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US Regional Employment 2021

New York: Law & Practice

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NEW YORK

Law and Practice

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1. CURRENT SOCIO-ECONOMIC, POLITICAL, AND LEGAL CLIMATE: CONTEXT MATTERS

1.1 The Impact of COVID-19 on the Workplace

In the short term, COVID-19 has created a number of regulatory requirements related to the pandemic itself. For example, at both the federal and state level, there have been temporary emergency requirements imposed related to, among other things:

- quarantine and isolation;
- COVID-19 testing;
- leave for exposure, symptoms, and sickness;
- masking;
- vaccination.

The pandemic has affected the workplace in a very similar way to its effect on everyday life – the way people used to interact, and things that people used to take for granted have changed dramatically during the pandemic.

A global entity assessing the business requirements in this region will need to consider carefully the current requirements, which are changing rapidly, sometimes on a weekly or even daily basis. New requirements also continue to be proposed at the local, state and federal government level as the pandemic rages on.

Those most recently include vaccination requirements, the possible availability of a test-out option, and the requirement that employers with unions potentially have bargaining obligations under the National Labor Relations Act (NLRA). For example, an employer in New York City, at any given time might have to assess its obligations to check vaccination status and assess possible religious and medical accommodations imposed on it by the city, the state, and the fed-

eral government, as well as bargaining on the impact of those requirements and the decision with respect to any discretionary choices, with the union representing its employees under the NLRA.

In addition, we have seen a dramatic change in the locus of the workplace. A large number of employees began to work remotely starting in March 2020, and many of those continued working remotely through 2021. From a technological perspective, it has become apparent that a number of employees who traditionally worked in person can now work remotely or in a hybrid arrangement with considerable success. The advent and success of videoconferencing platforms, and the technology available to most employees, has made working from home or otherwise working remotely a viable option. Employers have learned to deal with the management aspect of this but now must also address several other considerations, including:

- managing remote work;
- deciding if and when to return employees in whole or in part to in-person work;
- approving long-term remote working relationships;
- losing employees to remote work opportunities to other employers, either due to unwillingness to let employees work remotely or financial incentives for employees in low-cost-of-living areas who can command commensurate wages to migrate to employers paying high-cost-of-living area wage rates;
- weighing the synergies achieved by remote work against the downside of losses in terms of in-person work – these potentially include lack of mentoring, training, supervisory challenges and a general disconnection to the workplace.

Another significant challenge is the apparent sea-change in the labor force and the avail-

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ability of qualified workers. Pandemic relief benefits, including enhanced unemployment insurance, as well as the prospect of working at home, have shifted the workplace dynamics and created a tighter labor market. A number of employers have reported difficulty in attracting and retaining talent for the work that they have as the economy has ramped back up post-shutdown. This appears to be a challenge for the short to medium term, including wage pressure, and other pressures on employers to enhance workplace satisfaction in order to attract and retain workers.

From a legal perspective, there will continue to be challenges to vaccination mandates, and leave issues associated with individuals who have COVID-19-related conditions or have medical or religious objections to the workplace mandates. It is expected that these issues, along with the general workplace climate, will create the prospect for more employment litigation.

1.2 “Black Lives Matter,” “Me Too,” and Other Movements

Sexual harassment and related conduct is not a novel issue, in the workplace or elsewhere. Headline cases have sparked what have been termed “Me Too” and “Time’s Up” movements that highlighted the alleged pervasiveness and gravity of such conduct in high-visibility fields, the power dynamics involved and the extent to which such allegations were seemingly ignored. What is different about these movements is the extent to which – legislatively and otherwise – they have altered the thinking of some as to the fundamental approaches to these issues.

A well-settled area of concern is disparity in pay on the basis of gender, race and other protected areas defined by federal, state and local laws and regulations. These are not new issues, but the Pay Equity Movement has intensified the focus on such factors as:

- transparency;
- the historical causes, implications and ramifications of the salary gaps;
- appropriate comparators;
- more sophisticated statistical analyses and pay audits; and
- a heightened interest at the federal, state and local government levels, as evidenced by the fact that the federal Equal Employment Opportunity Commission (EEOC) now regards pay equity as one of its top priorities and many states have introduced bills to address the issue.

1.3 “Gig” Economy and Other Technological Advances

In its purest sense, the gig economy is predicated upon an independent contractor status involving flexibility, short-term commitments and often temporary status, characterized by individuals who choose to work where, when and as frequently as they wish. A significant number of these individuals also seek to supplement their gig incomes either through regular employment with another entity or what is classified, both by that entity and the individual, as an independent contractor relationship that renders the individual ineligible for minimum wage, overtime, workers’ compensation, unemployment insurance and other protections and benefits. While such entities, in the latter case, likely do not regard themselves as part of the gig economy, that “independent contractor” classification, when deemed a misclassification under the law, has generated substantial individual and collective or class action litigation and monetary recoveries.

Add to that the impact on the extended workplace of robotics and other artificial intelligence (AI), the new emphasis on algorithms, “big data” and other automation developments, and the implications are many.

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1.4 Decline in Union Membership?

Union membership in the private sector of the workforce in the USA has been in steady decline since its peak of about 35% in the early 1950s. Presently, union membership in the private sector, nationwide, is at about 6.5%; New York is at about 23.8% – this includes the public sector unionization, which drives a significant portion of the disparity.

Depending upon one's perspective, the reasons for the decline differ, but among the contributing factors are:

- a major shift in employment away from traditionally unionized industries;
- loss of manufacturing due to globalization and trade;
- a more highly educated and mobile workforce;
- the increase in contingent and on-demand, short-term work, typified by the “gig” economy; and
- the ever-increasing development and reliance upon telecommuting, electronic communications, ongoing automation, including robotics and other artificial intelligence and analytics.

Further, an increased number of states, not including New York, have adopted “right-to-work” laws prohibiting the extent to which an incumbent union can require, as a condition of employment, union membership or payment of union dues other than a fair share of the fees associated with the benefits and services provided by the union.

All of this has occurred over a number of years that witnessed the passage and promulgation of a number of federal, state and local laws and regulations in the areas of discrimination, harassment, retaliation, workplace safety, wages and hours, reductions in force, pension, health and other benefits, to name a few, that offer the

individual – independent of union membership – both protections and alternative forums that either were non-existent in the formative years of the union movement or, to the extent they did exist, were much more limited in substance or application. In a similar vein, the evolution and utilization by individuals of private class or collective actions, and other alternative forums – again, independent of union membership – cannot be dismissed as a contributing factor to this decline in union membership.

1.5 National Labor Relations Board

Federal labor policy and law with respect to union organization and representation and, in certain respects, to the rights and protections of the unorganized sector of the private sector workforce, is governed by the National Labor Relations Act (NLRA) and the federal administrative agency delegated to enforce the provisions of that statute, the National Labor Relations Board (NLRB).

The NLRB's objective has been to achieve a uniform and orderly administration of this national statute that, in many respects, pre-empts state or local law or regulation. The process has been subject, in varying degrees, to the political swings of the particular presidential administration in office at a given time, to interpretation within the different geographical regions of the Board and by the respective federal circuit courts of appeals governing those regions, and, where it takes jurisdiction, to ultimate resolution by the US Supreme Court. The Court has made clear, moreover, that the Board retains the discretion to reconsider its prior decisions “in light of significant developments in industrialized life believed by the Board to have warranted a reappraisal of the question” (NLRB v Weingarten, 420 U.S. 251, 265 (1975)). What legal changes these factors will bring in the near future remains to be seen.

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President Biden has appointed a new General Counsel to the National Labor Relations Board and it is anticipated that the NLRB will shift, based upon the Biden appointments, to a more favorable majority for unions and workers seeking to organize. The new General Counsel has taken the unusual step of authoring a memorandum, indicating that certain cases are especially ripe for scrutiny and possible reconsideration under the NLRB's established process of making policy through case law. The General Counsel has indicated that cases such as those governing employee access to electronic communications in the workplace, employee conduct that may impact protected concerted activity, and other issues on which the NLRB has vacillated over the years are ripe for reconsideration.

2. NATURE AND IMPORT OF THE RELATIONSHIP

2.1 Defining and Understanding the Relationship

As noted in **1.3 “Gig” Economy and Other Technological Advances**, to the extent entities in this “gig” economy have relied, with increasing frequency, upon the utilization of independent contractor relationships, such relationships have been the subject of heightened scrutiny by governmental agencies and the courts.

The problem typically arises where the need of the employer to control, direct and supervise the actions and performance of the individual is such that the true independent nature of the relationship, if it ever existed, no longer exists. In such instances, the entity may find itself liable – retroactively, as well – for certain tax obligations, pension, insurance and other benefits (statutory and otherwise) paid to its employee complement. The cost and other legal implications could be considerable.

Joint Employer

Recently, certain governmental agencies and courts have moved towards a more expansive definition of a joint employer relationship that would apply where two or more business entities simply possess the right to share or co-determine essential terms and conditions of employment, even if that right has not actually been exercised. Whether the right of control must actually be exercised, and done so directly, and/or the extent of that exercise, is currently the subject of extensive litigation. The ramifications of creating or avoiding a joint employer relationship between two employers are substantial and, in addition to other considerations, can involve joint obligations, under a union contract or otherwise, for statutory and employer-provided benefits, wages and other terms.

Historically, the standard for finding joint employer in the franchise context has been more demanding, as franchisors have been permitted to engage in a certain control that, although impacting the franchisee's employees, is consistent with the franchisors' right to protect the franchise brand. However, that standard, too, is in litigation.

Internship

While the law recognizes that unpaid interns may not be employees, as with independent contractors, merely denominating them as interns is insufficient to determine their status. There are multi-factor tests that determine whether misclassification has occurred, including, most importantly, whether the interns perform services more for the benefit of the employer or for themselves. The importance of properly structuring an unpaid internship cannot be minimized.

Employment “At-Will”

In most states, including New York, the common-law rule is that in the absence of a contract, employment is “at-will” – ie, either the

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employee or the employer may terminate the employment at any time, for any reason or no reason at all, as long as the reason is not one that is expressly prohibited by law. That said, due to the significant number of federal, state and local discrimination, harassment, retaliation and other legal protections, the at-will termination standard today provides less insulation from potential liability. Beyond that, in various states, exceptions to the right to terminate at will have provided many US employees with some kind of “just cause” or objectively reasonable protection against termination. The most common of these exceptions is a public interest exception that protects employees against adverse employment actions that violate a public interest. New York, however, has not adopted this public policy exception.

Even where there is no written employment contract, an implied contract that circumscribes the right to terminate may be inferred – depending upon the circumstances – from an employer’s or supervisor’s statements, a handbook, the employer’s practices (eg, of firing only for cause), or other facts. A minority of states have recognized a “covenant of good faith and fair dealing,” which has been interpreted in a variety of ways – anywhere from requiring just cause for termination to prohibiting terminations in bad faith or motivated by malice. In New York, one of the most stringently at-will states, a plaintiff employee must show “an express written policy limiting [the employer’s] right of discharge and that the employee detrimentally relied on that policy in accepting the employment” (*DePetris v Union Settlement Ass’n, Inc.*, 86 N.Y.2d 406, 410 (1995)).

Contractual Arrangements

Contractual arrangements and terms other than as to termination can be created individually or collectively (such as negotiated with a union), either in formal contractual agreements, offer let-

ters or other memoranda, policy statements or correspondence. Unless carefully drafted, they may be inferred from personnel handbooks or manuals, or, depending upon the circumstances, even by actions or verbal representations made at the time of hire or during employment, viewed in the context of subsequent actions.

In the event of a dispute as to certain statutory issues, the application of the law, rather than the contract, will be determinative. Similarly, while the language of an agreement may be a relevant factor in determining the validity of such classifications as “independent contractor” or “intern,” application of the legal considerations, in the context of the circumstances, will be determinative.

“Exempt” versus “Non-exempt” Status and what that Means

Generally, under the Federal Fair Labor Standards Act (FLSA), New York State Labor Law (NYLL) and Wage Orders promulgated by the New York State Department of Labor (NYS DOL), unless an employee is an “outside sales person” or is paid a salary and the job is subject to one of the statutory exemptions from hourly pay requirements, an employee must be paid on an hourly basis, and at an overtime rate of one-and-a half times the employee’s regular straight-time hourly wage for hours worked in excess of 40 in any single workweek. The three principal exemptions are “bona fide executive,” “administrative” and “professional.”

New York State’s minimum hourly wage rates are substantially higher than the USD7.25 presently required by the FLSA. As of December 31, 2020 the minimums will range from USD12.50 to USD15.00 per hour, depending on the number and location of the employees. Over the next several years, they will increase annually, and by December 31, 2021 will rise to USD15.00 per hour for all employees in New York City,

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Long Island, and Westchester Counties, and to USD12.50 per hour in the rest of the state.

To qualify for any of the three principal exemptions, the employee must be paid on a salaried – not hourly – basis, and the employee’s position must meet certain job duties tests that, under NYS DOL’s Wage Orders, substantially mirror those of the federal FLSA. For example, in order for a job to fall within the scope of the “executive” exemption:

- the primary duty of the job must be managing the enterprise or a customarily recognized department or subdivision of the enterprise;
- the employee must customarily and regularly direct the work of at least two or more other employees;
- the employee must have authority to hire or fire employees or make effective recommendations as to hiring, firing, advancement, promotion or other changes of status that are given “particular weight”; and
- the employee must customarily and regularly exercise discretionary powers.

To fall within the scope of the “administrative” exemption:

- the primary duty of the job must consist of office or non-manual field work directly related to management policies or the employer’s general operations;
- the employee must customarily and regularly exercise discretion and independent judgment; and
- the employee must regularly and directly assist the employer or another employee who is employed in a bona fide executive or administrative capacity (eg, employment as an administrative assistant), or perform specialized or technical work that requires special training, experience or knowledge under only general supervision.

New York differs from the FLSA in other ways that are employee-friendly. For example, the salary basis threshold for exempt status under state and certain local law, currently and prospectively, is much higher than the current FLSA threshold of USD35,568 per year effective January 1, 2020. As of December 31, 2019, an employee in New York City who works for an employer that has more than ten employees and who is paid less than USD58,500 per year (USD1,125 per week) must be paid on an hourly basis and receive overtime pay for hours worked in excess of 40 in a week, irrespective of the duties of the job. The salary basis threshold for smaller employers in New York City and all employers in Long Island and Westchester County is presently slightly lower than that for New York City, but still is more than the threshold under federal law and will increase to USD58,500 per year (USD1,125 per week) on December 31, 2021. For employers elsewhere in the state, the threshold is USD48,750 per year (USD937.50 per week) effective December 31, 2020.

2.2 Immigration and Related Foreign Workers

Employers may hire foreign nationals who, on petition, are authorized by the US Citizenship and Immigration Services (USCIS) to work in the USA either on non-immigrant (temporary) or immigrant (permanent) visa status. Work authorization can be family-based (eg, US spouses may sponsor their foreign spouses for permanent residence and accompanying work authorization), for humanitarian protection provided by the USA (eg, asylum or temporary protected status), or pursuant to the Diversity Immigrant Visa Program.

Options

The most common employment-based non-immigrant petitions filed on behalf of foreign workers are for H-1B visa status, which allows foreign nationals to work for a specific employ-

er in a “specialty occupation” – this requires attainment of a bachelor’s or higher degree or its equivalent in a specialty beyond the theoretical and practical application of a body of highly specialized knowledge. Alternatively, foreign companies looking to transfer their executives, managers or employees with specialized knowledge to a branch office, affiliate or subsidiary located in the USA may file for L-1 visa status.

Other non-immigrant visa options for foreign workers include: the O-1 visa for individuals who possess extraordinary ability in the sciences, arts, education, business, athletics or the motion picture or television industries; the TN visa for Canadian and Mexican professionals; and the E-3 visa for Australian professionals. Additionally, immigrant visa petitions may be filed by employers on behalf of foreign nationals who seek permanent residence (aka “green card”) and qualify for work authorization in various categories.

Worksite compliance

US employers are required to complete USCIS’ Form I-9 to document verification of the identity and employment authorization of every employee, both citizen and non-citizen, to work in the USA. Over the last two years there has been a definite increase in worksite inspections and Form I-9 audits by Immigration and Customs Enforcement (ICE). Failure by employers to verify their employees’ identity and employment authorization can result in significant fines and penalties, including criminal action for employers and employees. Employers are advised to conduct periodic self-audits of their Forms I-9 to minimize the potential for liability.

2.3 Collective Bargaining Relationship or Union Organizational Campaign

An Acquiring Entity: Successorship

An entity that acquires another, depending on the form of acquisition, may assume existing

employment obligations of the acquired entity. If the acquisition entails simply a transfer of stock, only the identity of the shareholders will have changed and, accordingly, existing contractual obligations, individually or collectively bargained, will continue, including as to what might entail a very costly – and unexpected – pension withdrawal liability. If the acquisition instead involves a transfer of some or all of the assets of the seller, and not the stock, successorship may be avoided entirely or involve some obligation short of assumption of existing contracts. Depending upon the circumstances, factors such as the continuity and/or integration of the business and its operations, its equipment, customers, supervision, workforce and pre-sale communications will be determinative.

The “Ally” Doctrine – Primary or Secondary

In the event of labor disputes, an “ally” doctrine has been applied to basically two groups of employees: those who perform “straight work” contracted out to them by a primary employer, and those who, because of common ownership, control and integration of operations, are so identified with the primary employer as to be treated as a single enterprise as opposed to a neutral employer. Determinations as to these issues will be important in several situations arising under the NLRA, including labor disputes involving secondary boycotts, picketing and related issues.

3. INTERVIEWING PROCESS

3.1 Legal and Practical Constraints

Fundamental to establishing a lawful and effective recruitment program are a clear job description that identifies the requisite qualifications and essential responsibilities, functions and duties of the position, and the training of all employer representatives involved in the hiring process, its

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procedures and the legal limitations on permissible and impermissible inquiries.

General Guidelines

The job description is the objective measuring stick to evaluate candidates. It also may serve as a critical element in the employer's defense of any claim that the failure to hire a particular candidate was unlawful (eg, disparate treatment of the applicant on the basis of a protected category or in evaluating whether a disabled applicant or employee can be reasonably accommodated to satisfy the essential functions of the job at issue).

During the interviewing process, inappropriate casual comments or stray remarks can result in unanticipated litigation and/or liability. Developing relevant interview questions in advance of any interviews is strongly recommended. Training for those involved in the recruitment process, including the types of inquiries to be avoided, can provide important protection from a possible legal claim.

Discrimination Issues

Federal, state and local employment discrimination laws shape a lawful recruitment program. Written or verbal questions that, directly or indirectly, inquire about an applicant's race, age, religion, national origin, sexual orientation, pregnancy, disability or marital status, or other similarly protected characteristics, are unlawful. So, too, are questions or criteria designed to screen out protected applicants based upon customer or client preference. Similarly, testing and other questions unrelated to the qualifications or essential functions of the job, or that indirectly reveal information related to a protected status without a business justification, are also problematic – for example, asking when applicants graduated from high school or college because it may reveal their ages or, unless visibly apparent at the interview or otherwise voluntarily identified

by the applicant, asking whether the applicant would need reasonable accommodation to perform the job.

Even in the absence of a specific intent to discriminate (disparate treatment), hiring criteria are vulnerable to discrimination claims where a neutral practice or policy adversely impacts applicants from a particular minority group in disproportionate numbers that cannot, by any objective measure, be explained (disparate impact), and the practice or policy cannot be justified as job-related and consistent with business necessity.

Conducting Background Checks

No specific statute governs the procedure for background checks conducted internally by the employer. However, if the employer engages a third party to conduct the background check, the federal Fair Credit Reporting Act and corresponding New York State statute require specific and detailed notice, consent and due process procedures, including:

- the obligation of the employer to disclose in writing to the applicant its intention to obtain such report from a third-party agency;
- the obligation to explain the nature and scope of the investigation upon request from the applicant;
- the obligation to obtain advance, written authorization from the applicant;
- if employment is denied in whole or in part because of the information received, notifying the applicant of the denial on such basis, identify the reporting agency, and provide a copy of the report and statement of the applicant's legal rights; and
- allowing the applicant a period of time to review and challenge the report before implementing its decision.

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In New York City, subject to certain exceptions, it is an unlawful discriminatory practice for an employer generally to request or use an applicant's or employee's "consumer credit history" for employment purposes, or to use it in determining terms or conditions of employment.

Before engaging an agency for such purposes, an employer should seek defense and indemnification agreements from the agency and confirm the agency's compliance with these legal requirements.

Records of Arrests and Criminal Convictions

The EEOC maintains that policies that disqualify applicants based on their criminal records should be scrutinized for potential disparate impact on racial minority applicants. Its regulatory guidance imposes time limits on the criminal offenses that can be taken into consideration, and focuses on those offenses specifically relevant to the essential requirements and fitness for the particular job in question. Further, it restricts such inquiries until later in the hiring process.

To the same effect, in New York State, while an employer may ask the applicant about or conduct a background check that includes criminal conviction records, any decision to preclude employment based on a conviction record is only permitted if the nature and timing of the criminal conduct have a direct bearing on the applicant's fitness or ability to perform one or more of the duties or responsibilities necessarily related to the job in question, or granting employment would create an unreasonable risk to property or the safety of others.

New York State and several of its counties and municipalities have adopted various "Ban the Box" measures that preclude such inquiries until later in the hiring process so as to allow applicants with criminal convictions to demonstrate their job qualifications prior to being asked about

their criminal history. In some cases, the restrictions are limited to specific classes of employers.

As to arrest records, New York State law precludes an employer from inquiring about, or relying upon, records of arrests that are not currently pending.

Wage History and Pay Equity

As earlier noted, across the USA, there has been increased regulation of pre-employment inquiries regarding applicants' wage or salary history. The concern is that pre-employment inquiries about salary history may improperly perpetuate an unlawful pay disparity attributable to prior employment that undermines the purpose of the Equal Pay Act.

The New York State Legislature recently joined several municipalities in New York (including New York City) in prohibiting pre-employment questions regarding an applicant's salary history, or seeking such information from prior employers. Employers are permitted, however, to ask about an applicant's salary and benefits expectations. Further, if job applicants volunteer their compensation history, employers are not prohibited from verifying and considering such information. The New York City law also prohibits employers from conducting searches of publicly available records for the purpose of obtaining an applicant's salary history.

Medical Inquiries and Tests

The Americans With Disabilities Act (ADA) and the New York State Human Rights Law limit the rights of employers to make disability-related inquiries and to require medical examinations during the hiring process. Before making a job offer, an employer may not require that applicants undergo a medical examination or, unless volunteered, ask applicants whether they have (or ever had) a disability and, if so, its nature and

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severity or how they became disabled. Neither may it ask about prior workers' compensation history or prescription drugs or medications, or pose a broad question that is likely to elicit information about a disability.

Current illegal drug use is not a disability and so an employer may ask applicants about any illegal drug use. Further, a test for illegal drugs is not a medical exam and is not regulated by the disability discrimination statutes. Job offers conditioned on successfully passing a drug test are also permitted.

Before making a job offer, an employer may ask about the applicant's ability to perform the specific and essential job functions, provided all applicants are subject to the same questions.

When making a job offer to an applicant, the employer may condition that offer on the applicant's satisfactory completion of a post-offer medical examination or response to disability-related inquiries pertinent to the applicant's ability to perform the essential functions of the job, provided all candidates who receive a conditional job offer in the same job category are required to take the same examination and/or respond to the same inquiries.

Where, during the hiring process but prior to the extension of any offer, applicants voluntarily make known to the employer their disability, and request an accommodation, an employer has an obligation to explore the possibility of a reasonable accommodation under the circumstances.

Any medical or disability-related information obtained by the employer during the hiring process should be maintained confidentially and separately from applicant or personnel files.

Restrictive Covenants

As a matter of due diligence, applicants may be asked during the hiring process whether they are bound by any restrictive covenants that would preclude or impede their ability to perform the essential functions of the job and fulfill its responsibilities. If hired, a preferred practice is to provide individuals and their managers with written guidance on fulfilling the requirements of the new position while adhering to the terms of the restrictive covenant. In those positions and industries in which restrictive covenants are common, an employer may also consider requiring the new hires to acknowledge in writing that by accepting employment they will not be in breach of any existing agreement with a former employer.

Documentation and Record-Keeping

Documentation of each step in the hiring process and maintaining records on applicants and new employees are governed by federal and state record-keeping requirements. EEOC regulations, which require an employer to preserve personnel and employment records for at least one year (or until any legal challenge to a related employment decision is fully resolved), expressly include employment application documents and other records relating to the employment application and selection process.

It is a recognized lawful practice to require all applicants to complete and sign an employment application, and to attest that the information provided is accurate and complete. The duty to preserve documents has also been applied to notes taken by an employer during hiring interviews. The documentation process should include reference checks and background investigations, as well as the employer's attempts to obtain such information.

In New York, employment discrimination claims may be brought up to three years after the fact

and pay claims are subject to a six-year statute of limitations. It is recommended that employers retain relevant applicant and employment records at least until the possibility of a potential claim is exhausted.

4. TERMS OF THE RELATIONSHIP

4.1 Restrictive Covenants

No-poaching Agreements

Unlike non-compete and non-solicitation agreements, no-poaching agreements are generally entered into, formally or otherwise, between or among two or more competing employers, focusing on each entity's agreement not to recruit the other's highly trained employees. Such agreements are viewed as a possible restraint of trade in violation of federal antitrust laws, subject to criminal and civil investigations and enforcement, as well as class action challenges. The US Department of Justice, in recent years, increasingly has initiated these types of enforcement actions.

Non-compete and/or Non-solicitation Agreements

Non-compete and/or non-solicitation agreements are generally entered into between an employer and an individual employee, and are designed to protect the employer's legitimate interests and concerns, including in such areas as trade secrets, confidential information and key existing customer or client relationships. Such restrictions must be reasonable in duration, geography and scope. As a practical matter, courts will look to strike a balance between the employer's legitimate right to protect itself from unfair competition and, with increasing concern, an employee's need and ability to obtain future employment.

In different states the receptivity of the courts to such restrictions will vary, including as to the relevance of the circumstances of the employee's termination. It behoves the entity to ascertain the climate within a particular state as to the receptivity of the courts in that state to such restrictions, the pertinent job market opportunities there available to the individual, and the willingness of the courts to "blue-pencil" an overly broad restriction (ie, reform the language of the restriction so as to preserve what it regards as reasonable). In New York, the blanket imposition of non-compete agreements on low-level employees who do not have access to confidential information, or otherwise are unlikely to threaten the employer's legitimate concerns, could be problematic.

The Inevitable Disclosure Doctrine

Under this doctrine a plaintiff employer may prove a claim of misappropriation by demonstrating that its now former employee's new employment with a competitor will inevitably lead the employee, in violation of a non-compete agreement, to rely upon and disclose to the new employer the plaintiff firm's trade secrets or other confidential information. Notwithstanding judicial reluctance to enforce such a doctrine, it has been enforced where the plaintiff employer was able to establish that the former employee could not reasonably be expected to fulfill the new job responsibilities without using the trade secrets of the employer, or has established the actual misappropriation of the trade secrets. It is not intended as a substitute for a non-compete agreement; rather, it is to be asserted in aid of enforcing a valid non-compete agreement.

The doctrine is predicated upon the understandable reluctance of the former employer to involve a customer(s) in its legal action. While not confined to New York State, it is worth noting that New York courts have applied the doctrine where appropriate.

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The Faithless Servant Doctrine

A sub-species of the duty of loyalty and fiduciary duty owed to an employer is the Faithless Servant Doctrine. In New York, it has been enforced in a wide array of situations involving employee misconduct that occurred – or was later discovered to have occurred – while in the employ of an employer, including:

- unfair competition;
- sexual harassment and off-duty sexual misconduct;
- insider-trading;
- theft;
- diversion of business opportunities;
- self-dealing; and
- disclosure of trade secrets or other confidential information.

Disloyal employees can be required to forfeit all of the compensation they were paid, dating from the first disloyal act going forward, irrespective of whether the employer can establish actual damages, including not just salary, but the value of benefits and other deferred compensation, punitive damages and costs where appropriate.

4.2 Privacy Issues

One of the primary issue raised by the response to the pandemic is the employer’s need to access and maintain records related to employee health conditions and vaccine status in order to promote a safe workplace and comply with COVID-19-related rules. Generally speaking, medical records generated by healthcare providers and private health insurance carriers are protected by the Health Insurance Portability and Accountability Act (HIPAA) to the extent they are generated or maintained by HIPAA-covered entities. Employment-related medical records – those collected the employer to assess fitness for duty, eligibility for leave, or ability to work under government regulations or employer rules – are also subject to a legal obligation that the records be

maintained confidentiality and subject to limited disclosure on a need-to-know basis.

An entity contemplating doing business in the USA should consider the privacy obligations impose by the various statutes when assessing its obligations. There is no general statute of broad application that addresses privacy, so an individualized assessment is needed for each jurisdiction and for each unique situation.

4.3 Discrimination, Harassment, and Retaliation Issues

Protected Categories

Beginning at the federal level, but also increasingly at the state and local levels, including New York, employment laws, regulations and case law generally proscribe discrimination, harassment and retaliation on the basis of an expanding array of protected categories, inclusive of race, color, religion, sex, gender, transgender, sexual orientation, age, national origin, citizenship, pregnancy, disability, credit, genetic information, whistle-blowing, service in the armed forces, and, as to covered classifications of employees, union membership and the right to engage in – or to refrain from – what are termed “protected, concerted activities.”

The Decision-Making Process – Documentation

Most important is the decision-making process itself, including its contemporaneous documentation, who will be the decision-maker(s) and, if others have input into that decision, the nature of their input and how, legally, that might or might not impact on not only the propriety of the challenged decision, but on whether the decision will be deemed that of a joint employer or some other entity as well.

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Disparate Treatment, Disparate Impact, Implicit Bias

The critical concerns, developments and disclaimers in the ongoing evolution of the implicit bias doctrine, including in the context of claims of disparate treatment and disparate impact, have been highlighted in the “Trends and Developments” section of the **US Regional Employment 2021: Introduction**. Federal and state courts have addressed these concerns in different ways, depending at times on the stage of the litigation at which the issue arises, how the managerial decisions in question were made, and the nature, extent and purpose of the proffered or record evidence on implicit bias.

The Import of the Internal Grievance Procedure

Equally important is whether the entity’s internal grievance or dispute process provides for the opportunity of a complainant to challenge the propriety of the decision or action taken, and the import of that process where the employee has failed to pursue that procedure. In that connection, in the companion cases of *Faragher v Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v Ellerth*, 524 U.S. 742 (1998), the US Supreme Court articulated the availability of an affirmative defense to an employer seeking to avoid liability for alleged workplace harassment in violation of Title VII.

Under this affirmative defense, an employer would not be deemed liable for a supervisor’s alleged harassing behavior if:

- it could establish the employee target of the alleged behavior had not suffered adverse job consequences;
- it had exercised reasonable care to prevent and promptly correct any harassing behavior; and
- the employee, unreasonably, had failed to take advantage of the employer’s internal

complaint process or any preventive or corrective opportunities provided by the employer to avoid harm.

As articulated by the courts, and confirmed by the EEOC, “good faith” effort by the employer would include:

- the establishment of appropriate policies against discrimination, harassment and retaliation;
- proper reporting procedures (allowing, as applicable, for the bypassing of an accused or otherwise conflicted supervisor or manager and for informal and formal complaints);
- effective and periodic training both as to the types of behavior proscribed and the responsibilities of its management and supervision for implementation of and adherence to the policies and procedures; and
- the conduct, and documentation, of a proper investigation.

Some states have incorporated or otherwise applied the *Faragher- Ellerth* affirmative defense in or to their own discrimination laws. New York State had, until a recent amendment, incorporated the affirmative defense in the New York State Human Rights Law. As it now stands, the failure of an employee to complain to the employer about alleged sexual harassment may or may not be a defense to liability.

4.4 Workplace Safety

Employers considering operating in the USA should be aware of the requirements of the federal Occupational Safety and Health Act (OSH Act). Administered by the Occupational Safety and Health Administration (OSHA), employers are reminded to comply with OSHA’s regulations, as well as to keep their workplaces free from “recognized hazards” to employees, including employer measures to protect employees from

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weather-related heat and cold, workplace violence and musculoskeletal/ergonomic injuries.

OSHA emphasizes enforcement and compliance and, upon a showing of probable cause, workplace inspection. The cost of non-compliance can be quite high: USD136,532 per violation for willful or repeat violations, or USD13,653 per violation for serious violations (2021 amounts, raised each year for inflation). Employers cited for OSHA violations may contest the violations via a trial before an OSHA administrative law judge, appealable to the Occupational Safety and Health Review Commission, and then a US Circuit Court of Appeals.

Employee safety requirements throughout the country are largely OSHA-dictated. The Act, however, does allow states to establish their own occupational safety and health programs so long as they are at least as comprehensive as the federal requirements. New York State has no additional state-specific occupational safety regulations, and its regulations are administered by OSHA.

In addition to regional differences in occupational safety, employers considering establishing operations in New York State should be aware of the liability limits of the state's workers' compensation system. Subject to limited exceptions, New York's workers' compensation system precludes employees' private suits against their employers for workplace-related injuries. Two exceptions should be no surprise – if the employer was uninsured or intentionally harms an employee; a third exception is for “grave injury” (eg, where an employee suffers death, amputation, paralysis, blindness, deafness, disfigurement or total disability due to brain injury).

4.5 Compensation and Benefits

As with other jurisdictions in the USA, most benefits provided to private sector employees in New

York State are governed by a variety of federal, state and/or local laws. In certain respects, such as with respect to the pension and other benefit provisions of the Employee Retirement Income Security Act (ERISA) and the health continuation coverage provisions of the Comprehensive Omnibus Budget and Reconciliation Act of 1985 (COBRA), these federal statutes (like the NLRA), with exceptions, pre-empt state and local law.

As to ERISA, to the extent the entity is contemplating participation in a collectively bargained multi-employer pension plan, it is imperative that the entity, before undertaking any such commitment, take into account a participating employer's potential “withdrawal liability” and serious financial implications in the event it or one or more other participating employers later withdraw from the plan. As to COBRA, it is important to understand the rights, obligations and options it provides employees and their dependents as to health continuation coverage in the event of the termination of an employee's coverage under the employer's health plan.

Several other federal laws affect the benefits provided by employers, including:

- health information privacy and security;
- family, medical or military leaves;
- mental health;
- substance abuse;
- mastectomy and breast reconstruction;
- medical child support orders; and
- dependent student health coverage.

New York State Health Insurance Coverage Requirements

Within the scope of permitted exceptions to COBRA and federal pre-emption requirements, more and more states have begun to assert their jurisdictional interests in several areas. New York State, for example, now extends health continuation coverage, from 18 months to 36 months,

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for eligible employees and dependents who have lost employer medical insurance coverage. It also requires New York health insurers to allow an employee's unmarried child, under certain conditions, to elect coverage through age 29 even if not financially dependent upon a parent. Additionally, it has imposed certain coverage requirements applicable to dependent children and grandchildren, preventive care and screenings, cancer screenings and treatments, diabetes, osteoporosis, drug and alcohol abuse, mental health and infertility.

Beyond that, and in contrast to many other states, for covered employers, New York State requires short-term disability coverage for employees who are unable to work as the result of certain pregnancy-related conditions or where otherwise attributable to an injury or illness unrelated to employment. New York State has also enacted a paid family leave law that allows an eligible employee to bond with a new child, provide care for a child, parent, grandparent, grandchild, spouse or domestic partner with a serious health condition, or address a qualifying exigency arising from military service of the employee's spouse, domestic partner, child or parent. Such paid employee leave is in addition to other leaves required by New York State, including leaves for jury duty, voting, military service, volunteer fire-fighting and emergency ambulance services, blood and bone marrow donations, and breastfeeding.

Benefit Plan Documents, Employee Handbooks and Employer Policies

Federal, state and local laws and/or best practices generally require of employers the adoption and documentation of policies applicable to such employment issues as equal employment opportunity and other workplace harassment, retaliation and discrimination issues impacting the protected classifications, employee pay and benefits, workplace rights, obligations, rules

and procedures, property rights and obligations, codes of conduct and discipline, matters of privacy, confidentiality, restrictive covenants, internal grievance and other such reporting procedures, and other terms and conditions of employment. A carefully drafted employee handbook or manual, or specific policy guidelines not only is essential, but currently the subject of critical and ongoing federal review.

5. TERMINATION OF THE RELATIONSHIP

5.1 Addressing Issues of Possible Termination of the Relationship Employment Policies

New York labor law mandates that private sector employers adhere to their employment handbooks and policies. As noted above, in the absence of a specific contract, statutory or regulatory obligation, the general principle in New York is that of at-will employment. Nonetheless, even in such circumstances, employment policies – unwittingly or otherwise – may give rise to an enforceable contractual obligation, such as:

- a wrongful termination claim;
- an alleged breach of policies and procedures relating to performance evaluations or progressive discipline where the written policy limited the circumstances under which an employee could be discharged;
- the failure of the employer to adhere to its own internal grievance procedures;
- under certain specified circumstances, a policy provided for an enforceable right to severance pay or payment for accrued, unused vacation pay at time of termination, the conditions of which unconditionally had been satisfied.

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Individual Employees

Outside of the collective bargaining context, there has been an expanded use of both internal grievance and external private arbitration and other dispute resolution procedures covering individual employees, as well as employer/employee agreements precluding the employee's resort to class or collective action litigation in certain instances and instead mandating resort to individual arbitration. Depending upon the nature of the issues, amidst much controversy, such agreements, as more fully discussed below, are either encouraged or contemplated under federal law or have received greater judicial acceptance, including as to certain employment discrimination and other statutory claims. Except as to arbitration of sexual harassment claims pursuant to a collective bargaining agreement, however, recent legislation in New York State has specifically precluded private arbitration of sexual harassment claims.

A Collective Bargaining Relationship

A collective bargaining agreement covering a recognized bargaining unit of employees typically will include provisions for discipline, up to and including discharge – generally subject to a “just cause” or equivalent standard – and will provide for an internal grievance procedure that, in the absence of a resolution, will culminate in binding arbitration with the union. Absent a specific provision to the contrary, the agreement to arbitrate will be deemed the negotiated trade-off for a “no strike” commitment from the union and the employees during the term of the collective bargaining agreement. It is important to note, however, that the specific terms of the no-strike agreement, including the precise obligations of both the employees and the union in the event of such a threatened or actual work stoppage, can be of crucial importance.

Unless expressly precluded from arbitration by law or the collective bargaining agreement itself,

such arbitration provisions are broadly construed by state and federal courts to encompass a wide range of issues and disputes. The awards of the arbitrators are given considerable deference and enforced, provided, generally, the award “draws its essence” from the collective bargaining agreement, does not impose the arbitrator's own brand of industrial justice, is not the subject of a conflict of interest or, depending upon the specifics, contrary to firmly established public policy. Employee members of the bargaining unit are further protected under the NLRA by a “duty of fair representation,” generally directed at their union collective bargaining representative alone, but also at their employer where the employer, in conjunction with the union, has been complicit in the breach of that duty.

Collective Bargaining Concerns

Under federal law, in the absence of a provision addressing the issue in the collective bargaining agreement, an employer has an obligation to bargain with the union, in advance, about a decision to close a facility if the decision is based on labor costs or other factors that are amenable to collective bargaining. Unless attributable to a desire to chill unionization elsewhere in the organization, a decision to go out of business entirely or that is fundamental to the core of entrepreneurial control of the business is permissible and not contingent on negotiation with the union. In either scenario, however, the employer generally will be obligated to negotiate with the union over the effects of the decision.

In certain unionized industries, retirement benefits are funded and administered through a jointly trustee multi-employer trust fund and benefit plan. Participation in such plans raises many additional legal concerns, including, as previously noted, the potential for statutorily imposed “withdrawal liability.”

Plant Closures and Mass Layoffs

Subject to jurisdictional and notice differences, as well as to certain limited exceptions attributable to faltering businesses, unforeseen circumstances and natural disasters, federal, New York and other state laws (commonly known as “WARN” statutes) impose notice requirements on employers in advance of a facility closing or mass layoff. Such notices must be provided to the state and local governments, employees, and union representative.

6. EMPLOYMENT DISPUTES: CLAIMS, DISPUTE RESOLUTION FORUMS, AND RELIEF

6.1 Contractual Claims

Claims for “wrongful termination” or “abusive discharge” are state common law causes of action, founded on the principle of the implied covenant of good faith and fair dealing. New York’s at-will doctrine, however, does not recognize such claims. Any claim for “unjust termination,” discipline or deprivation or loss of benefits will require a breach of contract theory or a statutory violation such as illegal discrimination, harassment or retaliation, including in a whistleblower context. Post-employment claims related to COVID-19 will likely be based on disability, leave use and retaliation theories.

6.2 Discrimination, Harassment, and Retaliation Claims

As described in **5.1 Addressing Issues of Possible Termination of the Relationship** and **6.4 Whistle-Blower/Retaliation Claims**, discrimination, harassment and/or retaliation claims may arise at various stages in the employment relationship and pursuant to federal, state and local laws, the employer’s own policies, procedures and contracts and/or, where applicable, the provisions of a collective bargaining agreement.

6.3 Wage and Hour Claims

The remedy for failure to pay minimum wages or overtime pay in violation of the federal Fair Labor Standards Act includes “back wages” plus an equal amount as “liquidated damages” if the violation is deemed “willful.” Back wages are limited to a two-year period or, if willful, a three-year period.

An FLSA plaintiff may seek to sue on behalf of other employees who, it can establish, are situated similarly in regard to the alleged violations.

New York State Labor Law (NYLL) governing unpaid wages and overtime pay is materially the same as FLSA law, inclusive of its provision for liquidated damages in the case of willful violations and the available exemptions. Several claims are available under the NYLL that are not available under federal law; the statute of limitations for claims under the NYLL is six years, double the FLSA limitations period for willful violations.

Plaintiffs who sue under the NYLL may bring their cases as class actions. A “class action” under the NYLL differs from a “collective action” under the FLSA in several ways, the most significant of which is that in a collective action, the only employees who may be awarded damages are those who “opt in” to the class by filing a consent to sue.

6.4 Whistle-Blower/Retaliation Claims

Virtually every statute that protects an individual employee from discrimination also protects the employee, former employee or applicant from retaliation for complaining, formally or informally, about the discrimination or otherwise participating in protected activity. Currently, this is the most common complaint of discrimination alleged. The elements of a retaliation case include proving the engagement in the protected

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activity (complaining, acting as a witness, etc), employer awareness of the activity, the adverse action, and a causal nexus between the adverse action and the protected activity. Most significantly, it is important to understand that a retaliation claim may survive even where the claimant has failed to prove the underlying claim of discrimination. Proper policies, procedures and training in place for the handling and investigation of both an underlying claim of discrimination and a possible claim of retaliation are essential to minimizing the risk of a successful retaliation claim.

Whistle-blowers

There are several federal, state and local whistle-blower statutes that protect individuals who suffer adverse consequences after reporting employer wrongdoing. These statutes are designed to encourage the reporting of misconduct that could harm the public in some manner.

By way of example, the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), Pub. L. 107-204, and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. 111-203, 2010, deal with reporting financial improprieties that affect the public. Sarbanes-Oxley protects employees of publicly traded companies who complain about or report fraudulent activity by their employers. Dodd-Frank offers financial incentives for financial industry employees who become whistle-blowers and provide original information. It also creates a private cause of action for financial services employees who suffer adverse employment consequences as a result of reporting misconduct to the SEC.

The False Claims Act offers financial incentives to whistle-blowers who report fraud against the federal government. Various other whistle-blower protections also exist for employees reporting wrongdoing in specific industries (eg, the Energy Reorganization Act for the nuclear power indus-

try and New York Labor Law § 741 regarding the quality of patient care in the healthcare industry).

6.5 Special Training and Resolution Approaches

Internal and External Forums

It is both helpful and vital to draw the distinction between the internal and external dispute resolution forums (both informal and formal) that may be available in a given employment dispute. Generally, of course, the preferable option, if feasible, will be the internal option. That is so whether there is a union in the picture or not, if only because of the cost factor and the likelihood, if so resolved, it will have been fashioned by the parties themselves. Some, in the context of a union relationship, have even written into the collective bargaining agreement a provision mandating such a post-grievance or pre-arbitration hearing conference, much akin to a pre-trial conference in a litigated matter.

Mediation and Arbitration

The cost, delay and uncertainty of litigation, particularly litigation ending in a jury trial, has spawned, in addition to arbitration, other ADR methods. Such alternative methods, although forgoing full rights of appeal, are often attractive to employers and/or employees due in part to the ability to keep the dispute and its resolution private.

Where deemed appropriate by the parties, the process allows for the mutual selection of an individual mediator, or panel of mediators, tailored in the parties' opinion to hear the type of dispute in question. In some instances, it is either an option or mandated by court or governmental agency. As distinct from arbitration, a mediator's role is not to decide the issue(s) separating the parties, but to help bring them, if possible, to a mutually acceptable resolution. A mediation option may be written into the collective bargaining agreement or process where

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a union is involved or, even in the absence of union involvement, voluntarily agreed to by the employer and the individual in an employment offer letter or agreement, or in a separate agreement to mediate.

6.6 Class or Collective Actions

As indicated at various points through this chapter, the possibility of class or collective actions presents itself. As now confirmed by a most recent decision of the US Supreme Court, under the Federal Arbitration Act, employers may avoid class or collective actions by requiring employees, as a condition of employment, individually to agree to adjudicate specified disputes with the employer by means of private arbitration rather than adjudication in the courts, coupled with an

express waiver of the right to have such claims determined on a class or collective basis or in a proceeding that includes disputes between the employer and other employees (see *Epic Systems Corp. v Lewis*, 138 S. Ct. 1612 (2018)). A global entity may wish to explore the use of such agreements.

6.7 Possible Relief

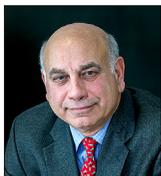
Here, too, the nature of the allegations and federal pre-emption considerations will determine which federal, state and/or local judicial forums will have jurisdiction, subject, where applicable, and recognized, to choice of forum and/or the parties' contractual agreements specifying the forum in which said disputes must be heard, as well as the law to be applied by that forum.

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cies, procedures and handbooks; guidance to human resource and business unit managers on the many different laws encompassing employees' rights; labor and employment-related litigation; collective bargaining; administration of collective bargaining agreements; and grievance and arbitration proceedings. The firm's industry experience runs the gamut, including manufacturing, higher education, healthcare, construction, transportation, financial services, retail, telecommunications, municipalities and school districts, energy, agriculture, technology, insurance, defense and government contractors, hospitality and food service.

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Thomas G. Eron is chair of the firm's labor and employment law department and a member of its management committee.

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Howard M. Miller is a labor and employment law attorney focusing on higher education, school law, and private-sector clients. His representation includes employment

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