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TODAY'S AGENDA

Gabe Oberfield – (12:00PM-12:10PM)

- Intros / Agenda
- Notable NYS Bill Signings
- Public Health Updates

Mark Beloborodov – (12:10PM-12:20PM)

- Intellectual Property Issues Before SCOTUS

Stephanie Fedorka – (12:20PM-12:30PM)

- Updates to:
 - NYLL 206-c (Breaks to Express Breastmilk) and
 - NYLL 215 (Retaliatory Workplace Safeguards for Protected Leave)

Cat Graziore (12:30PM-12:40PM)

- Higher Ed Student Discipline Cases of Note

G. Oberfield – (12:40PM-12:45PM)

- Fielding Open Questions and Final Remarks

Bill Activity Picking Up

Sources: New York State Senate

Bills before NYS Governor Hochul are wide ranging, and include:

- S9427A – Ramos – Wage Transparency standards –
 - *Expect a fuller briefing on this during the next Business in 2022*
- A372 – Rosenthal – Relates to prohibiting co-payments for treatment at an opioid treatment program
- A10176 – Thiele – Relates to licenses to sell liquor at off-premises catering establishments
- A4601 – Barnwell – Relating to signings of powers of attorney
- A8472 – Gottfried – Relates to prohibiting the establishment of new for-profit hospices
 - *One of AM Gottfried's final bills*



The New York State Senate

S9427A has been delivered to Governor Kathy Hochul.

Senate Bill S9427A
Requires employers to disclose compensation or range of compensation to applicants and employees

Sponsor:
RAMOS

Recent Actions:

What this Means:

The Governor has 10 days (not including Sundays) to approve ("sign") or reject ("veto") bills passed by both houses. Signed bills become law; vetoed bills do not. However, if the governor failure to sign or veto a bill within the 10-day period, the bill automatically becomes law.

There are c. 260 bills that have been or have yet to be delivered to Gov. Hochul

Bill Signings Picking Up

Sources: Politico.com, City and State, Office of the Governor



Bills signed into law include:

- S7199 – Gounardes – pertaining to certain provisions in insurance contracts
- A8869B – Eichenstein – Relates to insurance for victims of a hate crime
- S1785A – Skoufis – Requires residential health care facilities (NHs) to update residents, authorized family members, and guardians of residents of the presence of an infection and to have in their pandemic emergency plan a plan or procedure for designating a separate cohort area
- A8006 – Gottfried – Relates to authorizing residents of assisted living programs to receive hospice services
- S9333 – Ramos – Requires updating of New York State codes to replace instances of the terms “alien” and “illegal alien” with the terms “noncitizen” and “undocumented noncitizen”

And Gubernatorial Vetoes Continue

Sources: Politico.com, City and State, Office of the Governor

Bills recently vetoed by Gov. Hochul include:

- S6777A – SALAZAR – Relates to providing language translation services to accommodate census self-reporting
- A7889A – GOTTFRIED – Relates to process rights under audit and review of medical assistance program funds by the Medicaid inspector general
- 5956A – RIVERA – Relates to allowing physician assistants to serve as primary care practitioners for purposes of Medicaid managed care plans
- S4371D – BIAGGI – Relates to emissions of toxic air contaminants
- S2903A – KAVANAGH – Requires notice of risk of deportation of non-citizens, prior to accepting a plea
- S968A – GAUGHRAN – Relates to requiring service providers to prepare and submit emergency response plans



Gov. Hochul Soon to Select Chief Judge to NYS Court of Appeals



Former Chief Judge Janet DiFiore
Credit: nycourts.gov

- Gov. Hochul has until December 23, 2022, to name a new Chief Judge for NYS's highest appellate court
- Former Chief Judge Janet DiFiore stepped down during the summer, during her sixth year of service
 - Appointed by former Gov. Andrew Cuomo
- The pick is viewed by many as consequential and tone-setting for the court



NYS Gov. Kathy Hochul
Credit: Politico

Public Health Updates

NYS Health Commissioner to Step Down

- Dr. Mary Bassett, M.D., M.P.H., will leave NYS DOH at the conclusion of 2022 and return to academic role within Harvard's T.H. Chan School of Public Health
- Joined the Administration in 2021 as the successor to Howard Zucker, M.D., J.D., first in an acting and then in a confirmed role.
- Per Gov. Hochul, an extensive search is underway.
- The Dept. likely to be without a permanent Commissioner for portion of 2023.
- Dr. Bassett received accolades for her service from the Public Health and Health Planning Council during its December 8, 2022, convening.



Commissioner Bassett
Credit: New York State Dept. of Health



Former Commissioner Zucker
Credit: LinkedIn

Masking...Making A Comeback?



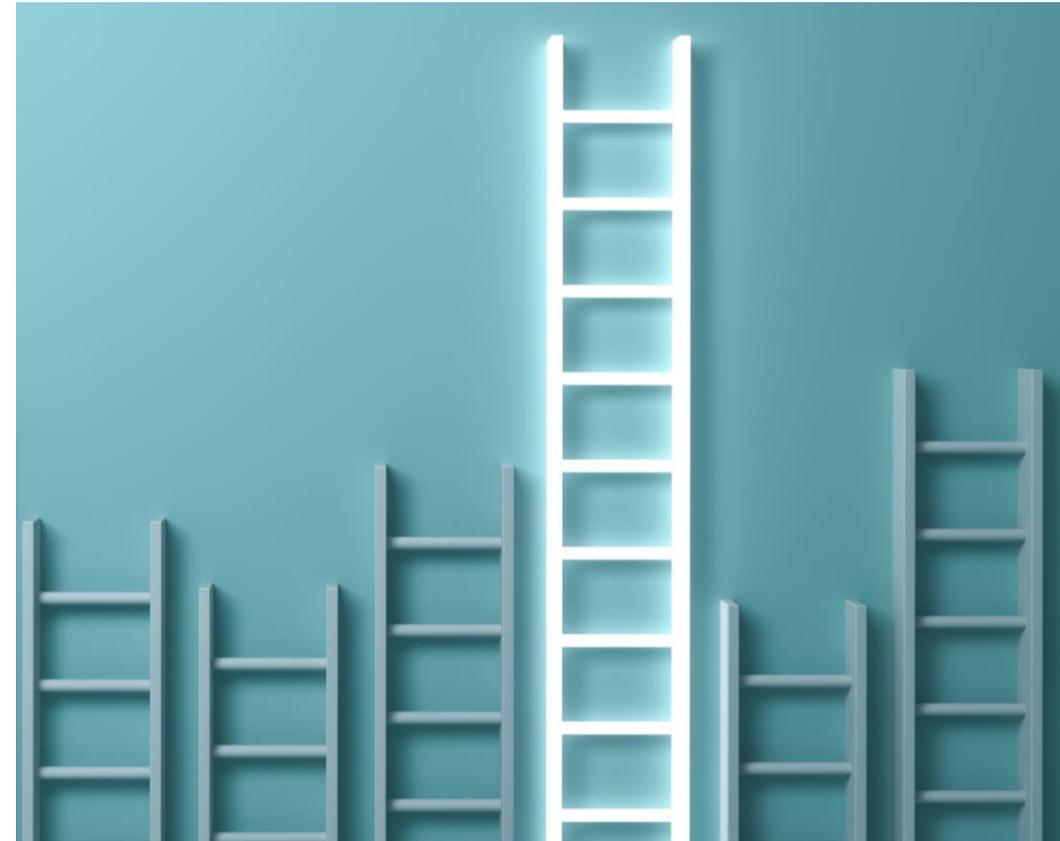
DOHMH Commissioner Ashwin Vasan, MD, PhD
Credit – NYC DOHMH

- In New York City – Commissioner of the New York City Dept. of Health and Mental Hygiene *recommends* masks indoors and in outdoor crowded spaces
 - Due to combination of circulating flu strains, RSV, COVID-19, etc.
 - Per New York Times reporting:
 - “The advisory comes as the rate of new Covid cases in the city has increased by about 55 percent over the past two weeks, according to data compiled by The New York Times, while the hospitalization rate has increased by 20 percent over that time. The city registered a seven-day average of 3,761 new cases on Thursday, up from 2,425 two weeks before.”
- **For the moment, NO mandates.**

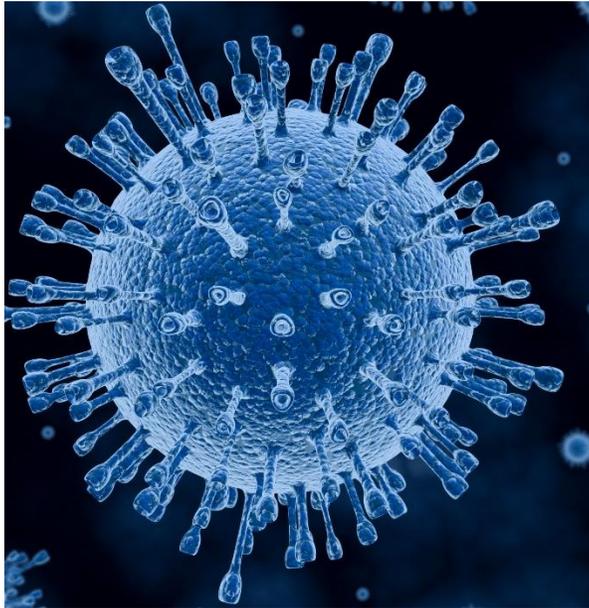


Bi-Valent COVID-19 Boosters

- Federal FDA approved bi-valent COVID-19 vaccination boosters for children as young as 6 months
 - Pfizer-BioNTech and Moderna
- Context: continuing lag in booster uptake relative to eligibility



Polio – Public Health Emergency Concludes



- NYS Executive Order allowed to expire
- Mass vaccination efforts since emergence of polio cases earlier this year
- Decline of evidence in wastewater, etc.

	<p>Executive Order 21.1 Continuing the Declaration of a Statewide Disaster Emergency Due to the Ongoing Spread of Polio in the State of New York</p>	 DOWNLOAD
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No. 21.1

EXECUTIVE ORDER

Continuing the Declaration of a Statewide Disaster Emergency Due to the Ongoing Spread of Polio in the State of New York

WHEREAS, a case of paralytic polio was identified on July 21, 2022, in an unvaccinated resident of Rockland County who had no international travel during the incubation period for polio;

WHEREAS, the poliovirus that infected the Rockland County individual has been identified as a case of vaccine-derived poliovirus, the last of which was identified in New York in 1990;

WHEREAS, genetically related poliovirus have been detected in wastewater samples collected from Kings, Nassau, Orange, Queens, Rockland, and Sullivan counties in April, May, June, July, August, and September 2022;

WHEREAS, polio was declared eliminated in the United States in 1979, primarily due to high vaccination rates against polio;

WHEREAS, routine vaccination rates against polio across all ages have decreased throughout the COVID-19 pandemic and vaccine hesitancy has increased;

WHEREAS, vaccination rates against polio among 2-year old children in New York is 79%, and is significantly less than that in several counties and zip codes;

DOH Updates 'Return to Work' Guidance for Health Care Personnel Exposed to COVID-19

- Applies to many health care settings (e.g., hospitals, nursing homes, etc.)
- Brings NYS into comportment with Federal Centers for Disease Control and Prevention guidance
- Alignment with Interim Guidance for Managing HCP with SARS-CoV-2 Infection or Exposure, as updated on Sept. 23, 2022.
- Creates relative flexibilities in context of asymptomatic exposures
- Timing – NYS health system under stress – and related staffing pressures



KATHY HOCHUL
Governor

Department
of Health

MARY T. BASSETT, M.D., M.P.H.
Commissioner

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

Date: November 30, 2022

To: All Healthcare Settings including but not limited to Hospitals, Nursing Homes, Diagnostic and Treatment Centers (DT&C) including End Stage Renal Disease (ESRD) Facilities, and Ambulatory Surgery Centers, Emergency Medical Services (EMS), Home Care, Outpatient Clinics, Dentists, and Private Practices

Updated Advisory on Return-to-Work Protocols for Healthcare Personnel with SARS-CoV-2 Infection or Exposure to SARS-CoV-2

Please distribute immediately to:

Administrators, Infection Preventionists, Hospital Epidemiologists, Medical Directors, Occupational Health Directors, Nursing Directors, Risk Managers, and Public Affairs Directors

The information contained herein is consistent with updated recommendations from the Centers for Disease Control and Prevention (CDC) and supersedes the February 4, 2022, New York State Department of Health (NYSDOH) return-to-work guidance. Updated CDC guidance will be reviewed by NYSDOH as it is released. Additional requirements may be added.

Healthcare personnel (HCP) refers to all paid and unpaid persons serving in healthcare settings who have the potential for direct or indirect exposure to patients or infectious materials, including body substances (e.g., blood, tissue, and specific body fluids); contaminated medical supplies, devices, and equipment; contaminated environmental surfaces; or contaminated air. HCPs include, but are not limited to, emergency medical service personnel, nurses, nursing assistants, home healthcare personnel, physicians, technicians, therapists, phlebotomists, pharmacists, students and trainees, contractual staff not employed by the healthcare facility, and persons not directly involved in patient care, but who could be exposed to infectious agents that can be transmitted in the healthcare setting (e.g., clerical, dietary, environmental services, laundry, security, engineering and facilities management, administrative, billing, and volunteer personnel).

Managing HCP with SARS-CoV-2 Infection or Exposure to SARS-CoV-2

All healthcare facilities should follow appropriate Centers for Medicare & Medicaid Services (CMS)

Pending IP Cases before the U.S. Supreme Court



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“The Supreme Court meets Andy Warhol, Prince and a case that could threaten creativity”*

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith (Docket No. 21-869; argued October 12, 2022)



* NPR's All Things Considered (aired on October 12, 2022)

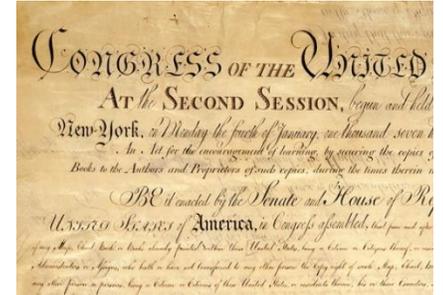
US Constitution – Intellectual Property Clause



Article 1 Section 8

Congress has the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Copyright Act of 1976

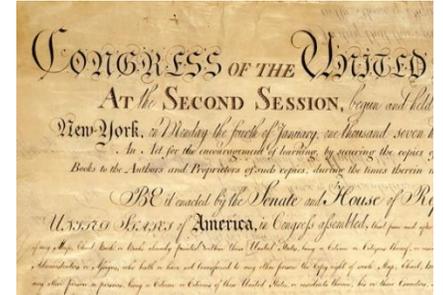


17 USC §106 - Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare **derivative works** based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Copyright Act of 1976



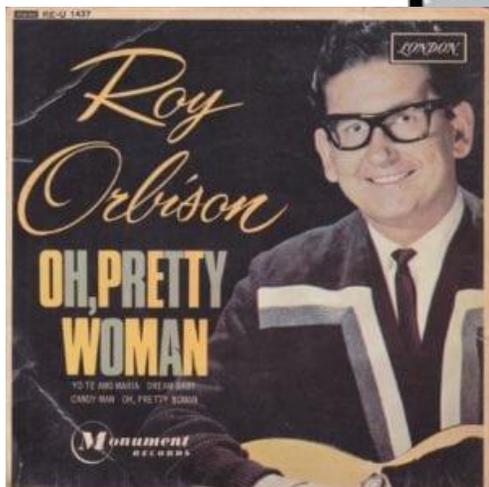
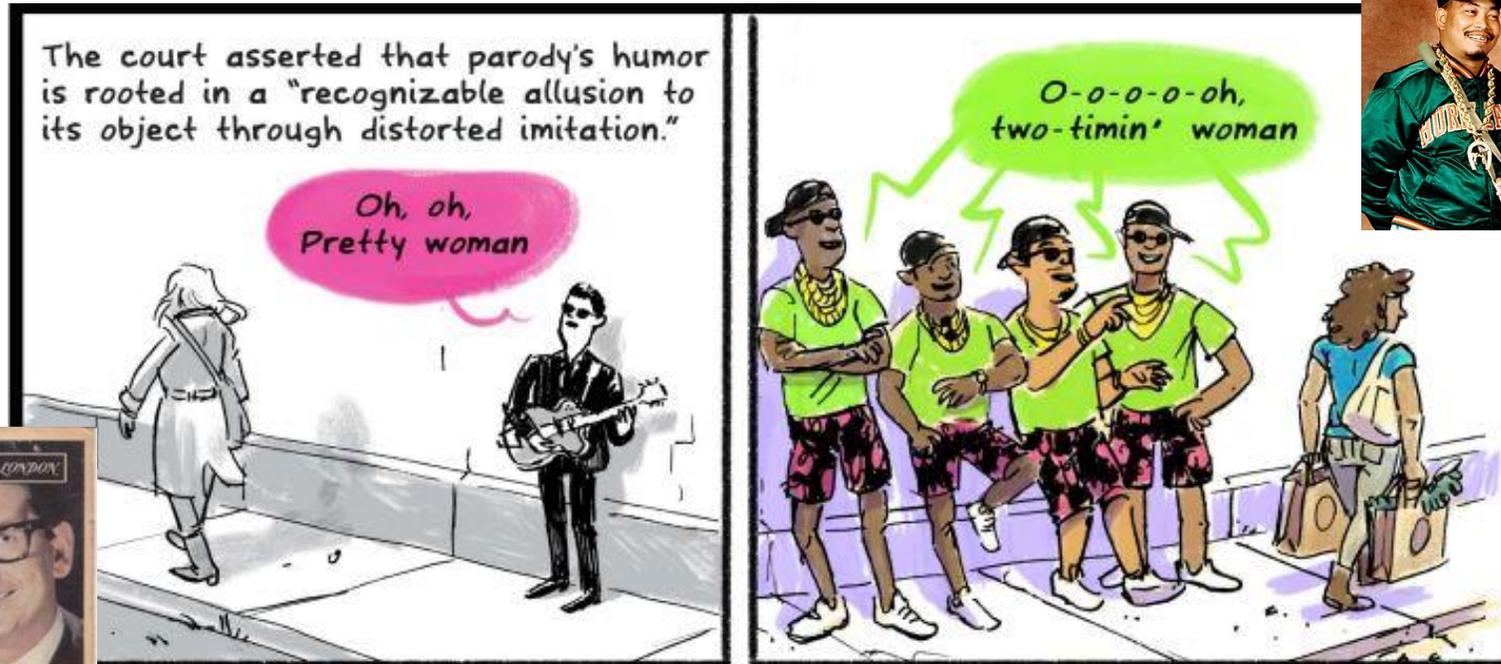
17 USC §107 - Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106a, fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) **the purpose and character of the use**, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Campbell v Acuff-Rose (510 U.S.C. 569 (1994))



“The Supreme Court meets Andy Warhol, Prince and a case that could threaten creativity”*

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith (Docket No. 21-869; argued October 12, 2022)



* NPR's All Things Considered (aired on October 12, 2022)

Issue



Does a work of art that visually resembles its copyrighted source material, but conveys a different meaning, constitute fair use? Is a court permitted to consider **meaning** when evaluating copyright infringement claims?

Oral Hearing at the US Supreme Court on Oct 12



Roman Martinez argues on behalf of the Andy Warhol Foundation. (artwork by William Hennessy)(as reported by SCOTUSblog)

Question Presented:

- whether a work is transformative when it conveys **a different meaning or message** from its source material, or whether a court is forbidden from considering the meaning of the accused work **when it recognizably derives from the source material.**

Rethinking the quid pro quo bargain of the U.S. patent system

Amgen Inc. v Sanofi (Docket No. 21-757; cert. granted on November 3, 2022)

35 U.S.C. §112(a) requires that a patent's specification must contain “a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same.”

- This statutory requirement dictates that patent applications contain sufficient disclosure to allow one skilled in the relevant art to make and use the claimed invention **without undue experimentation**. It is the essence of the quid pro quo bargain between the inventor and the government where a temporary right to exclude others from making or using the invention is granted to the inventor in exchange for the enabling description of their invention

Rethinking the quid pro quo bargain of the U.S. patent system

Amgen Inc. v Sanofi (Docket No. 21-757; cert. granted on November 3, 2022)

- **Issue:** Whether enablement is governed by the statutory requirement that the specification teach those skilled in the art to “make and use” the claimed invention, or whether it must instead enable those skilled in the art “to reach the full scope of claimed embodiments” without undue experimentation—i.e., to cumulatively identify and make all or nearly all embodiments of the invention without substantial “time and effort.”

Updates to NYLL 206-c



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Amendments to NYLL § 206-c

- **Dec. 9, 2022** – Gov. Hochul signed Senate Bill S4844B into law
 - Amendments to NYLL 206-c – Rights of Nursing Mothers Employees
- Employers must provide reasonable unpaid break time or permit employee to use paid break time or meal time to allow employee to express breast milk for nursing child *each time such employee has reasonable need to express breastmilk* for up to 3 years following child birth
- **Effective:** 180 days → **June 7, 2023**

Amendments to NYLL § 206-c

- Employer must designate room or location to be made available to nursing employee(s) upon request by such employee
- Must be in close proximity to work area; well lit; shielded from view; and free from intrusion from other persons in the workplace or public
- Cannot be restroom or toilet stall
- At a minimum must provide:
 - Chair
 - Working surface
 - Nearby access to clean running water
 - Electrical outlet (if workplace is supplied with electricity)
 - Must allow access to refrigerator for storage of breastmilk if employer provides refrigerator in workplace

Amendments to NYLL § 206-c

- If sole purpose or function of such room is not dedicated to the use by employee for expressing breast milk, the room must be made available to a nursing employee when needed and not be used for any other purpose while in use by the nursing employee
- Employers must provide notice to all employees as soon as practicable when such room has been designated as a place for employees to express breast milk

Amendments to NYLL § 206-c

- **Undue Hardship:** Where compliance with the provisions of those provisions would impose an undue hardship on the employer by causing significant difficulty or expense when considered in relation to size, financial resources, nature or structure of business, employer must still make reasonable efforts to provide a room or other location other than restroom or toilet seat, in close proximity to work area where employee can express breastmilk in private.
 - **Note:** This is high standard to prove and will depend on unique and specific circumstances of employer's business operations

Amendments to NYLL § 206-c

- NYSDOL to develop and implement written policy for employer use
- New Written Policy Requirements:
 - Inform employees of rights under NYLL 206-c
 - Specify means by which employee can request room or location to express breastmilk
 - Employer must respond to such request within reasonable timeframe but not to exceed 5 business days
- Policy must be provided to employees:
 - Upon hire
 - Annually
 - Upon returning to work following birth of child
- Anti-retaliation provision for exercising their rights under NYLL 206-c

Amendments to NYLL § 215

- Senate Bill S1958A signed by Gov. Hochul on November 21
 - Becomes effective 90 days → **February 19, 2023**
- NYLL § 215 → Anti-retaliation provisions of NY Labor Law
 - Makes it unlawful for employer to discharge, penalize, or in any manner discriminate or retaliate against an employee for:
 - Making complaint about possible labor law violation to NYSDOL or anyone
 - Providing information to NYSDOL
 - Testifying in an investigation or other proceeding under NYLL
 - Exercising rights protected under NYLL
 - Causing employer to receive adverse determination from NYSDOL

What's New...

- The amendments are intended to “clarify” that employees cannot be discharged, threatened, penalized, or in any other manner discriminated or retaliated against for using any “legally protected absence pursuant to federal, local, or state law.”
- ***“Assessing any demerit, occurrence, any other point, or deductions from an allotted bank of time, which subjects or could subject an employee to disciplinary action, which may include but not be limited to failure to receive a promotion or loss of pay”*** would constitute such unlawful retaliation, discrimination, or penalty under NYLL § 215

Potential Impact for Employers

- Calls into question any “no fault” or points-based attendance policies particularly those that take any absence into account (as opposed to not counting such lawful absences)
- Potential impact on attendance-based bonuses based on the “loss of pay” language in the amendments

What Should Employers Do

- Review attendance policies/leave policies
 - Revise accordingly
 - Education decisionmakers (refresh training) regarding unlawful retaliation
- Consult legal regarding policies that may be implicated by amendments, or before taking action against employees based on attendance when employee has taken legally entitled leave/absence under federal, state, local law (even in part)
- Stay tuned for any further guidance from NYSDOL on amendments (but don't hold your breath!)

Higher Ed Student Discipline Cases of Note



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Recent Cases Demonstrate the Need for Caution When Disciplining Students

- *Matter of Mozdziak v. SUNY Maritime*, 2022 NY Slip Op 06759 (Nov. 29, 2022)
- *Radwan v. Manuel*, 20-2194-cv (Nov. 30, 2022)

Matter of Mozdziak v. SUNY Maritime

- Student was alleged to have carved a racial epithet into a dormitory elevator door.
- Two students made a joint unsworn written statement alleging that they had witnessed the student engage in the misconduct.
- The two students did not testify at the hearing; their statement was credited over numerous alibi witnesses and statements presented by the disciplined student.

Matter of Mozdziak v. SUNY Maritime

- Procedural History:
- SUNY Maritime College determination affirmed the disciplinary hearing board's expulsion of the student for a finding that he engaged in misconduct.
- The New York State Appellate Division, First Department overruled the State University of New York Maritime College's determination.

Matter of Mozdziak v. SUNY Maritime

- The First Department ultimately found that the school's denial of the student's administrative appeal was arbitrary and capricious.
- SUNY Maritime Code of Conduct.
- What was this new evidence?
- University Police Department records

Matter of Mozdziak v. SUNY Maritime

- Inconsistent following of the School's Code of Conduct
- In addition to the right to a fair hearing, a charged student “has the right to copies of written reports pertinent to the case.”
- Violation of Due Process Rights.
- Takeaways.

Radwan v. Manuel

- A women's soccer player at the University of Connecticut (UCONN) who was a recipient of a one-year athletic scholarship, raised her middle finger to a television camera during her team's post-game celebration after winning a tournament championship.
- Radwan suspended from further tournament play and ultimately punished by UCONN with a mid-year termination of her athletic scholarship.

Radwan v. Manuel

- Radwan brought this lawsuit against UCONN and several university officials alleging violations of:
 - First Amendment rights
 - Procedural Due Process rights under 42 USC § 1983
 - Title IX of the Education Amendments Act of 1972 (Title IX).

Radwan v. Manuel

- The Title IX Claim survives
- Takeaways.

Questions?



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Introduction

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New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar [here](#).

Non-NYS Bar Association Members can purchase through Amazon [here](#).

Thank You

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It is not to be considered as legal advice.
Laws can change often, and information may become outdated.

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