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Bond, Schoeneck & King, PLLC has a labor and employment practice that is comprised of 90 attorneys across the firm's offices. Offices within New York State include Syracuse, Albany, Buffalo, Garden City, New York City and Rochester. Bond represents management in union and non-union settings and provides legal representation, advice and counsel exclusively to management in both the private and public sectors related to wage/hour and benefits issues; development of employment-related policies, 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 attorneys serve large international corporations, medium and small businesses, startups, entrepreneurs, not-for-profit corporations, and public sector entities. Its industry experience includes 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.

Authors

Michael I. Bernstein is a senior labor and employment law attorney at Bond, who began his career with the New York Regional Office of the National Labor Relations Board. In more than 50 years of private practice, he has represented management in all facets of labor and employment law, both in for-profit and not-for-profit settings, including in his capacities as a managing partner with Benetar Isaacs Bernstein & Schair, and as a senior partner and of counsel with Bond, Schoeneck & King. A graduate of Columbia Law School and the University of Michigan (economics), Michael has chaired the Labor & Employment Law Section of the New York State Bar Association (and is a member of its Executive Committee) and has chaired both the Labor Committee of the New York City Bar Association and the Federal Labor Standards Legislation Committee of the American Bar Association. Michael also has served as a member of the Governor's Advisory Panel on Economic Development, New York State; the Lt. Governor's Task Force on Plant Closings, New York State; the New York State Bar Association Privacy Initiative Task Force; and on Advisory Committees/Task Forces to the American Arbitration Association and the New York City Commission on Human Rights. Additionally, he is a longstanding member of the New York State Bar Association Committee on Diversity and Inclusion, the New York City Bar Association Committee on Minorities in the Profession, and the NYU Labor and Employment Center's Board of Advisors. In 2015, the New York State Bar Association, Labor & Employment Law Section, honored Michael with its "Lifetime Achievement Award".

Louis P. DiLorenzo is a partner at Bond who has practiced labor and employment law for over 35 years. He is the managing member of the firm's New York City office, and the chair of Bond's labor and employment, employee benefits and immigration practice groups. Lou represents employers and management in all aspects of labor and employment law. His areas of experience include collective bargaining, workplace investigations, NLRB proceedings, wage and hour issues, arbitration, wage incentive plans and employment litigation before the EEOC and the Human Rights Division. He has authored and co-authored numerous articles on various labor and employment law topics, is a frequent speaker at industry and legal conferences, and has co-chaired PLI's Annual Employment Conference for the last two years.

Authors Continued

Thomas G. Eron is a partner in the firm and the chair of its labor and employment department. For more than 25 years, Thomas' practice has included defense of employment discrimination claims before the EEOC, State Human Rights agencies and in state and federal courts, and the representation of employers in areas including collective bargaining negotiations, strikes and picketing disputes, labor arbitrations, 10(j) injunction actions and labor audits. He counsels public sector clients on Civil Service Law matters and represents municipalities and school districts in labor matters. Tom supports his clients with employment law counseling, training, handbook and policy development and litigation avoidance strategies and advises employers on harassment issues, disability law and FMLA compliance.

Howard M. Miller is a partner in the firm's labor and employment practice and co-chair of its school districts practice area. In private sector employment litigation, Howard litigates all types of employment discrimination and retaliation claims. He also represents clients in non-compete and trade secret cases and has won two significant appellate court decisions strengthening and cementing New York's "Faithless Servant Doctrine". Howard frequently lectures and writes articles on topics such as Constitutional Law, non-compete and trade secret litigation and employment issues relating to social networking sites and various aspects of employment discrimination and education law, and has contributed to several publications relating to the practice of employment law.

1. Current Socio-Economic, Political and Legal Climate; Context Matters

1.1 "Gig" Economy and Other Technological Advances

At the outset, it is important to begin with the current context in which the global entity will make its decisions. In these times, that, as discussed below and throughout this chapter, is especially so.

The Gig Economy

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 but another 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.

A global entity seeking to establish or enhance its presence in the USA, once aware of these issues, will be better able to avoid such exposure when creating and structuring the relationships with those who will be servicing its needs.

Cyberspace, Social Media, Artificial Intelligence and Other Technological Advances

Central to the workplace has always been a certain tension between the employer and the employee concerning the protected rights of employees to communicate both with each other and with others outside the workplace, whether in a non-union, union or potential union setting.

From the employer's perspective, its concerns necessarily include its rights and obligations to control or otherwise limit the use of its and the employees' devices, both on "company" time and otherwise, relative to what has heretofore been considered legitimate "company" property rights and matters of civility, employee and customer relations, productivity, safety, security, privacy, trade secrets and other confidential information. Often, the issue has arisen in the context of seemingly facially neutral and well-intentioned workplace policies designed to protect the employees themselves against the discrimination, harassment, bullying and retaliation society has proscribed.

Many of these communications issues evolved in the context of what had been termed as the proverbial "water cooler" or break room environment and its limited internal universe of employees. The increase in off-site telecommuting has altered this concept and posed its own issues. Beyond that, with today's electronic technology, the host of new devices, the ever-expanding social media platforms and potential recipients outside the immediate confines of the physical workplace, the changed workplace environment has now been redenominated by some as an "electronic water cooler" universe.

Add to that the impact on the extended workplace of robotics and other artificial intelligence, the new emphasis on algorithms, "Big Data" and other automation developments, and the implications are many.

1.2 "Me Too" and Other Movements

The #MeToo and Time's Up Movements

The relevance and impact of "me too" evidence of sexual harassment and related conduct is not a novel issue. Headline cases in the latter part of 2017, however, sparked what have been termed "#MeToo" 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 fundamental approaches to these issues.

First among these considerations is how is it that certain individuals, particularly in key positions, have suddenly been faced with serious allegations by different claimants, occurring over a number of years, without such allegations previously having surfaced or seemingly been addressed and, where warranted, appropriate action having been taken? How is it that they have been able to maintain and even enhance their status within their organizations over the years, notwithstanding what, in retrospect, may have been repeated, unwelcomed and unwarranted actions on their part?

Where internal settlement agreements were reached with the claimants, inclusive of non-disclosure agreements, but no action was taken against the accused, to what extent did the non-disclosure provisions enable the entity to continue on with the accused and allow the accused, unchecked, to act out against others? Is there a need to reexamine the propriety of such non-disclosure agreements in certain circumstances? What if not just the entity or the accused, but the claimant as well, preferred the privacy and confidentiality of a non-disclosure agreement? What if, given the sensitivity of the matter, the entity actually conducted an internal investigation, but also – to protect the integrity of the investigation – sought a commitment to confidentiality by those employees and other witnesses it questioned in the course of its investigation? Did that commitment to confidentiality create its own legal issues?

What if these allegations had never before been raised, but now have first surfaced after a number of years? To what extent, if denied by the accused, is the accused's right to due process – including a presumption of innocence – a real, and vital, consideration?

What if the entity, now seeking to make a clear statement of zero tolerance for sexual or other harassment, adopted a "zero tolerance" policy that regarded such harassment as immediate basis for discharge? Could such a policy, for example, actually discourage complaints from those who believe their complaints would mean automatic termination of popular, powerful and/or valuable members of the organization? What if the zero tolerance or other policy allowed, under appropriate circumstances, for discipline short of discharge?

The Pay Equity Movement

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 six essential priorities and at least 38 states have introduced bills to address the issue.

Consistent with these concerns, legal developments at the federal level emphasize the employer may not preclude its employees from discussing or disclosing their wages or from aiding or encouraging other employees to exercise their concerted rights under the National Labor Relations Act (NLRA) in this respect. At the same time it should be understood it is not just a compliance issue; it also provides the entity with excellent promotional opportunities, both internally and externally, including the new and expanded recruitment sources it may well yield.

Implicit Bias, Its Advent and Evolution

The global entity also should be aware of the advent, and evolution, of the ongoing movement to incorporate into the analysis of discrimination complaints the concept of "Implicit Bias". While the import of this concept cannot and should not be ignored, particularly with respect to any training and recruitment programs, its meaning, viability and application, highlighted in the Trends and Developments section, are very much the subject of debate, uncertainty and ongoing litigation.

Increased Whistle-blower Awareness, Pursuit of Claims and Enforcement

There is little doubt that what generically is denominated as "whistle-blowing" has in recent years reached dramatically new, and rather staggering, levels – whether measured in terms of the number of filings or tips, the varied governing statutes, how the claim is denominated (eg, as retaliation or otherwise), the dollar amounts of the awards to complaining individuals, and the estimated numbers of people protected. A global entity cannot ignore these developments,

the heightened public, media and employee awareness of the issues or the impact on its training and compliance obligations.

1.3 Decline in Union Membership

For decades, 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 at about 23.8%.

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, moreover, 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.

1.4 National Labor Relations Board

Central to 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 the National Labor Relations Act, as Amended (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, preempts 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, 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.

2. Nature and Import of the Relationship

2.1 Defining and Understanding the Relationship

Employment v Independent Contractor

As noted in **1.1 "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.

2.2 Alternative Approaches to Defining, Structuring and Implementing the Basic Nature of the Entity

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 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 letters 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" v "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 31 December 2019 the minimums will range from USD11.80 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 31 December 2021 will rise to USD15.00 per hour for all employees in New York City, 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 USD23,660 per year (increasing to USD35,568 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 will be USD46,020 per year (USD885 per week) as of December 31, 2019, and will rise to USD48,750 per year (USD937.50 per week) on December 31, 2020.

2.3 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 employer in a "specialty occupation" (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 US 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.

Current Developments

Visa petitions

In June 2018, the US Supreme Court determined that the "travel ban" established by the Executive Order, Protecting the Nation from Foreign Terrorist Entry into the United States, is constitutional and enforceable. Under that Order, non-immigrant and immigrant visas will not be issued to applicants from Libya, Iran, Somalia, Syria, Yemen and North Korea, unless affected individuals are granted a waiver, and Venezuelan government officials and their immediate family members are ineligible for non-immigrant and immigrant visas to the USA.

Pursuant to the Buy American, Hire American Executive Order issued in April 2017, non-immigrant visa petitions filed by employers – especially H-1B visa petitions – have been subject to heightened scrutiny by USCIS challenging both the wages offered to foreign workers and the classification of certain positions as "specialty occupations," and immigration officers, without advance notice, now have the discretion to deny a request for an immigration benefit and will no longer defer to previous agency petition decisions when evaluating employers' requests to extend the non-immigrant visa status of their employees.

TPS; DACA

USCIS' efforts to end Temporary Protected Status (TPS) and accompanying work authorization benefits for foreign workers from Haiti, El Salvador and Nepal, among other countries, is currently being litigated in federal court. As of the date of this writing, termination of TPS and related benefits has been enjoined, pending a final decision on the merits of the case. Should the courts hold in favor of the government, individuals from the affected countries will need to secure another form of work authorization before their TPS expires in order to continue their employment in the USA. For those foreign workers who were able to secure work authorization under Deferred Action for Childhood Arrivals (DACA), USCIS continues to accept requests for DACA renewals and work authorization, but is not accepting new applications for DACA benefits. In June 2019, however, the US Supreme Court announced it would review whether the administration's decision to terminate DACA was legal.

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 US. 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.

2.4 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.

"Ally", "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 procedures and the legal limitations on permissible and impermissible inquiries.

Generally

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 (eg, 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).

Some courts have found the employer's explanation that a candidate simply was "not a good fit" for the organization to be a coded euphemism for excluding certain minorities (or other protected categories) from the position.

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.

Social Media and the Internet

The investigation of social media activity and other internet information no doubt can provide valuable information about the applicants and insight into their character, but there are significant legal risks as well. Social media inquir-

ies or searches may reveal information that legally cannot be considered in the hiring process and its mere possession may open the door to adverse inferences and taint an otherwise legitimate hiring decision. That aside, the accuracy and reliability of the information obtained may be suspect or subject to challenge.

A number of states prohibit an employer from requiring applicants to provide social media passwords or access to their private social media. There is no such statute in New York State, although several bills to protect social media privacy in employment have been introduced in its legislature. While many employers do access such information, many others believe it is wise to refrain from such inquiries or searches. For those who do engage in these inquiries or searches, the recruitment procedure should specifically address how such inquiries or searches are to be conducted and used, and by whom.

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; to explain the nature and scope of the investigation upon request from the applicant; to obtain advance, written authorization from the applicant; if employment is denied in whole or in part because of the information received, to notify 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 to allow the applicant a period of time to review and challenge the report before implementing its decision. 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 inquires 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 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 Recordkeeping

- Documentation of each step in the hiring process and maintaining records on applicants and new employees are governed by federal and state recordkeeping 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

Definitions

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 behooves 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.

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

Trade Secrets; Customer Relationships

New York courts define a trade secret as "any formula, pattern, device or compilation of information which is used in one's business, and which gives [the owner] an opportunity to obtain an advantage over competitors who do not know or use it" (North Atlantic Instruments, Inc. v Haber, 188 F. 3d 38, 49 (2d Cir. 1999)). In BDO Seidman v Hirshberg, 92 N.Y.2d 382, 690 N.Y.S. 2d 854, 859 (1999), New York's highest court held that trade secrets and customer relationships are protectable interests: "The employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment." Depending upon the facts, courts have regarded as protected trade secrets customer prospects; the identity of a contact person at each customer or prospect; and customer preferences, pricing, product, marketing, profit margins and strategies.

Goodwill

Under New York common law, even in the absence of a specific contractual restriction addressing the sale of goodwill arising out of the acquisition of an established business, New York will "imply", as a matter of law, a restrictive covenant or duty on the part of the seller of the business to refrain from thereafter soliciting its former customers (Mohawk Maintenance Co, Inc. v Kessler, 52 N.Y. 2d 276 (1981)); the seller's implied covenant to refrain from such solicitation is, moreover, "a permanent one that is not subject to divestiture upon the passage of a reasonable time", provided, however, that the customers themselves, unsolicited, voluntarily may choose to follow the seller elsewhere (Bessemer Trust Co. v Branin, 618 F. 3d 76, 86 (2d Cir. 2010)).

The Enforceability of Non-compete and Non-solicitation Agreements

Courts will look to strike a balance between the employer's legitimate right to protect itself from unfair competition and an employee's level of responsibility and ability to obtain future employment, taking into account the particular market(s) in question. Non-compete and non-solicitation agreements should be drafted in a manner that is specifically tailored to the position and of no greater duration and scope than necessary to protect the employer's interest.

Where warranted, the non-compete agreement should acknowledge not only the employer's right to sue but, where appropriate, that a breach of the agreement will cause the company "irreparable harm" warranting a preliminary injunction.

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.

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. 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 in fact were made, and the nature, extent and purpose of the proffered or record evidence on implicit bias.

Against this evolutionary background and for reasons stated in the Trends and Developments chapter, inclusive of current disclaimers by key advocates of the doctrine as to the reliability of the tests used to measure its invocation as a predictor of behaviour, it remains to be seen how these questions of implicit bias will be resolved.

Training
The concern about the concept of implicit bias is that it presumes to substitute a stereotypical assumption of unconscious bias for the requisite evidence of specific intent necessary to establish disparate treatment.

Independent of the legal process, the concern about the possibility of an implicit bias unwittingly impacting upon the actions and decisions of an entity's employees has led to the incorporation of suggested best practices and approaches into the entity's recruiting, hiring, training and work assignment processes.

It has been found, for example, that, to the extent writing samples are part of the hiring process, it is advisable for those assessing the initial submissions to screen the submissions without the names or any other identifying characteristics that might suggest the racial, national origin, gender or any other characteristic of the applicants. Further, to the extent feasible, the involvement of a more diverse array of employees both in the reviewing of the submissions and in the interviewing and decision-making process is strongly recommended. So, too, expanding the recruitment sources to include other than referrals by incumbent employees will more likely enhance the possibilities of a more diverse workforce. Beyond that, in the day-to-day operations, there is no substitute for more diverse input and participation in decision-making, meetings, and team and other assignments, or in group training sessions in the hands of one sensitive to, and experienced with, potential issues of 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 the alleged sexual harassment is not a defense to liability. Moreover, New York State's highest court already had held that, unlike under Title VII, the New York City Human Rights Law (NYCHRL) does not permit such an affirmative defense.

4.4 Workplace Safety

Employers considering operating in the USA should be aware of the requirements of the federal Occupational Safety and Health Act (OSHA). Administered by the Occupational Safety and Health Administration, 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 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: USD132,598 per violation for willful or repeat violations, or USD13,260 per violation for serious violations (2019 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, preempt state and local law.

As to ERISA, to the extent the entity is contemplating participation in a collectively bargained multiemployer 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 as to 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 preemption 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, 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. Further, effective generally as to paid family leaves on or after January 1, 2018, New York State 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 firefighting 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; or where, 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.

The New York State Department of Labor, in fact, presumes accrued, unused vacation pay is due on termination, unless the employer's policy expressly states otherwise and the employer can establish the employee was notified of that limitation in the policy. By the same token, severance programs, if included in an employer's formal policies or even if consistently provided in its informal practices, may be considered welfare plans regulated by ERISA, and any prerequisites to payment of severance, such as executing a release of claims against the employer, must be supported by consideration and set forth in the severance policy or plan documents.

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 trusteed 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; 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 whistle-blower context.

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 (NYSLL) 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 and 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

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

6.5 Dispute Resolution Forums

Internally and Externally, Generally

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 prearbitration hearing conference, much akin to a pre-trial conference in a litigated matter.

Mediation; 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 as well 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 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 preemption 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.

7. Extraterritorial Application of Law

Although US laws generally apply only to the territorial United States, as noted below, Congress has extended the protection of certain laws beyond the US borders, including Title VII, the ADA and the ADEA. More specifically:

- Title VII was amended in 1991 to protect US citizens employed in a foreign country by a US employer or a US-controlled employer; while it excludes coverage for foreign entities not controlled by a US entity, it protects non-resident aliens who apply for employment within the US, and any company employer that elects to do business in the US, in the absence of constraints imposed by treaties, international agreements or contractual undertakings, is subject to its reach;
- the ADA applies to foreign employees employed by US employers on temporary assignment overseas where the employment relationship's "center of gravity" is in the USA; and
- the Age Discrimination in Employment Act was amended in 1984 to broaden the definition of "employee" to include any individual who is a citizen of the USA employed by an employer in a workplace in a foreign country.

The "Integrated Employer" Test

For the above three anti-discrimination laws, the courts have held that if it is the foreign parent controlling the US subsidiary, the extraterritorial application does not come into play. To determine control, the courts generally apply the "integrated employer" test and look to:

- the interrelationship of operations between the foreign employer and a US company;
- the extent of common management between the foreign employer and a US company;
- the degree of centralized control of both companies' labor operations; and
- the nature and extent of common ownership or financial control between the two companies.

Where employers are not incorporated in the USA (or are not incorporated at all), the courts look to see whether the employer has sufficient contacts within the USA to be deemed a US employer. Factors to be considered, as enumerated by the EEOC Guidelines, are the employer's principal place of business, the nationality of the dominant sharehold-

ers and/or those holding voting control, and the nationality and location of management.

The Foreign Laws Defense

Under the Foreign Laws Defense, employers are generally exempt from liability under Title VII, the ADA and the ADEA if compliance would cause the employer to violate the law of the foreign country in which the employee works. To invoke the foreign laws defense, the employer must show:

- the action is taken with respect to an employee in a workplace in a foreign country;
- compliance with US anti-discrimination laws would cause the employer to violate the law of the foreign country; and
- the law is that of the country in which the employee's workplace is located.

Bond, Schoeneck & King, PLLC

600 Third Avenue, 22nd Floor
New York, NY 10016-1915

Tel: (646) 253 2310
Fax: (646) 253 2301
Email: mbernstein@bsk.com
Web: www.bsk.com/people/michael-i-bernstein

While the minimum wage provisions of the Fair Labor Standards Act also apply to US seamen aboard American vessels, the FLSA's provisions do not apply extraterritorially, and it exempts from its minimum wage and overtime coverage any employee who performs services during the workweek in a workplace within a foreign country. However, when part of an employee's workweek is covered work performed in the US or its territory, no matter where else the work is performed, the employee is entitled to the benefits of the FLSA for the entire workweek, unless there is a particular exemption. Foreign employers and employees have no general exemption from the FLSA's minimum wage and overtime provision if they are located in the USA.

The NLRA applies only to employees working within the USA and its possessions and does not apply to US citizens working outside the USA or to foreign employers and employees who engage in activities "affecting commerce" (engaging in business operations) in the USA regardless of whether or not the employer is organized under the law of a foreign nation.