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Law and Practice

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

1.1 "Gig" Economy and Other Technological Advances

References to a "Gig" economy often beget a certain indifference, if not confusion – indifference because of a belief the movement has little application to most entities and, according to some reports, is even on the decline; confusion because other reports indicate not only that the movement is actually growing, but that, in certain respects, it also has had, and is having, direct and indirect effects on even those entities which in no way consider themselves part of 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. At the same time a significant number of these individuals also seek to supplement their Gig incomes either through regular employment with another entity or through regular engagement by such other entity on what is classified, both by the entity and the individual, as an independent contractor relationship that renders the individual ineligible for minimum wage, overtime, workers' compensation and unemployment insurance, and other protections under the law, as well as for other of the entity's employment benefits. While such entities 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 litigation and monetary recoveries. The gravity of the problem is underscored by the fact that in many instances these issues become the subject of class or collective actions.

Of concern to many employers is that what once seemingly was accepted as a true independent contractor classification under federal or local law has now been challenged with increasing frequency – indeed, being redefined so as to create an employment status that now affords coverage and other benefits and protections to which the individuals otherwise would not be entitled. A global entity seeking to establish or enhance its presence in the United States or a particular region(s) of the United States, once aware of these concerns, will be better able to avoid such exposure when creating and structuring the relationships with those who will be servicing its needs.

Central to the workplace has always been a certain tension between the employer and the employee concerning the rights of employees to communicate both with each other and with others outside the workplace, whether in a non-union or union setting, or where a union is attempting to organize the employees in question. Among the issues are the nature and scope of the subject matter of the communications and whether communicated through the employees' own devices or those of the employer. From the employer's perspective, its concerns necessarily include its rights and obligations to control or otherwise limit the use of such devices, both on "company" time and otherwise, relative to what has heretofore been considered legitimate "company" property rights and matters of civility, employee relations, productivity, safety, security, privacy, customer relations, trade secrets and other confidential information. Often, the issue has arisen in the context of what had been regarded as seemingly facially neutral and well-intentioned workplace

policies, including those designed to protect the employees themselves against the discrimination, harassment, bullying, retaliation and invasions of privacy our society has proscribed.

Many of these communications issues evolved in the context of what had been termed by some 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 all the more and posed its own issues. Beyond that, with today's electronic technology, the host of new devices, their varied uses (often integrated with personal communications), the ever-expanding social media platforms and the countless number of potential recipients outside the immediate physical confines of the physical workplace, our changed workplace environment has now been redenominated by some to include an "electronic water cooler" universe.

That "electronic" universe has been further compounded by robotics and other artificial Intelligence, the new emphasis on algorithms, "Big Data" and other automation developments, in ways that even at this point are difficult to imagine. Consider, for example, the impact of these technological developments on the extended workplace, both as to place and time, let alone possible employment issues of reorganization, relocation, workplace safety, job displacement, creation and opportunities, educational and other requirements, training and retraining, confidentiality, privacy, and by whom and how the work is to be performed. Add to that the diversity and inclusion and any reasonable disability accommodation issues that may well surface in the course of these considerations.

As will be seen below, the implications of these developments are many, the subject of ongoing examination and review, and at present somewhat uncertain.

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 pervasiveness and gravity of such conduct in high visibility fields, the power dynamics involved and the extent to which such allegations were tolerated, if not ignored. Any entity today cannot ignore the reality and impact of these movements no matter where in the United States the entity elects to establish or enhance its presence. To be sure, issues of sexual harassment are universal givens. That also holds, of course, for any of the other well-recognized areas of harassment, retaliation or discrimination, and the entity's need to address such issues in its policies, communications, training programs, internal procedures for investigation, discipline and the resolution of grievances. What is different about these movements are its dramatic revelations of particular aspects of the issues in ways that heretofore had gone virtually unchallenged or had received little attention, and its altering of the thinking of some as to fundamental approaches to be taken when faced with such allegations.

First among these considerations is how is it that certain individuals, particularly in key positions in an entity, industry or other field, 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 such individuals have been able to maintain and even enhance their status within their organizations over the years, notwithstanding what, in retrospect, may well 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 both the entity to continue on with the accused and allow the accused to act out against others, unchecked in his or her ways? Is there a need to re-examine 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? Speaking of confidentiality, 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 of those employees and other witnesses it questioned in the course of its investigation?

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 a real, and vital, consideration? What if the allegations were made over a hotline, provided by the entity, that allowed for the anonymity of the accuser?

What if the entity were seeking to make a clear statement of zero tolerance for sexual or other harassment and, accordingly, adopted a "Zero Tolerance" policy that regarded such harassment as immediate basis for discharge? No matter well intentioned the policy, what considerations would such a policy require? Could such a policy, for example, actually discourage complaints from those who believe a complaint means automatic termination of popular, powerful and/or valuable members of the organization?

The Pay Equity Movement

A well-settled area of concern is disparity in pay on the basis of gender, race, national origin, religion, age, disability and other protected areas defined by federal, state and local

laws and regulations. Among other considerations, the issues necessarily involve appropriate comparators; the pertinent job descriptions; sophisticated statistical analyses and audits; legal standing to sue, both individually and in the context of collective and class actions; burdens of proof and production; the measures of relief available; the appropriate forum(s) and the interplay of federal, state and local law. These are not new issues, but, to the extent one currently might regard it as a Pay Equity movement, present focuses of the movement, in addition to the above considerations, in particular concern transparency; the historical causes, implications and ramifications of the salary gaps in our society; more sophisticated, and confidential, 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.

In many respects the matter of pay equity both requires and at the same time suggests a transparency that affords the entity certain internal and external opportunities. It not only has been treated as a compliance issue of which the global entity must be aware, but legal developments at the federal level emphasize the employer may not preclude the employee from discussing or disclosing his/her own wages or those of other employees 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 pay equity is not just a compliance issue; pay equity also provides the entity with excellent promotional opportunities, both internally and externally, including the new and expanded recruitment sources it may well yield. While a primary focus of the Pay Equity movement has been one of gender, its application, when viewed in the context of wage and salary gaps, takes on an historical import that transcends gender and impacts the entire interviewing process. The same holds true for other protected groups historically impacted. As discussed below, pay disparity is still viewed in terms of such fundamental comparators as skill, effort, responsibility and similar working conditions, but much greater focus is now also given to inquiries into the individual's wage or salary history preceding his/her current employment. Such an historical gap may result in a finding of discrimination, unless the wage or salary gap at issue is attributable to other legitimate reasons, rather than to the perpetuation of past discriminatory practices.

More and more, as will be seen below, this issue of pay equity has been the subject of increased federal, state and local regulation, and a global entity seeking to establish or enhance its presence here in the United states will need to understand this and how it might impact not only on compensation decisions, but also on its decisions as to location, recruitment, hiring, training and promotional policies and practices.

Implicit Bias, Its Advent and Evolution

The global entity also should be aware of the advent, and evolution, of an 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, as discussed below, its meaning and application are very much the subject of debate and ongoing litigation, beginning with a fundamental question as to definition, i.e., is it an "unconscious" bias, an "indirect" bias, or something else predicated not upon the specific evidence in the case at hand, but simply a stereotypical assumption about a particular class of individuals? Is it, alternatively stated, (a) devoid of or something other than a "conscious" intent, and, if so, (b) how is it to be measured or determined, and (c) how is it compatible with established legal concepts of disparate treatment and disparate impact, the burdens of production and proof, or the rules of evidence? And how have the courts addressed these issues?

Increased Whistleblower Awareness, Pursuit of Claims and Enforcement

Whether measured in terms of the number of filings or tips, the different and varied governing statutes, how the claim is denominated (e.g., as retaliation or otherwise), the dollar amounts of the awards to complaining individuals (both in toto and individually), the estimated numbers of people protected, the extent of public, media and employee awareness and involvement, increased corporate responsibility and attention to training and compliance, new and added steps and measures to protect the whistleblower, or governmental interest and pursuit, there is little doubt that what generically is denominated as "whistleblowing" has in recent years reached dramatically new, and rather staggering, levels. To the extent applicable, and as discussed below, a global entity cannot ignore these developments.

1.3 Decline in Union Membership

For decades, union membership in the private sector of the workforce in the United States has been in steady decline since its peak of about 35% in the early 1950s. By the 1970s this decline in organized labor had started to steepen, although it still held at nearly a quarter of the private sector workforce. Between the late 1970s and the early 1980s, percentages halved, and between 1990 and 2009, they halved again, falling to single digits. Presently, union membership in the private sector is at about 6.5% (U.S. Bureau of Labor statistics).

Among the states, New York has continued to have the highest rate (15%) of union membership in the private sector, while South Carolina continued to have the lowest rate (2.8%). Most union members in the private sector live in California, New York, Illinois, Michigan, Pennsylvania, New Jersey and Ohio.

Depending upon one's perspective, the reasons for the decline differ, but the literature on the subject lists a myriad of contributing factors, such as a major shift in employment away from traditionally unionized industries; most job creation has involved not only the service-producing sectors, rather than the goods-producing sectors, but also professional and managerial occupations, rather than the blue-collar occupations; the loss of manufacturing jobs due to globalization and trade; a more highly educated and mobile workforce in contrast with the less-educated and more regional workforce traditionally represented by the union movement; the increase in contingent and on-demand short-term work, typified by the "Gig" economy and the utilization of such resources as independent contractors, free-lancers, consultants, on-call or temporary agency staffing, all at variance with the longer-term and more stable relationships associated with the union movement; and the ever-increasing development and reliance upon telecommuting, electronic communications, ongoing automation, including robotics and other artificial intelligence, analytics and other such technological advances. None of these factors can be ignored, any more than one can discount the proliferation of state "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 did not even exist in the formative years of the union movement or, to the extent they did exist, were much more limited in substance or application. Indeed, in certain of these areas, the states and local governments have been asserting themselves more and more on behalf of the individual and in ways that had not been seen in past or even more recent years. 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 is headed by a five (5)-member Board, each member a Presidential appointment, supplemented by a number of regional offices spread throughout the country. It is authorized to fulfill its responsibilities both through the adjudicatory process and by rulemaking, but in the main has opted for the former. The Board's decisions are subject to review by the respective federal courts of appeals overseeing the jurisdiction of the particular geographical region in question, and possibly to further review by the Supreme Court of the United State depending upon the circumstances, including possible conflicts within the regional circuits and the ultimate discretion of the Supreme Court.

The NLRB's objective has been to achieve a uniform and orderly administration of this national statute that, to the extent applicable, preempts state or local law or regulation. At the same time, the process has been subject, in varying degrees over the years, to the political swings of the particular Presidential administration in office at a given time, as well as to the law as it has been interpreted within the different geographical regions of the Board and the respective federal circuit courts of appeals governing those regions, and, where it takes jurisdiction, ultimate resolution of such conflicts by the U.S. Supreme Court. Moreover, where its administrative decision has been reversed by one or more of the federal circuit courts of appeals, but not by another or other circuit courts of appeals, the NLRB, under its policy of "nonacquiescence," has adhered in the latter circuit(s) to its prior holding until such circuit court(s) of appeals, or the U.S. Supreme Court, has (have) ruled otherwise.

As discussed above, there is no question that, globally and domestically, we are in the midst of significant developments and other changes in our industrial life and the workplace itself. Neither is there any question that the same is true of a second factor, the political swings both here and globally. The Supreme Court has made clear the Board retains the discretion to reconsider its prior decisions, including those of prior Board members, "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). The NLRB, in a number of areas, is currently wrestling with these considerations. What remains to be seen is what legal changes these two factors will bring in the near future.

2. Nature and Import of the Relationship

2.1 Defining and Understanding the Relationship

Employment v. Independent Contractor.

In establishing the nature of the relationship between the entity and the individual, a major issue, and one with potentially substantial legal and financial implications, is that of misclassification. 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.

From the individual's standpoint, the attraction is the independence and flexibility the arrangement permits. From the entity's standpoint, it is able to fulfill its needs, insulated from certain structural costs and liabilities. The problem typically arises where the need of the employer to control, direct and supervise the actions and performance of the individual are such that the true independent nature of the relationship, if it ever existed, no longer exists. Additionally, the problem may be exacerbated by the independent contractors working side-by-side, under the same supervision and control, with the entity's employees – and for extended periods. 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, in such cases, 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 codetermine essential terms and conditions of employment, even if they have not actually exercised that right. Whether the right of control must be actually exercised and done so directly is currently the subject of extensive litigation. The ramifications in creating or avoiding a joint employer relationship between two employers are enormous and, in addition to other considerations, can involve joint obligations, under a union contract or otherwise, for statutory benefits, employer provided benefits and wages, etc.

Historically, the standard for finding joint employer in the franchise/franchisor 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, as well, is under attack and can no longer be taken for granted.

How the legal developments evolve remains to be seen. Regardless, if not careful, a finding of joint employer can impose unintended costs and legal obligations despite little actual control over terms and conditions. The importance of careful selection of vendors, review of contractual arrangements, and sensitivity to the lines of distinction cannot be minimized.

Internship

While the law recognizes that unpaid interns may not be employees, as with independent contractors, merely denominating them as interns is not determinative of 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. Care in properly structuring an unpaid internship, or one that does not meet minimum wage or overtime requirements, should be carefully reviewed.

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, or as otherwise expressly protected by law, employment is "at-will." This means, absent such legal protections or an individual contract or one collectively bargained, either the employee or the employer may terminate the employment at any time, for any reason or no reason other than one expressly protected 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 U.S. employees with some kind of "just cause" or objectively reasonable requirement for 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 circumscribing the right to terminate may be created – depending upon the circumstances – based on an employer's or supervisor's statement, a handbook, the employer's practice of only firing for cause, or in some other manner. A minority of states have recognized a covenant of good faith and fair dealing which has been interpreted in a variety of ways from requiring anywhere from 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 seeking to rebut a presumption of atwill status bears a heavy burden, i.e., he/she 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 repre-

sentations made at the time of hire or during employment, viewed in the context of subsequent actions.

Contractual arrangements can address all manner of terms or conditions, including job duties, compensation, grounds for termination, duration, location, benefits, reporting procedures, probationary periods, hours, full-time, part-time, temporary or other status. In the event of a dispute as to certain statutory issues, e.g., whether someone is "exempt" (from overtime) or "non-exempt" under the Fair Labor Standards Act (see below), 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 context of the circumstances, will be determinative.

"Exempt" vs. "Non-Exempt" Status and What That Means
Generally, under the FLSA, New York 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 his/her job is subject to one of the three principal exemptions from hourly pay requirements, an employee must be paid weekly, on an hourly basis, and at an overtime rate of 1½ times his/her regular hourly wage for hours worked in that week in excess of 40 hours. The three principal exemptions are bona fide "executive," "administrative," and "professional." It should be noted that New York State's minimum wage rates are substantially higher than the $7.25 presently required by the FLSA. The New York State minimum wage for nonexempt employees as of December 31, 2018 ranges from $11.10 to $15.00 per hour, depending on the number of employees the employer has and where the employee works. These rates will increase annually over the next several years, and by December 31, 2021 will rise to $15.00 per hour for all employees in New York City, Long Island, and Westchester Counties, and to $12.50 per hour in the rest of the State.
To qualify for any of these three principal exemptions, the employee has to be paid on a salaried – not hourly – basis, and the employee's position has to meet certain job duties tests. The job duties tests under NYS DOL's Wage Orders substantially mirror those of the federal FLSA. For example, several elements have to be present in order for a job to fall within the scope of the "executive" exemption: (a) the primary duty of the job must be managing the enterprise or a customarily recognized department or subdivision of the enterprise; (b) the employee must customarily and regularly direct the work of at least two or more other employees; (c) the employee must possess the authority to hire or fire employees or make suggestions and recommendations as to hiring, firing, advancement, promotion or other changes of status that are given "particular weight"; and (d) the employee must customarily and regularly exercise discretionary powers. To fall within the scope of the "administrative" exemption, (a) 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; (b) the employee must customarily and regularly exercise discretion and independent judgment; and (c) the employee must regularly and directly assist an employer, or another employee who is employed in a bona fide executive or administrative capacity (e.g., employment as an administrative assistant), or perform specialized or technical work that requires special training, experience or knowledge under only general supervision.

The NYLL differs from the FLSA in several ways that are employee-friendly. For example, the salary basis threshold for exempt status under the NYLL is much higher than the current threshold of $23,660 per year provided by the FLSA. As of December 31, 2018, an employee in New York City who works for an employer that has more than 10 employees and who is paid less than $58,500 per year ($1,125 per week) must be paid on an hourly basis and is entitled to overtime pay for hours worked in excess of 40 in a week, irrespective of the duties of the employee's 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 $58,500 per year ($1,125 per week) on December 31, 2021. For employers elsewhere in the State, the threshold is $43,264 per year ($832 per week) as of December 31, 2018, and will rise to $48,750 per year ($937.50 per week) on December 31, 2020.

In addition, NYLL has promulgated certain industry-specific requirements that a prospective employer will need to take into account, as well as various other requirements, e.g., employers are required to provide newly hired employees, at the time of hiring, with a notice that includes various information about the entity and regarding the terms of employment; failure to provide such notice may be the subject of a private lawsuit by the employee for a penalty payment of up to $5,000, plus attorneys' fees. There is a similar requirement for weekly pay checks – the "pay stub" that customarily accompanies the employee's pay check must include certain information; failure to include the required information entitles the employee to bring a private lawsuit to recover a daily penalty payment capped at $5,000, plus attorney's fees.

2.3 Immigration and Related Foreign Workers

Generally
Employers may hire foreign nationals who are authorized by the U.S. Citizenship and Immigration Services ("USCIS") to work in the United States. Work authorization can be family-based (e.g., where a U.S. spouse sponsors his/her foreign spouse for permanent residence and accompanying work authorization), granted in connection with humanitarian protection provided by the U.S. (e.g., asylum or Temporary Protected Status), or pursuant to the Diversity Immigrant

Visa program. In many circumstances work authorization requires an employer to file a petition with USCIS on behalf of a foreign national in order to secure nonimmigrant (temporary) or immigrant (permanent) visa status, thereby enabling the person to work in the U.S.

Options

The most common employment-based nonimmigrant 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," i.e., job which requires the attainment of a bachelor's or higher degree (or its equivalent) in a specific specialty in addition to 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 U.S. may file for L-1 visa status. Other nonimmigrant 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. Immigrant visa petitions filed by employers on behalf of foreign nationals seek permanent residence (a.k.a. "green card") and work authorization for those who qualify in various eligibility categories.

Current Developments

Visa Petitions

While the preparation and filing of visa petitions with USCIS on behalf of foreign nationals is generally a straightforward process, employers should note that various policies and procedures of the current U.S. administration have resulted in unprecedented delays and challenges to petitions filed on behalf of foreign workers. Moreover, in June 2018, the Supreme Court of the United States 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. As such, nonimmigrant 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. Venezuelan government officials and their immediate family members are also ineligible for nonimmigrant and immigrant visas to the U.S.

Of further note is the increased visa scrutiny (a.k.a. "extreme vetting") established by the Buy American, Hire American Executive Order issued in April 2017. As a result of this Executive Order, nonimmigrant visa petitions filed by employers – especially H-1B visa petitions – have been subject to heightened scrutiny, along with a flood of Requests for Evidence (up nearly 45% in the last 18 months) from USCIS challenging both the wages offered to foreign workers and the classification of certain positions as "specialty occupations." In addition, due to new internal policy established by USCIS, immigration officers will no longer defer to previous agency petition decisions when evaluating employers' requests to extend the nonimmigrant visa status of their employees. As such, even though a foreign worker may have been granted H1B visa status a couple of years ago to work as a Financial Analyst in the U.S., an H-1B visa extension petition filed today by the employer on behalf of the foreign worker, involving the same position, may be challenged by USCIS, and even denied.

TPS; DACA

USCIS has taken steps to end Temporary Protected Status ("TPS") and accompanying work authorization benefits for foreign workers from Haiti, El Salvador and Nepal, among other countries. Unless individuals from these countries can secure another form of work authorization by the time their TPS expires, their employment will have to be terminated and they will have to return to their home countries. As of the date of this writing, the same holds true for those foreign workers who were able to secure work authorization under the Deferred Action for Childhood Arrivals, more commonly known as DACA. At present, USCIS is accepting requests for DACA renewals and work authorization, but is not accepting any new applications for DACA benefits.

Worksite Compliance

All U.S. employers are required to complete USCIS' Form I-9 to document verification of the identity and employment authorization of every employee, both citizen and noncitizen, to work in the U.S. While the Form I-9 verification process has generally been an onboarding formality since its inception thirty years ago, 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"). Current statistics indicate that I-9 audits and investigations by ICE have quadrupled in the last year alone. In addition, ICE has been conducting unprecedented large-scale worksite raids targeting unlawful workers and the businesses employing them. In early 2018, twenty-one people were arrested when nearly one hundred 7-Eleven stores in seventeen different states were targeted in the largest workplace immigration enforcement operation conducted under the current administration. Smaller employers are equally susceptible to worksite inspections and Form I-9 audits by ICE. In 2017, ICE inspected a tree trimming company headquartered in Pennsylvania and found ongoing violations over a five-year period. The company pleaded guilty and was ordered to pay a judgment in the amount of $80 million, the largest judgment ever in a worksite enforcement investigation. 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. In order to remain compliant, employers are advised to conduct periodic self-audits of their Forms I-9 to minimize the potential for liability.

These many policy changes and challenges by USCIS have resulted in extreme processing delays and created a growing backlog of nonimmigrant and immigrant visa applications. On the whole, the legal immigration process looks very different than it did less than two years ago. Employers are well-advised to keep this in mind both when pursuing immigration benefits on behalf of their foreign workers and in their efforts to comply.

2.4 Collective Bargaining Relationship or Union Organizational Campaign

An Acquiring Entity; Successorship
An entity that acquires another, depending on the form of the acquisition, may assume existing employment obligations of the acquired entity. If, for example, 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: (i) those who perform "straight work" contracted out to them by a primary employer; and (ii) 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

Generally
The importance of a successful recruitment process cannot be overstated. Employers invest substantial time, money and resources identifying the talent necessary for a successful business operation. Finding the "right" applicant is also critical in controlling costly future employee turnover.

Fundamental to establishing a lawful and effective recruitment program are (1) a clear job description that identifies the essential responsibilities, functions and duties of the position and the required and preferred qualifications for all applicants; and (2) the training of all employer representatives involved in the hiring process, its procedures and the legal limitations on permissible and impermissible inquiries.

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, e.g., disparate treatment of the applicant on the basis of a protected category or in evaluating whether an individual applicant or employee who is disabled can be reasonably accommodated to satisfy the essential functions of the job at issue.

During the interviewing process, the employer's representative is both "selling" the employment opportunity to a prospect and investigating and evaluating the applicant's qualifications and competency for the job, often in interviews that are the parties' first encounter with one another. Inappropriate casual comments or stray remarks can create unintended litigation and/or liability for the employer. Developing relevant interview questions in advance of any interviews is strongly recommended. Training and practice for those involved in the recruitment process, including the types of inquiries to be avoided, can provide important protection from a myriad of legal claims.

Discrimination Issues
Various employment discrimination laws, federal, state and local, shape a lawful recruitment program. Written or verbal questions that initiate inquiry into, or otherwise directly inquire about an applicant's race, age, religion, national origin, sexual orientation, pregnancy status, marital status, or other similarly protected characteristics are unlawful. So, too, are questions or decisions designed to screen out protected applicants based upon customer or client preference. Questions that indirectly reveal information that relates to a protected status without a business justification are also problematic, e.g., it is impermissible to ask when an applicant graduated from high school because it may reveal his/her age; unless visibly apparent at the interview or otherwise voluntarily identified by the applicant in the application for employment, to ask in a job application form or at the interview if the applicant would need reasonable accommodation to perform a job because the answer is likely to reveal whether an applicant has a disability.

Decisions based on objective factors relevant to the position or business operation, such as education or experience, are less likely to be problematic. Agencies or courts will draw reasonable inferences in assessing what is relevant to an employer's intent in selecting or rejecting particular candidates. By the same token, 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 that workplace.

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 (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 an applicant's social media activity and other internet information no doubt can provide valuable information about the applicant and insight into his/her character, but there are significant legal risks as well. Social media inquiries or searches may reveal information that legally cannot be considered in the hiring process and its mere possession could 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 an applicant to provide his/her social media passwords or otherwise requiring an applicant to provide access to 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 the state legislature. While many employers do access such information, many other employers believe it is wise to refrain from such inquiries or searches. For those that 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

Background checks, including reference checks, are another useful tool to confirm the information that an applicant provides to the employer. The extent of the background check will frequently vary based on several factors, including the levels of responsibility and supervision, the relationship to the public, suppliers, and other employees, the potential for a risk of harm to third parties, interaction with any particularly vulnerable populations (children, elderly, injured, or disabled individuals), and any specific legal requirements for background checks for the position at issue. The timing of the background check, e.g., following the extension of an offer conditioned upon such a check, is another consideration.

No specific statute governs the procedure for background checks that are 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 impose specific and detailed notice, consent and due process procedures on such background checks. Specifically, an employer is required to disclose in writing to a job applicant that it intends to obtain a report from a third-party agency concerning the applicant's background, and must explain the nature and scope of the investigation upon request from the applicant. The employer must obtain advance, written authorization from the applicant in a prescribed manner. Also, if employment is denied in whole or in part because of the information received, the employer must notify the applicant, identify the reporting agency, provide a copy of the report and a statement of his/her legal rights, and 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.

Given the complexity of the law in this area and the potential for significant liability, before engaging an agency to conduct background checks, an employer should confirm the agency's compliance with these legal requirements and secure defense and indemnification agreements for any errors or violations the agency may commit.

Records of Arrests and Criminal Convictions

Inquiries regarding applicants' prior arrests and criminal convictions raise several legal issues. While individuals with criminal records are not expressly protected by federal law, the EEOC maintains that policies which disqualify applicants based on their criminal records should be scrutinized for potential disparate impact on racial minority applicants. To avoid even unintended discrimination against minority applicants, the EEOC regulatory guidance advocates for narrowly-tailored screening policies, both tying the specific criminal offenses at issue to the essential job requirements and the fitness for the particular job in question, and imposing time limits on the criminal offenses that can be taken into consideration.

The asserted connection between criminal records and employment discrimination has led to an initiative across the United States to prohibit or limit preemployment inquiries regarding applicants' criminal histories. This initiative, known as "Ban the Box," is designed to ban the preliminary job application question as to whether the applicant has ever been convicted of a crime and to delay such inquiries until later in the hiring process, to allow those applicants with criminal convictions to demonstrate their qualifications for a job prior to being asked about their criminal history.

In New York, several counties and municipalities have enacted legislation that prohibits the criminal conviction question on the initial job application and prescribes at what point in the hiring process questions about criminal histories may be raised. Many of these statutes are limited to specific classes of employers.

More generally, New York State law contains several provisions that regulate an employer's consideration of applicants' criminal records. With respect to arrest records, an employer may not ask applicants about, or rely on, records of arrests not currently pending in making employment decisions. With respect to criminal convictions, under New York State law, an employer may ask the applicant or conduct a background check that includes criminal conviction records, but any decision to preclude employment based on a conviction record is only permitted if (i) 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 (ii) granting employment would create an unreasonable risk to property or the safety of others. In making this assessment, the statute requires the employer to consider eight specific factors regarding the criminal conduct and the relationship to the prospective employment.

Wage History and Pay Equity

As earlier noted, across the United States, 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. The EEOC has so argued and several federal courts, including the Ninth Circuit in Rizo v. Yovino, 887 F.3d 453, 456-57 (2018), have held that the use of prior salary histories perpetuates the pay disparity between men and women and undermines the purpose of the Equal Pay Act.

There is currently no state-wide legislation on this issue in New York. However, the State Legislature is actively considering such legislation, and several municipalities in New York have already enacted prohibitions on pre-employment questions regarding an applicant's salary history. Notably, in New York City, almost all employers are prohibited from (i) asking job applicants about their compensation history and (ii) relying on a job applicant's compensation history when making a job offer or negotiating an employment contract, unless that applicant freely volunteers such information. The legislation is enforced through the New York City Commission on Human Rights, or a civil action in court. 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. Employers are permitted, however, to ask about an applicant's salary and benefits expectations. Further, if a job applicant volunteers his/her compensation history, the New York City statute does not prohibit employers from verifying and considering such information.

Medical Inquiries and Tests

The Americans With Disabilities Act ("ADA") and the New York 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 an applicant undergo a medical examination or, unless volunteered by the applicant, ask an applicant whether he/she has (or ever had) a disability, how he/she became disabled, or its nature or severity. 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.

Significantly, 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 also 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 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, an applicant voluntarily makes known to the employer his/her disability, and requests 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 separated from applicant or personnel files.

Restrictive Covenants

During the hiring process, an employer, as a matter of due diligence, may lawfully ask an applicant if he/she is a party to any restrictive covenants that would preclude or impede his/her ability to perform the essential functions of the job and fulfill its responsibilities. The employer may evaluate the enforceability of the covenants, based on controlling legal principles, and may lawfully make an employment decision to deny employment if, in the employer's judgment, the restrictions are too burdensome or limiting. If the employer hires the individual, a preferred practice is to provide the new employee and his/her 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 a new employee to acknowledge in writing that by accepting the employment he/she 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, as well as new employees, are significant components of a lawful recruitment process. There are numerous federal and state recordkeeping requirements in the various employment statutes. These statutory requirements extend to applicant records. 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 submitted by all applicants 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. If such records are not preserved, a court may hold that the plaintiff is entitled to a presumption that the missing records would have helped prove his/her claim of discrimination. The documentation process should include records of information gathered from 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 employment records (including applicant records) at least until the possibility of a potential claim is exhausted.

4. Terms of the Relationship

4.1 Restrictive Covenants

1. Definitions:

To begin, it is important to distinguish the differences in the types of restrictive covenants and related restrictions, and the objectives contemplated by each:

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. The residual effects of such agreements, whether or not intended, may reduce the competition for employees in the job market, not to mention the compensation levels. Such agreements, accordingly, 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. Indeed, the U.S. Department of Justice, in recent years, has not only heightened its concerns about these restraints, but increasingly has initiated these types of enforcement actions, including against such entities as Apple, eBay, Intuit, Pixar, Intel, Google, LucasFilm and Adobe.

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 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, both 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, i.e., reform the language of the restriction so as to preserve what it regards as reasonable.

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 him/her, 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. While there is a 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 plaintiff employer, or where the plaintiff employer has established the actual misappropriation of the trade secrets. At the same time, 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. See, eg, Lumex, Inc. v. Highsmith, 919 F. Supp. 624, 635-36 (E.D.N.Y. 1996), a frequently cited case

on the doctrine, where the federal district court issued an injunction, notwithstanding its finding the employee had acted in good faith:

"The Court finds that, notwithstanding Highsmith's good intentions, there not only is a high risk, but it is inevitable that he will disclose important Cybex trade secrets and confidential information in his efforts to improve the Life Circuit product, and aid his new employer and his own future. Highsmith has even more incentive to further Life Fitness interests, improve Life Circuit and aid in the development of new products, by his bonus and stock option rights in his new employment agreement. As stated above, there is a high risk that in the course of working on Life Circuit or on other Life Fitness business, he will, perhaps inadvertently, disclose Cybex trade secrets, or Lumex pricing and profit structure or even the Cybex future prototypes. Highsmith was privy to the top secret Cybex product, business and financial information. He cannot eradicate these trade secrets and this confidential information from his mind."

The Faithless Servant Doctrine
A sub-species of the duty of loyalty and fiduciary duty an employee owes to his/her present 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 that employer, including unfair competition; sexual harassment; insider-trading; theft; diversion of business opportunities; self-dealing; disclosure of trade secrets or other confidential information; and off-duty sexual misconduct. Where appropriate, its application can be most effective in that it can require the disloyal employee to forfeit all of the compensation he/she was paid dating from the first disloyal act going forward, irrespective of whether the employer can establish actual damages, and can include 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; customer references and knowledge of pricing; pricing methods and profit margins; marketing and product pricing strategies; knowledge of future products and marketing strategies warranting protection.

Good Will
Under New York common law, in the absence of a specific contractual restriction addressing the sale of good will 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 then soliciting its former customers. Mohawk Maintenance Co, Inc. v. Kessler, 52 N.Y. 2d 276 (1981); indeed, the seller's implied covenant to refrain from such solicitation is "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
Non-compete and non-solicitation agreements should be drafted in a manner that is specifically tailored to the position; the duration of the restrictions should be no greater than necessary to protect the employer's interest; the scope of a non-solicitation agreement should be commensurate with the specific circumstances and the legitimate concerns of the employer; and the non-compete should list categories of information that the employer deems to be confidential/trade secret. As a practical matter, courts will look to strike a balance between the employer's legitimate right to protect itself from unfair competition and an employee's ability to obtain future employment, taking into account the particular market(s) in question.

In New York, continued employment, alone, is legal consideration for a noncompete. Moreover, often a non-compete will be requested in the context of a promotion or increase in compensation.

Where warranted, an employer may need to seek a preliminary injunction to prevent the employee from violating, or further violating, the non-compete. Language in the non-compete agreement acknowledging not only the employer's right to sue where appropriate, but that a breach of the agreement will cause the company "irreparable harm" warranting a preliminary injunction, is, of course, advisable. Where appropriate, an employer may also recover lost profits as an element of damages.

4.3 Discrimination, Harassment and Retaliation Issues

Protected Categories
Beginning at the federal level (e.g., Title VII of the Civil Rights Act, the Americans With Disabilities Act, the Age Discrimination in Employment Act), but also increasingly at the state and local levels, it must be understood that depending upon the forum our 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, whistleblowing, 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." These protections, where applicable, govern all aspects of the employment relationship, inclusive of recruitment and hiring, promotions, transfers, pay, benefits and other terms and conditions of employment, and, of course, the termination of the employment relationship itself. Depending upon the nature of the allegations and the particular statute or regulation in question, the circumstances must be examined carefully along with the particular legal burdens of production and proof and the rules of evidence applicable to the case at hand.

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?
To the extent the alleged discrimination is predicated upon a claim of disparate treatment, an essential element of the case requires evidence – proof -- of a conscious intent to discriminate. To the extent the alleged discrimination is predicated upon a claim of disparate impact, the question of intent in no way is an element of the case; rather, the claim is predicated upon the impact of the decision or action in question and whether that decision or action impacted in a discriminatory manner, without regard to the issue of intent. If, as most have conceded, implicit bias, by definition, in no way involves the element of a conscious intent to discriminate, how, it has been argued, can the concept of implicit bias apply to justify a claim of disparate treatment that requires just that, a conscious intent to discriminate? Independent of implicit bias, either the evidence has established such an intent or it has not. If, by the same token, the sole issue of a disparate impact claim is whether or not there has been the alleged disparate impact, without regard to the element of intent, what is the relevance of implicit bias to such a claim?

Our 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. Among the questions addressed in various of the court decisions have been whether, in cases requiring the establishment of an intent to discriminate, the court should allow a proffered expert on implicit or unconscious bias to offer testimony as to a doctrine that, by definition, is devoid of such a conscious or deliberate intent to discriminate? If the proffered expert witness has not even met with or otherwise interviewed the defendant(s)? The plaintiff(s)? Or even reviewed any of the record evidence specifically related to the allegations of the case? If the decision maker(s) was (were) never even subjected to any of the tests utilized to ascertain, or measure, the existence of such implicit or unconscious bias? If the proffered expert was offered only to provide evidence, in general, as to the theory of implicit or unconscious bias -- unrelated to the specific facts or circumstances or the parties in the case at hand, and was never even asked, or permitted, to offer any opinion as to whether, in such case, there was in fact discrimination?

Against this background, it also must be noted that the authors of one of the leading tests designed to measure implicit bias ["IAT"], themselves, have acknowledged the unreliability of their test as a predictor of behavior:

"[W]e assert that the IAT should not be used [to make decisions about others]. We cannot be certain that any given IAT can diagnose an individual. At this stage in its development, it is preferable to use the IAT mainly as an educational tool to develop awareness of implicit preferences and stereotypes. For example, using the IAT to choose jurors is not ethical. In contrast, it might be appropriate to use the IAT to teach jurors about the possibility of unintended bias. Using the IAT to make significant decisions about oneself or others could lead to undesired and unjustified consequences" (https://implicit.harvard.edu/implicit/ethics.html).

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. Addressing the issue in the context of sexual stereotypical assumptions, the U.S. Supreme Court, years ago, agreed that, "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." Price Waterhouse v. Hopkins, 490 U.S. 228, at 251 (1989). The Court made clear, however, what was re-

quired, "[i]n the specific context of sex stereotyping," was not the mere assumption of the stereotype, but evidence that the employer actually "acted" on the basis of that stereotypical belief – in that case, as the Court put it, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 250 (emphasis added).

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 reviewing the submissions to see the submissions without the names or any other identifying characteristics that might suggest the racial, national origin, gender or any other characteristic of the author, and to allow, to the extent practical, a diverse group of reviewers to participate both in the reviewing of the submissions and in the interviewing process itself. Similarly, by expanding the recruitment sources to include other than referrals by incumbent employees and to draw upon new and diverse recruitment sources, the possibility of a more diverse workforce is enhanced. 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, where feasible, 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 avail himself/herself of that procedure. By way of example, 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 U.S. 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 (e.g., discharge; denied promotion); 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, such "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); and 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, including New York, have incorporated or otherwise applied the Faragher-Ellerth affirmative defense in or to their own discrimination laws, e.g., to the New York State Human Rights Law. New York State's highest court, the New York Court of Appeals, has held, however, that the New York City Human Rights Law ("NYCHRL") does not permit such an affirmative defense.

4.4 Workplace Safety

Employers considering operating in the United States should be aware of the requirements of the federal Occupational Safety and Health 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. OSHA has interpreted this second requirement, otherwise known as the "General Duty Clause" under the Act, to include employer measures to protect employees from weather-related heat and cold, workplace violence, musculoskeletal/ergonomic injuries, and workplace violence. OSHA's regulations, as well, prescribe specific requirements for workplaces, such as exit route requirements, electrical requirements, machine guarding requirements, and general housekeeping requirements. Entire treatises have been written to aid in compliance with OSHA regulations; employers considering operations in the United States should review the regulations to become familiar with these safety requirements.

OSHA's enforcement mechanisms are somewhat different than in other countries where safety agencies might focus on education and assistance; OSHA emphasizes enforcement and compliance and may inspect a U.S. workplace whenever it has probable cause to do so. The cost of non-compliance can be quite high: $129,336 per violation for willful or repeat violations, or $12,934 per violation for serious violations (2018 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 U.S. Circuit Court of Appeals.

Because employee safety requirements throughout the country are largely dictated by the Occupational Safety and Health Act, the regional effect of state employee safety requirements may not be as high on an employer's list of factors when

considering location as it is, for example, regarding minimum wage laws. To the extent it is a significant factor, the Act allows 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' suits against their employers for workplace-related injuries. Two of the exceptions should be no surprise – if the employer was uninsured or intentionally harms an employee; a third exception is for "grave injury" (e.g., where an employee suffers death, amputation, paralysis, blindness, deafness, disfigurement or total disability due to a brain injury).

4.5 Compensation & Benefits

As is the case with other jurisdictions in the United States, most benefits provided to private sector employees in New York State are governed by a variety of federal, state and/or local laws in conjunction with their proscriptions, as applicable, against discrimination, harassment or retaliation. In certain respects, such as with respect to the pension provisions of the federal Employee Retirement Income Security Act ("ERISA") and the health insurance protections of an amendment to ERISA, the Comprehensive Omnibus Budget and Reconciliation Act ("COBRA"), one must take into account the extent to which these federal statutes (like the NLRA), with exceptions, preempt state and local law.

Specifically 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, research and 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, e.g., as to health continuation coverage in the event of the termination of an employee's coverage under the employer's plan; health information privacy and security; benefit rights while on certain family, medical or military leave; standards for mental health, substance abuse, mastectomy and breast reconstruction, medical child support, dependent students and other benefits.

New York State Health Coverage Requirements

Within the scope of any exceptions to COBRA and other federal preemptions, more and more the states have begun to assert their jurisdictional interests in several areas heretofore omitted. New York State, for example, now provides for an extension of health continuation coverage, from 18 months to 36 months, for eligible employees and dependents who have lost employer medical insurance coverage, regardless of the size of the employer. It also requires New York health insurers to allow an employee's unmarried child to elect coverage through age 29 even if that child is not financially dependent upon a parent, as long as the child lives, works or resides in New York State or the service area of the insurer and is not eligible under another medical plan or Medicare; and small health insurance plans covering from 1 to 100 employees to use "community rating" in the setting of premiums. Additionally, New York State has imposed certain defined coverage requirements concerning dependent children and grandchildren; women and children; preventive care and screenings; certain cancer screenings and treatments; diabetes; osteoporosis; certain drug and alcohol abuse treatments; aspects of 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, in contrast to many states in the United States, 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 paid leaves it mandates, including as to jury duty, voting, military service, volunteer fire fighting and emergency ambulance services, blood and bone marrow donations, and breastfeeding.

Life Insurance; Section 529 Plans

While New York State does not require the employer to provide the employee with life insurance benefits, if it so provides, the employer will be subject to employer contribution, coverage incontestability and conversion right requirements. New York State also is one of the few states that allows a New York State taxpayer to deduct, for New York State income tax purposes, up to $5,000 in contributions annually ($10,000 if married and filing a joint tax return) to a Section 529 (federal Internal Revenue Code) college student or other defined educational institution savings plan.

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, as discussed below, 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
As noted above, absent 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, e.g., 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 disciplined, up to and including discharge; 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, even though not legally required to provide such a right (e.g., severance pay or payment for accrued, unused vacation pay at time of termination), the conditions of which unconditionally had been satisfied.

New York labor law mandates that private sector employers adhere to their employment handbooks and policies. Indeed, the New York State Department of Labor 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.

Again, handbooks and policies, including their disclaimers, should be carefully drafted and reviewed both at the outset and ongoing to avoid creating any unintended contractual obligations.

Internal Grievance and Arbitration Provisions: Individual Employees; Union Organized Employees

Individual Employees
Outside of the collective bargaining context, there has been an expanded use of both internal grievance and external 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 a private forum to resolve 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.

To the extent these issues can be anticipated at the outset of a relationship, whether expressed in an offer letter, a contract with the employee or the employer's handbook or other policy statements, or in conjunction with any benefits awards or provisions, they will need to be addressed at such times. That especially holds true, where applicable, for such subjects as "change of control," restrictive covenants, trade secrets and confidentiality, privacy and non-disclosure agreements.

A Collective Bargaining Relationship
It can be assumed that any collective bargaining agreement covering a recognized bargaining unit of employees will, when originally negotiated and subsequently extended and renegotiated, govern the terms and conditions of the employees, including the provisions for discipline, up to and including discharge – generally subject to a "just cause" or equivalent standard. As noted below, such collective bargaining agreements will typically include an internal grievance procedure that, in the absence of a resolution, will culminate in binding arbitration with the union representative of the employees. Absent a specific provision to the contrary, such 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 and, to the extent feasible, should be addressed in any such collective bargaining negotiations.

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 issue 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

For unionized operations, most collective bargaining agreements will contain provisions addressing seniority, the order of layoffs, severance pay, subcontracting, related issues arising from a facility closure or mass layoff, and other terms regarded, under the NLRA, as "mandatory" or "permissive" subjects of collective bargaining. 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." Such liability is intended to fund the employer's share of the multi-employer plan's overall liability, and, accordingly, has no correlation with whether the employer has failed to meet its own contribution obligations; indeed, as previously cautioned, the employer's share of the withdrawal liability can be grossly disproportionate to its own contributions to the plan, or to the benefits accrued by its employees.

Many of these issues should be considered prior to acquiring an entity with an existing collective bargaining agreement and, ongoing thereafter, re-evaluated during the negotiation of successor agreements.

Plant Closures and Mass Layoffs

Federal and New York State laws commonly known as "WARN" statutes impose notice requirements on employers in advance of a facility closing or mass layoff. In the event a global entity, either when acquiring an existing operation or entity or thereafter, contemplates such possibilities, it should be aware of these laws. Under federal law, an employer with more than 100 employees must provide 60 calendar days' advance notice of a plant closure that results either in the loss of employment for 50 or more employees at a single facility, in a mass layoff at a single facility affecting 50 to 499 employees who represent 33-1/3% of the employees, or a layoff of 500 or more employees anticipated to be at least 6 months or more in duration. Notice must be provided to the state and local governments, employees, and union representative.

The New York requirements are similar, except that: (i) the requirements apply to employers with 50 or more employees; (ii) the threshold for notice is 25 or more employees terminated, or 25 employees who represent at least 33% of the workforce, or 250 employees, laid off from a single location; and (iii) the notice period is 90 calendar days, not 60. State and federal law provide limited exemptions from notice where the reductions are attributable to faltering businesses, unforeseen circumstances, and natural disasters. For employers operating in New York, the state WARN statute dictates the need for and timing of notice to employees, their representatives, and the government agencies.

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 whistleblower context.

6.2 Discrimination, Harassment and Retaliation Claims

As described elsewhere, 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 Wages and Hours Claims

The principal statute that supports wage and hour claims under federal law is, as above noted, the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. The remedy for failure to pay minimum wages or overtime pay in violation of the FLSA includes "back wages," i.e., the wages the employee would have been paid had the employer paid the employee in compliance with the law, plus an equal amount as "liquidated damages" if the employer's violation was "willful." Back

wages are limited to a two-year period or, if deemed a willful violation, a three-year period.

The definition of "willful" for purposes of doubled damages is different from its definition for purposes of the statute of limitations. In the case of doubled damages, the issue is whether the employer acted in good faith. As interpreted, avoidance of liquidated damages in that context has been the exception. For purposes of the statute of limitations, the test is whether the employer knew or showed reckless disregard as to whether its conduct violated the FLSA.

Where appropriate, an FLSA plaintiff may sue on behalf of other employees who are situated similarly in regard to the alleged violations. To do so, the plaintiff must first move for conditional certification of a collective action. That requires a "modest factual showing" that members of the proposed collective action are situated similarly, predicated upon the allegations in the complaint, augmented by affidavits and sometimes information gleaned in discovery. If granted, the court will order the employer to provide contact information for all employees alleged to be similarly situated so as to facilitate their inclusion in the action should they so desire.

The second stage of the FLSA collective action process is more rigorous, and occurs after completion of discovery, when the employer may move to decertify the collective class. Generally, the court considers (a) whether issues concerning various individuals are sufficiently similar to warrant collective treatment; (b) whether various defenses render collective treatment inappropriate; and (c) fairness and procedural issues relevant to the question of collective treatment.

New York State law governing unpaid wages and overtime pay is materially the same as FLSA law, and the exemptions available under the New York Labor Law ("NYLL") are, by and large, the same as those under the FLSA. In addition, the NYLL provides for liquidated damages in an amount equal to the unpaid wages in the case of "willful" violations. However, 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, where the plaintiffs prevail, the only employees, present and former, who may be awarded damages are those who "opt in" to the class by filing a consent to sue.

As now confirmed by a most recent decision of the U.S. Supreme Court, employers may avoid class or collective actions by requiring employees, as a condition of employment, 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)). Depending upon the circumstances, a global entity may wish to explore the use of such agreements.

6.4 Whistleblower/Retaliation Claims

Retaliation Claims

Currently, the most common form of discrimination alleged by employees is for retaliation following the making of a complaint of discrimination. The number of retaliation claims filed with the EEOC doubled in the last 15 years from 19,114 (24% of all claims) in 1998 to 41,097 (48.8% of all claims) in 2017. 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. 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. Remedies available for victims of retaliation are typically the same as those available to victims of discrimination. Most significantly, however, 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.

Whistleblowers

There are several federal, state and local whistleblower statutes that protect individuals who suffer adverse consequences after reporting employer wrongdoing. These statutes are designed to encourage the reporting of misconduct which 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 (DoddFrank), 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 whistleblowers 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 Securi-

ties and Exchange Commission. The False Claims Act offers financial incentives to whistleblowers who report fraud against the federal government. Various other whistleblower protections also exist for employees reporting wrongdoing in specific industries (e.g., the Energy Reorganization Act regulates whistleblowing in the nuclear power industry and New York Labor Law § 741 protects employees who disclose improper quality of patient care in the health care industry).

Whistleblower statutes or statutory provisions – and there are many – define very specific protected activity, often require reporting or disclosure to particular authorities, and offer protection from employers for adverse employment consequences as a result of the complaining or disclosure. Often, they also provide private causes of action and remedies, such as reinstatement, back pay, attorneys' fees and other costs. Whether cast in terms of retaliation or whistleblowing, as earlier noted, the increase in such actions, and the monetary awards flowing from such actions, have reached dramatic and staggering proportions.

6.5 Dispute Resolution Forums

1. Internally and Externally, Generally

At the outset, 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, rather than by imposition of a third party or entity. Where a union relationship, that in and of itself may be especially conducive to a more constructive ongoing relationship; where a non-union setting, employees are comforted by the realization their employer is willing to reverse itself where justified.

With or without a union in the picture, how productive the internal process will be likely will be dependent upon the intentions and practices of the parties to the dispute. Where viewed simply as an opportunity to reiterate, and insist upon, their respective accounts and theories of the dispute, its value – other than in the simplest of cases – may be highly questionable, and a mutually agreeable resolution less likely. Where, on the other hand, truly viewed as an informal opportunity to explore (and even investigate further) the facts, circumstances and positions of the other with the objective of reaching an informed decision, a more positive result is likely, even if only to better help narrow and define the issues or for the therapeutic value of the process itself. With this in mind, 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 alternative dispute resolution 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.

Mediation is a process which provides for an intermediary to become involved in the dispute to help the parties reach an agreed upon resolution. Unlike arbitration, or a judicial resolution, successful mediation does not result in a decision from a fact finder.

Rather, it results in an agreement structured and accepted by the parties. While mediation is not suitable for every occasion or dispute, 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 absent 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

Depending upon the nature of the allegations of a particular dispute, as indicated above, jurisdiction for resolving such disputes may lie with one or more particular governmental agencies. In certain instances allegations may be asserted simultaneously with such federal, state and/or local agencies, each of which may follow its own body of law, including as to the nature of the relief it may afford, its administrative procedures, timetables and statutes of limitation. In other instances, the jurisdiction of the state and local agencies may be preempted by the federal agency's assertion of its jurisdiction. It may even be, as with the EEOC, that the federal statute requires that there be a filing with the federal administrative agency before the claimant can seek judicial relief, in order to afford the federal agency the initial opportunity, should it so desire, to investigate and otherwise process the allegations in question; should it decide otherwise, the federal agency, in such instances, may issue a "Right to Sue" notice to the claimant. Additionally, if not preempted, a local law such as the New York City Human Rights Law may afford the claimant the option of proceeding either before the New York City Human Rights Commission or directly in state court. Further, even to the extent the parties to the dispute enter into a private settlement agreement, certain federal agencies have made clear either that any such private settlement agreement is subject to their prior approval and/

or that, at the very least, their private settlement agreement, as a matter of public policy, cannot preclude the individual employee(s), or prospective witnesses, from otherwise cooperating with the federal agency in its investigation of these or related allegations in the event such investigation proceeds.

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 (e.g., in the case of contractual, other than statutory, claims), 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

Generally

As we exist in a global economy, more and more companies establish themselves in foreign countries. Although U.S. laws generally apply only to the territorial United States, Congress has extended the protection of certain laws beyond the U.S. borders, including Title VII, the ADA and the ADEA. The extraterritorial application does not extend to non-U.S. citizens such as holders of green cards who are working outside the United States, unless there is sufficient time spent in the U.S. doing business or training for the U.S. employer. Nonetheless, one must anticipate continued questions about the extraterritorial application of federal and state law, given the expected "extension" pf the proverbial workplace through robotic or other artificial intelligence, telepresence and other rapidly developing cyberspace technology.

B. Title VII.

Title VII, which, among other protected areas, prohibits discrimination, harassment and retaliation in employment based on race, color, religion, sex or national origin, was amended in 1991 specifically to protect U.S. citizens employed in a foreign country by a U.S. employer or a U.S.-controlled employer and excludes coverage for foreign entities not controlled by a U.S. entity. Title VII protects nonresident aliens who apply for employment within the U.S. Any company that elects to do business in the U.S., absent constraints imposed by treaties, international agreements, or contractual undertakings, is subject to Title VII's reach.

The Americans with Disabilities Act; The Age Discrimination in Employment Act

The Americans with Disabilities Act ("ADA") prohibits employers from discriminating against a qualified disabled person with respect to any employment decision and is required to make a reasonable accommodation for the disabled. The ADA applies to foreign employees employed by U.S. employers on temporary assignment overseas where the employment relationship's "center of gravity" is in the United States. The Age Discrimination in Employment Act ("ADEA") protects certain applicants and employees 40 years of age and older from discrimination on the basis of age in hiring, promotion, discharge, compensation, and terms, conditions, or privileges of employment. It was amended in 1984, to broaden the definition of "employee" to include any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country. Congress wanted to insure coverage of citizens employed overseas by American firms or their subsidiaries. The extraterritorial application is generally the same for Title VII, the ADA and the ADEA.

The "Integrated Employer" Test

For the above three anti-discrimination laws, the courts have held that if it is the foreign parent controlling the U.S. subsidiary, the extraterritorial application does not come into play. To determine control, the courts generally apply the "integrated employer" test and look to: (1) the interrelationship of operations between the foreign employer and a U.S. company; (2) the extent of common management between the foreign employer and a U.S. company; (3) the degree of centralized control of both companies' labor operations; and (4) the nature and extent of common ownership or financial control between the two companies. Where employers are not incorporated in the United States (or are not incorporated at all), the courts look to see whether the employer has sufficient contacts within the United Sates to be deemed a U.S. employer. Factors to be considered, as enumerated by the EEOC Guidelines, are the employer's principal place of business, the nationality of the dominant shareholders 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 that: (1) the action is taken with respect to an employee in a workplace in a foreign country; (2) compliance with U.S. antidiscrimination laws would cause the employer to violate the law of the foreign country; and (3) the law is that of the country in which the employee's workplace is located. (The laws of the country in which an employer is headquartered or incorporated would not control for purposes of this third factor of the defense unless the charging party's workplace is also located in that country.)

The Fair Labor Standards Act

As previously noted, the Fair Labor Standards Act ("FLSA") establishes minimum wage, overtime pay, recordkeeping and other employment standards affecting full-time and part-time workers in the private sector and in federal, state,

and local governments. While its minimum wage provisions also apply to U.S. 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 U.S. 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 United States.

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The National Labor Relations Act

The National Labor Relations Act ("NLRA"), as also previously noted, was enacted to protect the rights of employees and employers, to encourage collective bargaining, and to curtail private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy. The rights guaranteed in the NLRA apply to all private sector employees and employers, union and non-union alike. The NLRA applies only to employees working within the United States and its possessions and does not apply to U.S. citizens working outside the United States or to foreign employers and employees who engage in activities "affecting commerce" (engaging in business operations) in the U.S., regardless of whether or not the employer is organized under the laws of a foreign nation.