XIII. NEW YORK STATE'S PAY TRANSPARENCY LAW IN EFFECT

On March 3, 2023, a bill amending the New York State mandatory disclosure of compensation or range of compensation law, or commonly referred to as the pay transparency law (the "Pay Transparency Law"), was signed into law by Governor Hochul, reflecting changes that the Governor requested in exchange for her approval of the law in December of 2022.[139] The effective date of the amendments was September 17, 2023, the same as the original version of law.[140] The Pay Transparency Law is applicable to almost all employers with four or more employees, as well as agents and recruiters.[141] However, temporary help firms are excluded from the definition of employer and therefore are not required to comply with the pay transparency requirements.[142]

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134. *Id.*

135. *See* 60 AM. JUR. 2d *Patents* § 79 (database updated 2025); *see also* 60 AM. JUR. 2d *Patents* § 81 (database updated 2025).

136. Hyatt v. Boone, 146 F.3d 1348, 1352 (Fed. Cir. 1998) (citing Yasuko Kawai v. Metlesics, 480 F.2d 880, 885 (C.C.P.A. 1973)).

137. *See* N.Y. LAB. LAW § 203-f(1)(b) (McKinney 2024).

138. *See id.*

139. *See* Act of Mar. 3, 2023, 2023 McKinney's Sess. Laws of N.Y., ch. 94 (codified at N.Y. LAB. LAW § 194-b (McKinney 2024).

140. *See id.*

141. *See* N.Y. LAB. LAW § 194-b(6)(b)(i) (McKinney 2024).

142. *See id.* § 194-b(6)(b)(ii).

Under the Pay Transparency Law, employers are now obligated to disclose an amount or range of compensation for open jobs, promotion, or transfer opportunities.[143] This requirement only applies to jobs that are at least partially performed in New York State or jobs that are performed outside of New York but report to a supervisor or office located in New York.[144] In addition to compensation disclosure, employers are also required to include a job description if one exists for the position.[145] Applicants or employees may file a complaint with the Commissioner of Labor if a violation has occurred.[146] Failure to comply with the pay transparency requirements could result in a civil penalty which may increase based on the amount of violations.[147] Additionally, employers cannot retaliate against applicants or current employees for exercising their rights under this law.[148]

XIV. CLEAN SLATE ACT

On November 16, 2023, Governor Hochul signed legislation, also known as the Clean Slate Act (the "Act"), to automatically seal from public access criminal records for most individuals convicted of a crime.[149] The intent of the Act is to increase employment opportunities for individuals with criminal histories who have no recent criminal convictions.[150] The implementation of the Act was also intended to reduce recidivism and help individuals contribute to their community.[151] On November 16, 2024, the Act officially went into effect.[152]

The law amends New York's criminal procedure law, the executive law, the correction law, the judiciary law, and the civil rights law with respect to the automatic sealing of select convictions.[153] The Act only seals prior criminal convictions where the individual does not reoffend within a stipulated period of time.[154] As such, any criminal

143. *See id.* § 194-b(1)(a)(i).
144. *See id.* § 194-b(1)(a).
145. *See id.* § 194-b(1)(a)(ii).
146. LAB. § 194-b(5)(a).
147. *Id.* § 194-b(5)(b); *see* N.Y. LAB. LAW § 218(1) (McKinney 2024).
148. LAB. §194-b(2).
149. *See* Act of Nov. 16, 2023, 2023 McKinney's Sess. Laws of N.Y., ch. 631 (codified at N.Y. CRIM. PRO. § 160.57 (McKinney 2024).
150. *See id.*
151. *See Clean Slate Act Myths and Facts*, N.Y. STATE ASSEMBLY, https://assembly.state.ny.us/cleanslate/?sec=facts_and_myths (last visited Nov. 23, 2024).
152. *See* CRIM. PRO. § 160.57.
153. *See id.*
154. *See id.* § 160.57(1)(b).

arrest and accompanying criminal actions that are still pending may be disclosed through a background check.[155]

The statutory period for eligible convictions ranges from three years for misdemeanors to eight years for eligible felonies.[156] The clock restarts if parole or probation is revoked or if there is a new conviction.[157] All records of sex crimes, and Class A felonies (such as first or second-degree murder, first degree kidnapping), except those related to drug possession, are ineligible for sealing.[158]

Most notably, the Act provides an exception to the sealing:

> 1. When, pursuant to statute or the regulations of this division, the division conducts a search of its criminal history records for civil purposes, and returns a report therein, it shall only report any criminal convictions, and any criminal arrests and accompanying criminal actions which are pending.
>
> 2. The provisions of subdivision one of this section shall not apply to criminal history records: (a) provided by the division to qualified agencies as defined in subdivision nine of section eight hundred thirty-five of this article; (b) provided to federal or state law enforcement agencies; (c) prepared solely for a bona fide research purpose; or (d) prepared for the internal record keeping or case management purposes of the division.[159]

A qualified agency as defined under the New York Executive Law § 835 is:

> [T]he unified court system, the administrative board of the judicial conference, probation departments, sheriffs' offices, district attorneys' offices, the state department of corrections and community supervision, the department of correction of any municipality, the financial frauds and consumer protection unit of the state department of financial services, the office of professional medical conduct of the state department of health for the purposes of section two hundred thirty of the public health law, the child protective services unit of a local social services district when conducting an investigation pursuant to subdivision six of section four

155. *See* N.Y. STATE ASSEMBLY, *supra* note 151.
156. CRIM. PRO. § 160.57(1)(b)(i)(ii).
157. *Id.*
158. CRIM. PROC. § 160.57(1)(b)(v)–(vi).
159. N.Y. EXEC. LAW § 845-d(1)–(2) (McKinney 2024).

> hundred twenty-four of the social services law, the office of Medicaid inspector general, the temporary state commission of investigation, police forces and departments having responsibility for enforcement of the general criminal laws of the state, the Onondaga County Center for Forensic Sciences Laboratory when acting within the scope of its law enforcement duties and the division of forensic services of the Nassau county medical examiner's office when acting within the scope of its law enforcement duties.[160]

To summarize, the sealed convictions may be accessed by law enforcement, courts, police departments for hiring purposes, gun licensing, and for state and federal jobs requiring fingerprint-based background checks.[161] Based on this exception, protections are still in place for employment positions that service vulnerable populations.[162]

Additionally, if an individual has their records sealed via the Act, they will also have a private cause of action against another who discloses the sealed conviction without their consent.[163] However, a cause of action will only arise if (1) a duty of care was owed; (2) the person disclosing knowingly and willfully breached their duty; (3) disclosure caused an injury; and (4) the breach was a substantial factor in causing the injury.[164]

XV. PAID PRENATAL LEAVE EFFECTIVE JANUARY 1, 2025

Included in the New York State Fiscal Year 2025 Budget Bill that Governor Hochul signed into law on April 20, 2024, were amendments to the New York Paid Sick Leave Law ("PSL"), requiring every New York employer "to provide . . . twenty hours of paid prenatal personal leave during any fifty-two-week calendar period."[165] Paid prenatal personal leave is "leave taken for the health care services received by an employee during their pregnancy or related to such pregnancy, including physical examinations, medical procedures, monitoring and testing, and discussions with a health care provider related to the pregnancy."[166] The

160. N.Y. EXEC. LAW § 835 (McKinney 2023).

161. *See* CRIM. PROC. LAW § 160.57(1)(d)(iii)-(x).

162. *See id.* § 160.57(1)(d)(viii). Background checks for vulnerable populations, such as children, the disabled and the elderly, are now compromised because employers can hire individuals with criminal records.

163. *See* N.Y. CIV. RIGHTS LAW § 50-g(1) (McKinney 2024).

164. *Id.*

165. Act of April 20, 2024, 2024 McKinney's Sess. Laws of N.Y., ch. 55 (codified at N.Y. LAB. LAW § 196-b(4-a) (McKinney 2024)).

166. LAB. § 196-b(4-a).

benefits are available in hourly increments and will be paid in hourly installments.[167] Employees taking prenatal leave will be paid at their "regular rate of pay, or the applicable minimum wage . . . whichever is greater . . . ."[168] This law took effect on January 1, 2025.[169]

XVI. PROPOSALS NOT INCLUDED IN THE 2025 BUDGET BILL TO KEEP IN MIND

A. Proposed Expansions to New York State Disability Leave Benefits

Statutory disability insurance payments in New York State have been stagnant for thirty-six years.[170] The current $170 per week benefit cap has been in effect since 1989.[171] Governor Hochul's memorandum in support of increasing disability insurance payments noted that the benefit today is "worth less than half of what it was worth when the cap was set."[172] The proposal would have eventually increased the amount to two-thirds of the employee's average weekly wage ("AWW"), capped at two-thirds of the Statewide Average Weekly Wage ("SAWW") for the first twelve weeks of disability, and then capped at $280 weekly for the remainder of the twenty-six weeks.[173] Although proposed benefit increases ultimately did not make it into the Budget Bill, it is something to watch out for in coming years.

B. Proposed Limitation of Liquidated Damages in Certain Frequency of Pay Violations

Governor Hochul proposed a clarification to New York State's Labor Law Section 198, related to the requirement that manual workers be paid on a weekly basis and the damages available in the event of a violation.[174] The proposed amendment would have limited plaintiffs' recovery of liquidated damages for violations of the frequency of payment provisions in the New York Labor Law where employees were paid regularly

167. *Id.*

168. *Id.*

169. *See* LAB. § 196-b(4-a).

170. *See* GOVERNOR KATHY HOCHUL, MEMORANDUM IN SUPPORT OF PUBLIC PROTECTION AND GENERAL GOVERNMENT ARTICLE VII LEGISLATION 16 (2024), https://www.budget.ny.gov/pubs/archive/fy25/ex/artvii/ppgg-memo.pdf.

171. *See id.*

172. *Id.*

173. *Id.*

174. *See* GOVERNOR KATHY HOCHUL, MEMORANDUM IN SUPPORT OF EDUCATION, LABOR AND FAMILY ASSISTANCE ARTICLE VII LEGISLATION 14–15 (2024), https://www.budget.ny.gov/pubs/archive/fy25/ex/artvii/elfa-memo.pdf.

on at least a semi-monthly basis.[175] As Governor Hochul noted, there has been a proliferation of lawsuits against employers large and small, "resulting in large payouts for workers and plaintiffs' attorneys, causing some employers serious financial harm."[176] The proposed bill would have clarified that if the employee was paid at least semi-monthly, New York Labor Law would not entitle them to 100% liquidated damages.[177] However, the Budget Bill did not include this legislation limiting liquidated damages for violations of the frequency of payment provisions in New York Labor Law.

XVII. LEGAL DEVELOPMENTS IN NEW YORK CITY

A. Prohibition on Height and Weight Discriminations

On May 11, 2023, the New York City Council passed Int. 0209-2022 (the "Bill") which prohibits height and weight discrimination within employment, housing, and public accommodations under the New York City Human Rights Law ("NYCHRL"). The Bill was later signed into law by Mayor Eric Adams on May 26, 2023, and took effect 180 days thereafter on November 22, 2023.[178]

The key takeaway from the Bill, and now effective statute, is that height and weight would be added as protected classes to the NYCHRL's already-listed categories.[179] As such, many of the practices already prohibited by the NYCHRL based on other protected classes would now be prohibited based on actual or perceived height and weight, as well.[180] The statute also provides for protection in places of public accommodation and in employment settings.[181] In places of public accommodations, employees are also not allowed to discriminate against another person based on actual or perceived height and weight.[182]

Although the statute now provides protections against height and weight discrimination, there are some exceptions that would allow

175. *See id.* at 15.

176. *Id.*

177. *See id.*

178. *See Mayor Adams Signs Legislation to Prohibit Height or Weight Discrimination in Employment, Housing, and Public Accommodations*, CITY OF N.Y. (May 26, 2023), https://www.nyc.gov/office-of-the-mayor/news/364-23/mayor-adams-signs-legislation-prohibit-height-weight-discrimination-employment-housing-#/0.

179. *See* N.Y.C. CHARTER § 8-107 (2024).

180. *See id.*

181. *Id.* § 8-107(1), (4).

182. *Id.* § 8-107(4)(1).

employers to make weight-based or height-based decisions. The first exception allows employers to make weight-based or height-based decisions when it is required by federal, state, or local law or regulation.[183] The second exception allows employers to make weight-based or height-based decisions if the Commission has identified particular jobs or categories of jobs where height or weight may prevent an employee from performing the essential functions of the job and no reasonable alternative action to permit the employment exists.[184]

In addition to the above-mentioned exceptions, the statute provides an affirmative defense for employers who make weight-based or height-based decisions. The first affirmative defense is that the person's height or weight would prevent the person from preforming the "essential requisites of the job" and no reasonable alternative action exists making performance possible.[185] The second affirmative defense is that the decision was made based on height or weight criteria that is reasonably necessary for the execution of normal operations.[186] The statute also permits employers to offer incentive programs to support weight management as part of a voluntary program, without violating the statute.[187]

Employers who violate this statute may be subject to civil penalties to be paid to the City of New York or compensatory and expectation damages ordered by the Commission to be paid to the complainant.[188]

B. Amendments to the New York City Earned Safe and Sick Time Act

The New York City Earned Sick Time Act was initially passed in June of 2013.[189] Subsequently in May 2018, the Act was expanded and renamed the Earned Safe and Sick Time Act ("ESSTA").[190] Most recently, the New York City Department of Consumer and Worker Protection ("DCWP") adopted an amendment to the ESSTA which went

183. *See id.* § 8-107(1)(g)(1)(A).
184. *See* N.Y.C. CHARTER § 8-107(1)(g)(1)(B).
185. *Id.* § 8-107(1)(g)(2)(A).
186. *See id.* § 8-107(1)(g)(2)(B).
187. *See id.* § 8-107(1)(g)(3).
188. *See* N.Y.C. CHARTER § 8-120(a) (West 2024).
189. *See* 13A SHARON P. STILLER, NEW YORK PRACTICE, EMPLOYMENT LAW IN NEW YORK § 4:479 (3d ed. 2024).
190. *See* N.Y.C. CHARTER § 20-911 (2024).

into effect on October 15, 2023.[191] The adopted amendments modify various portions of the Act.[192]

Notably, some of the key amendments include changes to (1) what constitutes an "employee" under the ESSTA; (2) how to calculate an employer's size to meet safe/sick time requirements; (3) when it is permissible to request documentation from employees for safe and sick leave; (4) information on requirements for employees to notify their employer for use of leave; (5) calculating an employee's rate of pay; and (6) updates that should be made to an employer's ESSTA workplace policy.[193]

1. Who is Covered by the ESSTA?

The new amendments specify that an employee who performs work, including telecommuting, while physically located in New York City is "employed for hire within the City of New York . . . regardless of where the employer is located."[194] These employees, therefore, are now covered by the ESSTA.[195]

The ESSTA also covers an employee who works primarily in another state if they "regularly perform, or are expected to regularly perform, work in New York City during a calendar year."[196] However, only working hours that these employees work in New York City will count for leave accrual purposes.[197]

On the other hand, employees who work remotely strictly outside of New York City are not covered by the ESSTA, irrespective of whether their employer is physically located in New York City.[198]

2. Calculating Employer Size

Private employers with 100 or more employees must provide up to fifty-six hours of paid safe and sick time annually, and employers with between five and ninety-nine employees, must only provide up

191. *See id.*

192. *See New York City Department of Consumer and Worker Protection (Notice of Adoption of Final Rule)*, NYC RULES (Sept. 2023), https://rules.cityofnewyork.us/wp-content/uploads/2023/09/DCWP-NOA-Earned-Safe-and-Sick-Time-Act.pdf.

193. *See id.* at 1–2.

194. RULES OF CITY OF NEW YORK § 7-203(a).

195. *See id.*

196. *Id.* § 7-203(b).

197. *See id.*

198. *Id.* § 7-203(a).

to forty hours of safe and sick time annually.[199] The amendments provide clarity as to how to calculate employer size in accordance with the ESSTA.[200]

An employer's size is based on the number of employees nationwide—not only those employees working in New York City—and it is determined by counting the highest total number of employees employed at any point during the calendar year to date.[201] This headcount must include full-time employees, part-time employees, employees jointly employed by one or more employers, and employees on leaves of absence, suspensions and other temporary absences (so long as the employer has a reasonable expectation that the employee will later return to active employment).[202]

3. Requesting Documentation for Employees' Safe and Sick Leave

An employer is not permitted to require documentation from an employee in support of the need for safe and sick time if the use of safe/sick time lasts three or fewer consecutive workdays.[203] "Unless otherwise required by law, an employer must not require an employee to submit such documentation" prior to his or her return to work.[204] When requiring documentation, an employee is allowed a minimum of seven days from the date he or she returns to work to submit the requested documents.[205]

An employer that requests documentation may withhold payment of safe and sick time until the employee has provided such documentation or confirmation, except that an employer must not withhold payment "when the required documentation is unattainable by the employee due to associated costs."[206]

If an employer requests documentation from an employee to support the use of sick time and the licensed health care provider charges the employee a fee for obtaining this documentation, the employer must reimburse the employee for this fee.[207] Similarly, if an employer requests documentation from an employee to support the use of safe

199. RULES OF CITY OF NEW YORK § 7-202(b)-(c).
200. *See id*. § 7-202.
201. *See id.* § 7-202(a)
202. *See id.*
203. RULES OF CITY OF NEW YORK § 7-206(f).
204. *Id.* § 7-206(c).
205. *See id.*
206. RULES OF CITY OF NEW YORK § 7-209(b).
207. *See* RULES OF CITY OF NEW YORK § 7-206(c).

time, the employer must reimburse the employee for "all reasonable costs or expenses incurred for the purpose of obtaining such documentation."[208]

4. Employee Notice

Where the leave is *foreseeable*, employers may require that the employees provide reasonable notice, if the requirement to provide notice and the method of providing notice are set forth in the employer's written ESSTA policy.[209] An employer that requires notice of *unforeseeable* leave must provide a written policy that contains reasonable procedures for the employee to provide notice as soon as practicable.[210] The amendments include additional examples of such procedures for employees to provide notice of unforeseeable leave, such as sending an email or submitting a leave request in the scheduling software system.[211]

The amendments also include a definition for when leave is *foreseeable* versus *unforeseeable*, stating that "[a] need is foreseeable when the employee is aware of the need to use safe/sick time seven days or more before such use. Otherwise, the need is unforeseeable."[212]

5. Calculating Employees' Rate of Pay

Under the ESSTA, covered employees are entitled to their "regular rate of pay" for safe and sick leave. The amendments clarify that the "regular rate of pay" means the employee's regular rate of pay "at the time the safe or sick time is taken."[213]

6. ESSTA Policy Requirements

The amendments require employers to make a number of changes to their ESSTA policy, including, but not limited to:

1. If an employer requires an employee to provide reasonable notice of the need to use safe and sick leave, this requirement, and the method of providing notice must be specified in the policy.[214]

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208. *See* RULES OF CITY OF NEW YORK § 7-206(c).
209. *See* RULES OF CITY OF NEW YORK § 7-205(d).
210. *See id.* § 7-205(b).
211. *See id.*
212. *Id.* § 7-205(e).
213. RULES OF CITY OF NEW YORK § 7-208(a).
214. *See* RULES OF CITY OF NEW YORK § 7-205(a).

2. If an employer requires employees to submit documentation in support of their use of safe and sick leave, then this must be specified in the written policy, as well as the documentation that the employer will accept and instructions on how employees can submit the documentation.[215] In addition, if the employer withholds payment until such documentation is provided, the employer must include this in their policy as well as how the employee can submit requests for reimbursement.[216]
3. Employers must include a more specific statement regarding confidentiality—that the employer:

> [W]ill not ask the employee to provide details about the medical condition that led to the employee to use sick time, or the personal situation that led the employee to use safe time, and that any information that the employer receives about the employee's use of safe/sick time will be kept confidential and not disclosed to anyone without the employee's written permission or as required by law.[217]

7. Private Right of Action

On January 20, 2024, the New York City Council amended the City's ESSTA again, this time creating a private right of action for employees claiming employer violations of ESSTA.[218] The new law amended Section 20-924 of the New York City Administrative Code and allows employees to commence a civil action alleging a violation of ESSTA "within 2 years of the date the [employee] knew or should have known of the alleged violation."[219] The new law became effective on March 20, 2024.[220]

In the past, the sole redress for employees alleging employer violations of ESSTA was to submit an administrative complaint to the New York City DCWP.[221] The new amendment allows employees to file both an administrative complaint with the DCWP and a civil action in a court of competent jurisdiction for the same alleged ESSTA violation. Employees are not required to file an administrative

215. *See id.* § 7-205(b), (d).
216. *See* RULES OF CITY OF NEW YORK § 7-209(d).
217. RULES OF CITY OF NEW YORK § 7-211(c)(2)(v).
218. *See* N.Y.C. CHARTER § 20-924 (2024).
219. *Id*. § 20-924(f).
220. *See id.* § 20-924.
221. *See* N.Y.C. CHARTER § 20-924(b) (2023).

complaint with the DCWP prior to commencing an action in court for alleged ESSTA violations.[222] If the employee chooses to file a complaint with DCWP, they must do so "within [two] years of the date [they] knew or should have known of the alleged violation."[223] The ESSTA states that the employee's identity will remain confidential unless disclosure is necessary.[224]

If an employee files both a civil suit and a DCWP complaint against the employer for the same alleged violation, DCWP will stay its investigation until it receives notice that the civil suit has been "withdrawn or dismissed without prejudice."[225] Once DCWP receives notice of a final judgment or settlement of the civil action, DCWP may dismiss the complaint unless it "determines the complaint alleges a violation not resolved by such judgment or settlement."[226] The employee must notify DCWP "within 30 days of the date that the time for any appeal has lapsed that such complaint is withdrawn, dismissed without prejudice, or resolved by final judgment or settlement."[227]

Once a violation is proven, the effected employee may be entitled to several remedies, to be granted by DCWP:

> d. The department shall have the power to impose penalties provided for in this chapter and to grant each and every employee or former employee all appropriate relief. Such relief shall include: (i) for each instance of safe/sick time taken by an employee but unlawfully not compensated by the employer: 3 times the wages that should have been paid under this chapter or $250, whichever is greater; (ii) for each instance of safe/sick time requested by an employee but unlawfully denied by the employer and not taken by the employee or unlawfully conditioned upon searching for or finding a replacement worker, or for each instance an employer requires an employee to work additional hours without the mutual consent of such employer and employee in violation of section 20-915 [Change in schedule] of this chapter to make up for the original hours during which such employee is absent pursuant to this chapter: $500; (iii) for each violation of section 20-918 [Retaliation and interference prohibited] not including

222. *See* N.Y.C. CHARTER § 20-924(g) (2024).
223. *Id*. § 20-924(b).
224. *See id*.
225. *Id.* § 20-924(c)(1).
226. *Id.*
227. N.Y.C. CHARTER § 20-924(c)(1) (2024).

> discharge from employment: full compensation including wages and benefits lost, $500 and equitable relief as appropriate; (iv) for each instance of unlawful discharge from employment: full compensation including wages and benefits lost, $2,500 and equitable relief, including reinstatement, as appropriate; and (v) for each employee covered by an employer's official or unofficial policy or practice of not providing or refusing to allow the use of accrued safe/sick time in violation of section 20-913 [Right to safe/sick time; accrual], $500.[228]

DCWP has the authority to grant an employee all the above-mentioned remedies, if appropriate, due to the employer's violation.[229]

In addition to the remedies for employees affected by the employer's violation of ESSTA, DCWP may impose civil penalties payable to the City.[230] For an employer's first violation of ESSTA, the civil penalty cannot exceed $500.[231] For the second violation, occurring within two years of the first violation of ESSTA, a civil penalty of up to $750, and "not to exceed $1,000 for each succeeding violation."[232] Each civil penalty is based on the number of employees who were subject to the employer's ESSTA violations.[233]

For civil actions commenced by employees for an employer's violation of ESSTA, the amendment permits an employee to seek "injunctive and declaratory relief, attorney's fees and costs, and such other relief as such court deems appropriate."[234]

C. New York City: Bill of Rights

On March 1, 2024, New York City's Department of Consumer and Worker Protection ("DCWP") released its newly expanded Workers' Bill of Rights.[235]

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228. *Id.* § 20-924(d).
229. *See id.*
230. *See id.* § 20-924(e).
231. *Id.*
232. N.Y.C. CHARTER § 20-924(e) (2024).
233. *See id.*
234. *Id.* §20-924(f).
235. *See Department of Consumer and Worker Protection Releases Workers' Bill of Rights: A One-Stop-Shop for Understanding Your Labor Rights*, NYC CONSUMER & WORKER PROT. (Mar. 1, 2024), https://www.nyc.gov/site/dca/news/013-24/department-consumer-worker-protection-releases-workers-bill-rights—one-stop-shop-for.

The Workers' Bill of Rights provides information about the rights and protections of employees, independent contractors, and prospective employees in New York City under city, state, and federal laws.[236] However, it is important to note that the Workers' Bill of Rights is not an exhaustive list of rights.[237]

By July 1, 2024, employers were required to provide a copy of the Workers' Bill of Rights to each of their current employees.[238] Thereafter, employers were also required to provide the Workers' Bill of Rights to each new hire on an employee's first day of work.[239] Employers are now required to post the provided multilingual poster in a conspicuous location that is accessible and visible to employees.[240] Organizations like DCWP, the Mayor's Office of Immigrant Affairs, and the Commission of Human Rights have indicated that they would be conducting outreach to ensure workers were educated on their rights and employer's duties under the new law.[241]

The Workers' Bill of Rights should also be posted online or on the employer's mobile application "if such means are regularly used to communicate with [the employer's] employees."[242] The distribution and posting must be provided in English and in any language spoken as a primary language by at least five percent of employees, if the DCWP has the Workers' Bill of Rights available in that language.[243]

Employers that fail to adhere to the posting requirement will incur a $500 penalty, but first-time violators will be given a thirty-day window to cure any violation.[244] Employees may also file a complaint online or by contacting 311 for employer violations.[245]

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236. *See Worker's Bill of Rights*, NYC CONSUMER & WORKER PROT., https://www.nyc.gov/site/dca/workers/workersrights/know-your-worker-rights.page (last visited Mar. 20, 2025).

237. *See id.*

238. *See* N.Y.C. CHARTER § 32-102(b) (2024).

239. *See id.*

240. *See id.*

241. *See* NYC CONSUMER & WORKER PROT., *supra* note 236.

242. N.Y.C. CHARTER § 32-102(d) (2024).

243. *See id.* § 32-102(c).

244. *See id.* § 32-102(e).

245. *See* NYC CONSUMER & WORKER PROT., *supra* note 236.

XVIII. IMPACTFUL LITIGATION

A. Supreme Court Increases Burden on Employers Seeking to Deny a Religious Accommodation Based upon Undue Hardship

Employers, over the course of time, have been navigating the intricate relationship between workplace practices and religious accommodations. Accordingly, employers have adopted procedures and polices adhering to Title VII of the Civil Rights Act of 1964, which "requires employers to accommodate the religious practice of their employees unless doing so would impose an 'undue hardship on the conduct of the employer's business.'"[246] Following the Supreme Court's 1977 decision in *Trans World Airlines, Inc. v. Hardison*, courts "have interpreted 'undue hardship' to mean any effort or cost that is 'more than . . . de minimis.'"[247] In 2023, the Supreme Court in *Groff v. DeJoy* clarified that this interpretation was mistaken and subsequently provided the correct requirements of Title VII—significantly changing the employment law landscape and forty-seven years of routine practices.[248]

In *Groff v. DeJoy*, Groff was an employee of the United States Postal Service ("USPS") who, due to his religious beliefs, believed that Sundays should be exclusively "devoted to worship and rest, not 'secular labor' and the 'transport[ation]' of worldly 'goods.'"[249] When Groff began his employment, "it generally did not involve Sunday work," but he was ultimately required to work on Sundays.[250] Groff did not comply and received "progressive discipline" for not carrying out his duties on Sundays and his work was distributed to other carriers and, at times, even the postmaster, who did not ordinarily deliver mail.[251] Groff eventually resigned in 2019 and filed a lawsuit "under Title VII, asserting that USPS could have accommodated his Sunday Sabbath practice 'without undue hardship on the conduct of USPS's business.'"[252]

The District Court granted USPS's motion for summary judgment and the Third Circuit affirmed, holding that "it was 'bound by

246. Groff v. DeJoy, 600 U.S. 447, 453–54 (2023) (quoting 42 U.S.C. § 2000e(j)).

247. *Id.* at 454; *see* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

248. *See Groff*, 600 U.S. at 454.

249. *Id.*

250. *Id.* at 454–55.

251. *Id.* at 455.

252. *Id.* at 455–56 (citing 42 U.S.C. § 2000e(j)).

[the] ruling' in *Hardison*, which it construed to mean 'that requiring an employer "to bear more than a de minimis cost" to provide a religious accommodation is an undue hardship."[253] More specifically, the Third Circuit found that if Groff were to be exempt from working on Sundays, the workflow and workplace issues that had arisen from his absence would not only continue but meet the low threshold of "requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship."[254]

The Supreme Court, in Justice Alito's majority opinion, held that "showing 'more than a *de minimis* cost,' as that phrase is used in common parlance, does not suffice to establish 'undue hardship' under Title VII" because when "describing an employer's 'undue hardship' defense, *Hardison* referred repeatedly to 'substantial' burdens, and that formulation better explains the decision."[255] As a result, when analyzing religious accommodations in the employment setting, the Court determined that the entirety of the *Hardison* decision could not be interpreted as requiring employers to show "more than a de minimis cost" to meet the undue hardship standard required under Title VII.[256] Rather, the Court held "that 'undue hardship' is shown when a burden is substantial in the overall context of an employer's business" because this context-specific standard "comports with both *Hardison* and the meaning of 'undue hardship' in ordinary speech."[257] The Court specified that this burden could be met when "substantial increased costs in relation to the conduct of its particular business" are present, but more importantly, "courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, 'size and operating costs of an employer.'"[258]

The Court's holding underscores that going forward, when employers and courts are analyzing requests for religious accommodations, the emphasis will be on the factual circumstances, which from the outset, seems to provide the potential for significant variation

253. *Groff*, 600 U.S. at 456 (quoting Groff v. Dejoy, 35 F.4th 162, 174 n.18 (3d Cir. 2022)).

254. *Id.* (quoting *Groff*, 35 F.4th at 174 n.18).

255. *Id.* at 468.

256. *Id.* at 453–54, 468.

257. *Id.* at 468.

258. *Groff*, 600 U.S. at 470–71 (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 83 (1977)).

among requests—disrupting the status quo[259] that was established under the prior interpretation of *Hardison*. However, the Court, after articulating this new standard, provided some clarification around the interpretation of Title VII because the majority felt that "[t]he erroneous *de minimis* interpretation of *Hardison* may have had the effect of leading courts to pay insufficient attention to what the actual text of Title VII means . . . ."[260] First, the Court declared that when assessing religious accommodations, courts must assess an "accommodation's effect on 'the conduct of the employer's business.'"[261] Thus, the potential impact an accommodation may have on a co-worker, alone, is not enough to conclude the analysis, but it may be relevant if it also "go[es] on to 'affect the conduct of the business.'"[262] Second, the Court underscored that "Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations."[263]

In the context of Groff's situation, the Court explained that "it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary."[264]

B. New York Employers Face Expanded Liability for Negligent Supervision

A recent 2023 New York Court of Appeals decision has significantly expanded liability for negligent supervision, which will require New York employers to carefully evaluate policies, procedures, and decision making.

In *Moore Charitable Foundation v. PJT Partners, Inc.*, the Moore Charitable Foundation brought an action against PJT Partners, an

259. The prior interpretation of *Hardison*, under Third Circuit precedent, provided that "any effort or cost that is 'more than . . . *de minimis*'" allowed for employers to reject religious accommodations, and this threshold was considered not difficult for employers to pass. *Id.* at 454.

260. *Id.* at 471–72.

261. *Id.* at 472 (quoting 42 U.S.C. § 2000e(j)).

262. *Id.*

263. *Groff*, 600 U.S. at 473 (citing Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444, 455 (7th Cir. 2013)).

264. *Id.*

investment bank, for negligent supervision and retention, conversion, and fraud.[265] This action transpired following a series of events.

PJT Partners ("Defendants") hired Andrew Caspersen "primarily to start a new business line focusing on 'fund recapitalization' work, specifically by 'representing private equity fund managers who were interested in offering liquidity to their investors.'"[266] Caspersen ultimately acquired a substantial deal for the Defendants, which consisted of "the recapitalization of a private equity fund managed by Irving Place Capital."[267] Caspersen recruited a new investor who agreed to buy out the fund's existing equity holders and Irving Place Capital was set to pay the Defendants a deal fee.[268] When the transaction closed, Caspersen intercepted and diverted the payment from Irving Place Capital to himself by providing Irving Place Capital with a fake invoice with directions that transferred the money into an account controlled by Caspersen.[269] To cover up his illegal practices, Caspersen subsequently "devised a scheme to obtain replacement funds from plaintiff The Moore Charitable Foundation" and to use a portion of those funds to pay back the defendants; this scheme was initiated by Caspersen offering the foundation "an opportunity to invest in a security with a risk-free 15% rate of return."[270] Unfortunately, this opportunity truly only consisted of fraud and deception, as Caspersen used the $25 million dollars received from the foundation to make it seem as if the Irving Place Capital payment was finally received, while the remainder of the $25 million dollars was transferred to his personal account, which he used to "engage in speculative securities trading."[271] Caspersen even made fake interest payments to the foundation on a fraudulent promissory note to keep his illegal scheme intact and, ultimately, the Plaintiffs filed suit.[272]

The "Supreme Court dismissed cause of action for negligent supervision and retention but allowed other claims to proceed."[273] "The court explained that it was dismissing the negligence claim based on plaintiffs' failure to adequately plead that defendants were on notice

265. *See* Moore Charitable Found. v. PJT Partners, Inc., 217 N.E.3d 8, 11–13 (N.Y. 2023).
266. *Id.*
267. *Id.* at 12.
268. *See id*.
269. *See id.*
270. *Moore Charitable Found.*, 217 N.E.3d at 12.
271. *Id.* at 13.
272. *See id.*
273. *Id.*

of Caspersen's propensity for fraud, and had 'not considered' whether defendants' duty ran only to customers."[274] On appeal, the Appellate Division dismissed the Plaintiffs' entire compliant, affirming the Supreme Court's "dismissal of the negligent supervision and retention claim based on its conclusion that the complaint did 'not allege that defendants were aware of the facts that plaintiffs contend would have put them on notice of the employee's criminal propensity.'"[275] The Appellate Division also expressed that the complaint did not properly assert a claim for negligent supervision because they never alleged that they were the Defendant's customers.[276]

The Court of Appeals disagreed, holding that the Plaintiffs sufficiently stated a claim for negligent supervision and retention as they successfully articulated and supported "that defendants had notice of Caspersen's propensity to commit fraud" and the "Appellate Division erred in holding that a customer relationship is a prerequisite to duty in a negligent supervision claim."[277]

The Court of Appeals provided that

> Where the negligence claim relates to an employer's retention and supervision of an employee, the complaint must include allegations that: (1) the employer had actual or constructive knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm; (2) the employer knew or should have known that it had the ability to control the employee and of the necessity and opportunity for exercising such control; and (3) the employee engaged in tortious conduct on the employer's premises or using property or resources available to the employee only through their status as an employee, including intellectual property and confidential information.[278]

With regard to notice, the Court of Appeals found that the Defendants' knowledge of Caspersen's excessive drinking and obsessive personal stock trading does not, "standing alone, justify an inference that defendants should have known of Caspersen's propensity to commit fraud" because to provide notice of an employee's propensity to commit a tort, "that conduct must be 'similar to the injury-causing

274. *Id.*

275. *Moore Charitable Found.*, 217 N.E.3d at 13 (quoting Moore Charitable Found. v. PJT Partners, Inc., 115 N.Y.S.3d 11, 13 (N.Y. App. Div. 1st Dep't 2019)).

276. *See id.*

277. *Id.* at 14.

278. *Id.*

act.'"[279] Here, the Court determined that there was a disconnect between this conduct and the fraudulent scheme at issue, and therefore, the conduct could not impose actual or constructive notice on the Defendants.[280] However, Caspersen's attempt to conceal the fact that he embezzled payment from Irving Place Capital was deemed as requisite notice by the Court to defeat a motion to dismiss because the employees who heard Caspersen's explanation of why the money was not yet received "should have recognized it as either false or questionable based on their familiarity with the Irving Place deal . . . ."[281]

With regard to a duty owed by the Defendants to the Plaintiffs, the Court of Appeals, again, disagreed with the Appellate Division.[282] The Court began this analysis by discussing how a tortfeasor's legal duty is exclusively a question of law; without an imposed duty on the defendant, the injured party, regardless of the conduct at issue, cannot hold defendants liable.[283] Further, the Court stated that:

> We fix the point of a duty in a particular case "by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability."[284]

The Court took this opportunity to explain the extent of an employer's duty embodied in a negligence supervision action, holding that there is no requirement that a plaintiff be a customer of the defendant, the plaintiff does not need to have a special relationship with the employer, nor does there need to be privity between the employer and the plaintiff.[285] The Court justified these findings by highlighting precedent that discusses an employer's existing liability for non-customers alleging physical injuries and property damage due to an employee's conduct, the preexisting duty for employers to supervise employees, and the other limitations embedded in negligence claims.[286]

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279. *Id.* at 15 (citing Brandy B. v. Eden Cent. Sch. Dist., 934 N.E.2d 304, 307 (N.Y. 2010)).

280. *See Moore Charitable Found.*, 217 N.E.3d at 15–16.

281. *Id.* at 16.

282. *See id.*

283. *See id.*

284. *Id.* (quoting 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1101 (N.Y. 2001)).

285. *See Moore Charitable Found.*, 217 N.E.3d at 17.

286. *See id.* at 17–18.

The Court then briefly discussed one limitation: if an "employee's tortious conduct is too attenuated from the employment relationship, the employer will not be liable" under a proximate cause analysis, which is addressed in every tort action for negligence.[287]

C. Second Department Weighs in on Liquidated Damages for Pay Frequency Violation

In *Grant v. Global Aircraft Dispatch, Inc.*, the Second Department addressed the depth of relief available for employees who allege that their employers are not complying with the Frequency of Payment requirements under New York Labor Law.[288]

New York Labor Law Section 191 provides that "[a] manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned"[289] except for non-profitmaking organizations[290] and certain employers who, at the discretion of the Commissioner of Labor, meet specified requirements allowing for bi-weekly payment.[291] Under the New York Labor Law, a manual worker is defined as "a mechanic, workingman or laborer . . . ."[292] However, the New York Department of Labor interprets "manual worker" as also encompassing "individuals who spend more than 25% of working time engaged in 'physical labor'" and it acknowledges that "the term 'physical labor' has been interpreted broadly to include countless physical tasks performed by employees."[293] In order to enforce these provisions, New York Labor Law Section 198 provides that, in the event New York Labor Law Section 191 is violated, the Commissioner of Labor, on behalf of the employee, can seek legal remedies and calculate their damages.[294]

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287. *Id.* at 18.

288. *See* Grant v. Glob. Aircraft Dispatch, Inc., 204 N.Y.S.3d 117 (2d Dep't 2024).

289. N.Y. LAB. LAW § 191(1)(a)(i) (McKinney 2024).

290. *See id.* ("[A] non-profitmaking organization shall be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly."); N.Y. LAB. LAW § 190 (9) (McKinney 2024) ("Non-profitmaking organization' means a corporation, unincorporated association, community chest, fund or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual.").

291. *See* LAB. § 191(1)(a)(ii).

292. LAB. § 190(4).

293. *Frequency of Pay Frequently Asked Questions*, N.Y. STATE DEP'T OF LAB., https://dol.ny.gov/system/files/documents/2021/03/frequency-of-pay-frequently-asked-questions.pdf (last visited Sept. 26, 2024).

294. *See* N.Y. LAB. LAW § 198 (1–a) (McKinney 2024).

However, in 2019, the First Department, in *Vega v. CM & Assocs. Constr. Mgmt., LLC*, held that the statutory language of Labor Law § 198 included a private right of action for employees seeking redress from their employers for violations of New York Labor Law Section 191.[295] Consequentially, the Court also determined that the "wage claim" to which Section 198 refers includes not only instances of non-payment or partial payment of wages, but also late payment of wages.[296]

In 2024, this exact issue was also presented before the Second Department in *Grant v. Glob. Aircraft Dispatch, Inc.*, and it disagreed with the First Department, holding that "the plain language of Labor Law § 198(1–a) supports the conclusion that this statute is addressed to nonpayment and underpayment of wages, as distinct from the frequency of payment" and that "payment of full wages on the regular biweekly payday [does not constitute] nonpayment or underpayment"—drawing a stark contrast from the First Department's interpretation.[297]

The Second Department specified that an action for a violation of Labor Law Section 191, under Section 198, cannot be exclusively based on "frequency of pay violations" because a party could then be entitled to liquidated damages even though they did ultimately receive their full pay, and to permit an action as such, is not supported by the language in the Labor Law Section 198.[298] The Court underscored that Labor Law Section 198 only addresses nonpayment and underpayment, and "the recovery of liquidated damages is dependent upon the recovery of an underpayment" because it is an additional amount, supplementing a loss.[299]

As a result, the Court concluded that "Labor Law § 198 does not expressly provide for a private right of action to recover liquidated damages, prejudgment interest, and attorneys' fees where a manual worker is paid all of his or her wages biweekly, rather than weekly, in violation of Labor Law § 191(1)(a)."[300] The result from the Second Department significantly constrained the extent of Labor Law Section

295. *See* Vega v. CM & Assocs. Constr. Mgmt., LLC, 107 N.Y.S.3d 286, 288 (App. Div. 1st Dep't 2019).

296. *See id.* at 287.

297. Grant v. Glob. Aircraft Dispatch, Inc., 204 N.Y.S.3d 117, 122 (N.Y. App. Div. 2d Dep't 2024) (citing Gutierrez v. Bactolac Pharm., Inc., 177 N.Y.S.3d 704, 705 (N.Y. App. Div. 2d Dep't 2022)).

298. *See id.* at 122–25.

299. *Id.* at 122.

300. *Id.* at 125.

198's applicability and, accordingly, created a split between the First and Second Department. The Court of Appeals has yet to address this issue, and it will be imperative to monitor any developments in the Court of Appeals and the legislature this upcoming year.

D. Extension of New York Anti-Discrimination Law to Nonresident Job Applicants and Employees

Both the New York City Council and the New York State legislature have passed anti-discrimination employment laws and the New York Court of Appeals, on a question certified by the Second Circuit, addressed whether such laws apply to non-residents applying for jobs in New York.[301]

In *Syeed v. Bloomberg L.P.*, the Plaintiff, a South Asian American woman and resident of California, brought a class action lawsuit in New York State Court asserting "among other causes of action, individual claims under the State and City Human Rights Laws."[302] "Plaintiff maintained that defendant discriminated against her on the basis of sex and race" because she was denied a promotion in the Bloomberg New York City office and instead, the position was given to someone with less experience and education and that "she was subjected to discrimination on account of her sex and race while working as a reporter in defendant's Washington, D.C. bureau."[303] The Defendant removed the case to federal court and was granted a motion to dismiss; however, on appeal in the Second Circuit, the Court reversed and certified the following question for the Court of Appeals to answer:

> Whether a nonresident plaintiff not yet employed in New York City or State satisfies the impact requirement of the New York City Human Rights Law or the New York State Human Rights Law if the plaintiff pleads and later proves that an employer deprived the plaintiff of a New York City- or State-based job opportunity on discriminatory grounds.[304]

The Court of Appeals answered this question holding "that the New York City and New York State Human Rights Laws each protect nonresidents who are not yet employed in the city or state but who

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301. *See* Syeed v. Bloomberg L.P., 235 N.E.3d 351, 352 (N.Y. 2024).

302. *Id.*

303. *Id.* at 353.

304. *Id.* at 353–54 (quoting Syeed. v. Bloomberg L.P., 58 F.4th 64, 71 (2d. Cir 2023)).

proactively sought an actual city- or state-based job opportunity."[305] The Court reasoned that they could not "conclude that the legislature and city council intended to give New York employers a license to discriminate against nonresident prospective employees" and as a result, a narrow reading of the statutes was rejected.[306]

XIX. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PUBLISHES NEW GUIDANCE ON WORKPLACE HARASSMENT FOR FIRST TIME IN TWENTY YEARS

On April 29, 2024, the U.S. Equal Employment Opportunity Commission ("EEOC") released new guidance on harassment in the workplace—superseding prior guidance from 1987, 1990, 1994, and 1999.[307] It is imperative to note that EEOC guidance "provides the Commission's interpretations of the laws enforced by the agency . . . [and] draws from the text of the statute/s, the legislative history, prior Commission policy and decisions, case law, and other legal sources."[308]

Embodied in the recent guidance on harassment in the workplace, is a whole host of new provisions, reflecting the development of contemporary law.[309] The guidance opines on the prohibition of harassment based on several categories: "Sexual Orientation and Gender

305. *Id.* at 352.

306. *Syeed*, 235 N.E.3d at 356.

307. *See Enforcement Guidance on Harassment in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 29 2024), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace#_Toc164807993.

308. *EEOC Guidance*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc-guidance (last visited Feb. 18, 2025).

309. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 307.

Identity,"[310] "Sex,"[311] "Race,"[312] "Color,"[313] "National Origin,"[314] "Religion,"[315] "Pregnancy, Childbirth, Related Medical Condition under Title VII,"[316] "Age,"[317] "Disability,"[318] "Genetic Information,"[319] and "Retaliation."[320]

The guidance also considers that conduct must now "be evaluated in the context of the specific work environment in which it occurred"

310. *See id.* ("Harassing conduct based on sexual orientation or gender identity includes epithets regarding sexual orientation or gender identity; physical assault due to sexual orientation or gender identity, outing . . . harassing conduct because an individual does not present in a manner that would stereotypically be associated with that person's sex; repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity . . . or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.").

311. *See id.* ("Harassing conduct based on sex includes conduct of a sexualized nature, such as unwanted conduct expressing sexual attraction or involving sexual activity (e.g., "sexual conduct"); sexual attention or sexual coercion, such as demands or pressure for sexual favors; rape, sexual assault, or other acts of sexual violence; or discussing or displaying visual depictions of sex acts or sexual remarks.").

312. *See id.* ("Harassment is based on a complainant's race if it is because the complainant is Black, Asian, White, multiracial, or another race.").

313. *See id.* ("[C]olor-based harassment. . . [is harassment] due to an individual's pigmentation, complexion, or skin shade or tone. . . .").

314. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 307 ("Harassment based on national origin includes ethnic epithets, derogatory comments about individuals of a particular nationality, and use of stereotypes about the complainant's national origin.").

315. *See id.* ("Harassment based on religion includes the use of religious epithets or offensive comments based on a complainant's religion (including atheism or lack of religious belief), religious practices, or religious dress.").

316. *See id.* ("Sex-based harassment. . . include[s] issues such as lactation; using or not using contraception; or deciding to have, or not to have, an abortion." Harassment based on these issues generally would be covered if it is linked to a targeted individual's sex including pregnancy, childbirth, or related medical conditions.).

317. *See id.* (Age-based harassment "includes harassment based on negative perceptions about older workers. . . stereotypes about older workers, even if they are not motivated by animus.").

318. *See id.* (Disability-based harassment "includ[es] harassment based on stereotypes about individuals with disabilities in general or about an individual's particular disability. . . harassment based on traits or characteristics linked to an individual's disability, such as how an individual speaks, looks, or moves.").

319. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 307 (Genetic information-based harassment is "harassment based on an individual's, or an individual's family member's, genetic test or on the basis of an individual's family medical history.").

320. *See id.* ("The EEO statutes prohibit employers from retaliating against employees and applicants for employment because of their 'protected activity.'").

given the rise of remote work.[321] The guidance is quite comprehensive and provides additional examples and numerous scenarios that depict how these types of harassment could arise, which is a great tool for employers to use when creating workplace policy and investigating misconduct.

CONCLUSION

As in years past, the *Survey* year saw a multitude of changes, primarily concerning continued efforts to strengthen employees' rights in the workplace and the repeal of Covid-era legislation. All of these changes will significantly affect employers and employees in New York City and throughout the remainder of New York State. The changes highlighted in this *Survey* represent only a selection of important changes; employers and their legal counsel should continue to monitor legal developments to ensure compliance with all applicable laws.

321. *See id.*