

## NEW YORK

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### I. AT-WILL EMPLOYMENT

#### A. Statute

New York has no specific statute addressing “at-will” employment.

#### B. Case Law

New York common law does not recognize a cause of action for the wrongful discharge of an at-will employee. *Sullivan v Harnisch*, 19 N.Y.3d 259, 261, 969 N.E.2d 758, 946 N.Y.S.2d 540 (2012). Employment for an indefinite term is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason. *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 300, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

In *Murphy*, the plaintiff alleged he was fired in retaliation for disclosing alleged accounting improprieties by corporate personnel to management. The Court of Appeals held that parties may by express agreement limit or restrict the employer’s right to discharge; however, “absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment, an employer’s right at any time to terminate an employment at will remains unimpaired.” *Id.* at 305. *Murphy* remains good law, even though New York enacted a whistleblower statute, Labor Law § 740, in 1984. See below under “Exceptions to At-Will Employment”.

In *Sullivan v. Harnisch*, the Court of Appeals expressly declined to make an exception to the *Murphy* rule for the compliance officer of a hedge fund. See also *Smalley v. Dreyfus Corp.*, 10 N.Y.3d 55, 58, 882 N.E.2d 882, 884, 853 N.Y.S.2d 270, 272 (2008)(“[i]n the decades since *Murphy*, we have repeatedly refused to recognize exceptions to, or pathways around, these principles.”); *Horn v. N.Y. Times*, 100 N.Y.2d 85, 790 N.E.2d 753, 760 N.Y.S.2d 378 (2003) (conflict with in-house physician’s perceived ethical obligations).

Regardless of an employee's at-will status, New York courts have required employers and employees to honor contractual obligations, such as paying employees' bonuses and reimbursing tuition benefits, following termination of employment. See *Ryan v. Kellogg Partners Inst. Servs.*, 19 N.Y.3d 1, 968 N.E.2d 947, 945 N.Y.S.2d 593 (2012)(oral agreement to pay at-will employee

non-discretionary bonus held enforceable); *Currier, McCabe & Assocs., Inc. v. Maher*, 75 A.D.3d 889, 891, 906 N.Y.S.2d 129, 132 (3d Dep't 2010)(former employee was bound to reimburse employer for tuition benefits as per terms stated in handbook).

## II. EXCEPTIONS TO AT-WILL EMPLOYMENT

### A. Implied Contracts

#### 1. Employee Handbooks/Personnel Materials

Statements in an employee handbook created questions of fact whether an employee could rebut the presumption of at-will employment in *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

In *Weiner*, the Court of Appeals held that inducements and assurances given Weiner by McGraw-Hill regarding “just cause” requirements for discharge, coupled with Weiner’s reliance on those assurances and his rejection of other employment offers, constituted consideration for a contract based upon the provisions of the handbook. *Id.* at 465-66. The court thus allowed the case to go forward to give Weiner the opportunity to rebut the presumption of at will employment under New York law. *Id.* The court held that when determining whether such a presumption is overcome, the trier of fact must consider the “course of conduct” of the parties, including their writings and negotiations. *Id.*

In *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 506 N.E.2d 919, 514 N.Y.S.2d 209 (1987), the Court of Appeals reaffirmed the limitations discussed in *Weiner*, but held that the statements in the defendant’s personnel manual did not rise to an express agreement that it would not dismiss an employee for following its policies of full disclosure of business improprieties.

In *De Petris v. Union Settlement Ass’n, Inc.*, 86 N.Y.2d 406, 657 N.E.2d 269, 633 N.Y.S.2d 274 (1995), the Court of Appeals held that the at-will employment rules, including the *Weiner* elements, apply in Article 78 judicial reviews of administrative proceedings where plaintiff alleges a failure to abide by the stated procedure for termination and not a breach of any substantive rights.

A federal district court noted in *Azzolini v. Marriott Int’l, Inc.*, 417 F.Supp.2d 243, 247 (S.D.N.Y. 2005), that the *Weiner* exception was narrow and had been applied on a very limited basis. See also *Nicholas v. Wyndham Hotel Grp., LLC*, No. 14-cv-5726 (PKC), 2015 U.S. Dist. LEXIS 28530 (S.D.N.Y. Mar. 9, 2015)(citing *Azzolini*).

#### 2. Provisions Regarding Fair Treatment

In *Leahy v. Federal Express Corp.*, 609 F. Supp. 668 (E.D.N.Y. 1985), the plaintiffs alleged that by signing their employment contract they expressly included language in a manual which called for a “Guaranteed Fair Treatment Procedure” for all employees. While the plaintiffs argued this limited the defendant’s ability to terminate them at will, the court, following *Murphy*, held that because there was no limitation in the employment contract on the employer’s ability to

terminate at will – in fact, such a right was expressly stated in the contract – such a fair treatment provision would have no bearing on the at-will nature of the employment. *Leahy*, 609 F. Supp. at 672. See also *Soto v. Federal Exp. Corp.*, No. 06-CV-05413, 2008 WL 305017 (E.D.N.Y., Feb. 1, 2008)(citing cases since *Leahy*).

### 3. Disclaimers

In *Lobosco v. N.Y. Tel. Co./NYNEX*, 96 N.Y.2d 312, 751 N.E.2d 462, 727 N.Y.S.2d 383 (2001), the Court of Appeals held that “[r]outinely issued employee manuals, handbooks and policy statements should not lightly be converted into binding employment agreements,” especially where there is “conspicuous disclaiming language” to the contrary. *Id.* at 317. See also *Baron v. Port Auth.*, 271 F.3d 81, 85 (2d Cir. 2001); *Wait v. Beck's N. Am., Inc.*, 241 F. Supp. 2d 172, 185 (N.D.N.Y. 2003); *Leahy*, 609 F. Supp. at 671-72.

In *In re Thomas v. MasterCard Advisors, LLC*, 74 A.D.3d 464, 465, 901 N.Y.S.2d 638 (1st Dep’t 2010), the court held that the petitioner did not have a viable claim for wrongful termination in violation of the standards contained in the respondent’s employee handbook because a disclaimer in the handbook expressly provided that it was not intended to create any implied terms of employment.

### 4. Implied Covenants of Good Faith and Fair Dealing

Since *Murphy*, New York courts have rejected claims of “abusive” discharge and have rejected imposing any “good faith” requirement in at-will employment. See *Ingle v. Glamore Motor Sales, Inc.*, 73 N.Y.2d 183, 535 N.E.2d 1311, 538 N.Y.S.2d 771 (1989); *Stanton v. Highland Hosp.*, 197 A.D.2d 854, 602 N.Y.S.2d 278 (4th Dep’t 1993). In *Ingle*, the plaintiff’s status as a minority shareholder did not prevent his employer from repurchasing his stock and terminating his at-will employment. *Ingle*, 73 N.Y.2d at 188.

However, in *Johns v. IBM Corp.*, 361 F. Supp.2d 184 (S.D.N.Y. 2005), the court, applying New York law, held that forfeiture of a departing employee’s benefits is governed by equity, where the honesty and good faith of the employer is an issue of fact. *Id.* at 189, citing *Gehrhardt v. Gen. Motors Corp.*, 581 F.2d 7 (2d Cir. 1978). The court allowed an inquiry into whether the employer made a “reasonable” decision when the discharge led to forfeiture of stock options worth in excess of \$400,000.

## B. Public Policy Exceptions

### 1. General

New York courts do not recognize any common-law public policy exceptions to an employer's right to at-will termination of employees provided such termination is not discriminatory in nature as proscribed in federal, state and city statutes. *Horn v. N.Y. Times*, 100 N.Y.2d 85, 790 N.E.2d 753, 760 N.Y.S.2d 378 (2003); *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 506 N.E.2d 919, 514 N.Y.S.2d 209 (1987); *Murphy*, 58 N.Y.2d at 293. However, the legislature in 1984 enacted a “whistleblower” statute, discussed below.

## 2. Exercising a Legal Right

N.Y. LABOR LAW § 201-d (“the Lawful Activities Act”) prohibits an employer from refusing to hire, employ, license or discharge an employee because of his or her (1) individual political activities outside of working hours and off the employer’s premises; (2) legal use of consumable products prior to and after the conclusion of the employee’s working hours and off the employer’s premises; (3) legal recreational activities outside work hours and off the employer’s premises; (4) membership in a union or any exercise of rights created under Title 29, U.S.C. Chapter 7 or under Article 14 of the Civil Service Law.

The statute does not protect activity which creates a “material conflict of interest” related to the employer’s trade secrets, proprietary information or other proprietary or business interest. N.Y. LABOR LAW § 201-d (McKinney).

Only those political activities specifically referred to in the statute, such as running for office, campaigning, or participating in fundraising, are protected. For example, giving speeches calling for democracy in China and criticizing the Chinese government is not protected. See *Liu v. Morgan Stanley*, 2013 WL 5740205 (Sup. Ct., N.Y. County, Oct. 15, 2013).

## 3. Refusing to Violate the Law

In *Wieder v. Skala*,<sup>2</sup> 80 N.Y.2d 628, 609 N.E.2d 105, 593 N.Y.S.2d 752 (1992), the Court of Appeals held that a law firm associate who was allegedly discharged for insisting that the firm comply with disciplinary rules by reporting professional misconduct allegedly committed by another associate, stated a claim for breach of his employment contract because plaintiff’s duties as a lawyer and as an associate of the law firm were inseparable.

In *Sullivan v. Harnisch*, 19 N.Y.3d 259, 969 N.E.2d 758, 946 N.Y.S.2d 540 (2012), however, the Court of Appeals refused to extend the rule in *Wieder* to a compliance officer at a hedge fund, and implied that the rule might only apply to the relation between a lawyer and a law firm. See also *Horn v. New York Times*, 100 N.Y.2d 85, 790 N.E.2d 753, 760 N.Y.S.2d 378 (2003)(refusing to apply *Wieder* rule to physician employed by a nonmedical employer).

## 4. Exposing Illegal Activity (Whistleblowers)

New York’s “whistleblower” statute, N.Y. LABOR LAW § 740, prohibits an employer from taking retaliatory action for an employee’s disclosure or threat to disclose to a court or public body an activity, policy, or practice of the employer that is in violation of law, or for objecting or refusing to participate in such a matter. The violation that the employee seeks to report must present substantial and specific danger to the public health or safety, or constitute health care fraud, defined elsewhere as “provid[ing] materially false information or omit[ting] material information for the purpose of requesting payment from a health plan for a health care item or service.” N.Y. PENAL LAW § 177.05.

Before this statute was enacted, whistleblowers had little or no protection from retaliatory discharge. See *Sabetay*, *supra*. A 2006 amendment to the statute protected employees who object to health care fraud.

N.Y. Labor Law § 741, the Health Care Workers Whistleblower Law, enacted in 2002, offers specialized whistleblower protection over and above the generalized protection afforded by section 740, but is meant to safeguard only those employees who are qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care, and whose jobs require them to make these judgments. *Reddington v. Staten Is. Univ. Hosp.*, 11 N.Y.3d 80, 93, 893 N.E.2d 120, 128, 862 N.Y.S.2d 842, 850 (2008). See also *Tomo v. Episcopal Health Servs., Inc.*, 85 A.D.3d 766, 769, 925 N.Y.S.2d 563, 567 (2d Dep't 2011)(awarding sanctions against hospital's chief information officer for litigating cause of action alleging a violation of Labor Law § 741 after *Reddington*).

Section 740(7) provides that bringing an action under this statute “shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law.” This subsection has spawned a lot of litigation. See the entire history of *Reddington v. Staten Is. Univ. Hosp.*, 543 F.3d 91 (2d Cir. 2008)(conforming holding to answers to certified questions). See also *D'Antonio v. Little Flower Children & Family Servs. of N.Y.*, No. 17-CV-1221 (JS)(SIL), 2018 U.S. Dist. LEXIS 44595 (E.D.N.Y. Mar. 19, 2018)(discussing inconsistencies in New York case law).

In *Bordell v. Gen. Elec. Co.*, 88 N.Y.2d 869, 667 N.E.2d 922, 644 N.Y.S.2d 912 (1996), the Court of Appeals held that reasonable suspicion of a violation of a statute or regulation creating a substantial risk to public safety does not state a cause of action under the statute; there must be an actual violation. Leaving tanker trucks with hazardous materials unattended on a public street in violation of federal regulations did not create a substantial and specific danger to the public health or safety, particularly since there were no adverse consequences. *Cotrone v. Consol. Edison Co. of N.Y., Inc.*, 50 A.D.3d 354, 354, 856 N.Y.S.2d 48, 48 (1<sup>st</sup> Dep't 2008).

The Court of Appeals held in *Webb-Weber v. Community Action for Human Services, Inc.*, 23 N.Y.3d 448, 15 N.E.3d 1172, 992 N.Y.S.2d 163 (2014), that for pleading purposes, the complaint in an action under § 740 need not specify the actual law, rule or regulation violated, although it must identify the particular activities, policies or practices in which the employer allegedly engaged, so that the complaint provides the employer with notice of the alleged complained-of conduct. Previous Appellate Division authority to the contrary should no longer be followed. *Id.* at 453.

An independent member of a corporation's board of directors was held not to be an “employee” under N.Y. Labor Law § 740, precluding the board member's retaliation claim against the corporation. *Garner v. China Natural Gas, Inc.*, 71 A.D.3d 825, 898 N.Y.S.2d 49 (2d Dep't 2010).

Prejudgment interest may be awarded under § 740(5). See *Tipaldo v. Lynn*, 26 N.Y.3d 204, 42 N.E.3d 670, 21 N.Y.S.2d 173 (2015).

### **III. CONSTRUCTIVE DISCHARGE**

The constructive discharge test is a part of federal employment discrimination law that can be applied in other contexts, such as disputes arising under employment contracts. See *Morris v. Schroder Capital Mgmt. Int'l*, 7 N.Y.3d 616, 859 N.E.2d 503, 825 N.Y.S.2d 697 (2006). In *Morris*, the Court of Appeals held that the constructive discharge test was the appropriate standard for determining, in the context of a dispute over a non-compete provision, whether an employee had left his position involuntarily. *Id.*, 7 N.Y.3d at 622.

To establish constructive discharge, a plaintiff must show that there was a material change in his duties or a significant reduction in rank. See *Rudman v. Cowles Communications, Inc.*, 30 N.Y.2d 1, 10, 280 N.E.2d 867, 872, 330 N.Y.S.2d 33 (1972); *Marks v. Cowdin*, 226 N.Y. 138, 123 N.E. 139 (1919).

In *Pugliese v. Actin Biomed LLC*, 106 A.D.3d 591, 967 N.Y.S.2d 16 (1st Dep't. 2013), the plaintiff stated a claim for constructive discharge by alleging that defendants humiliated, ostracized, and sexually harassed her, and told her that they would “make her life miserable until she quit”, in response to her objections to violations of FDA regulations.

### **IV. WRITTEN AGREEMENTS**

#### **A. Standard “For Cause” Termination**

An employer attempting to terminate an employment contract under a termination clause based on the employer’s discretion must act in good faith, *Reiss v. Arabian Am. Oil Co.*, 279 App. Div. 805, 109 N.Y.S.2d 625 (2d Dep’t 1952), *aff’d*, 304 N.Y. 953, 110 N.E.2d 888 (1953), and not “in a surreptitious or unreasonable fashion.” *Kemelhor v. Penthouse Int’l, Ltd.*, 689 F. Supp. 205, 213 (S.D.N.Y. 1988), *aff’d without opn*, 873 F.2d 1435 (2d Cir. 1989). *Kemelhor* notes that the law essentially requires the employer to have some articulable reason for terminating the employee under such a provision. *Id.* at 213-14.

New York courts have held that “conduct [that] is detrimental to the employer’s interest or violates a reasonable work condition” is grounds for termination for cause. *In re Hall*, 192 A.D.2d 1043, 1043, 597 N.Y.S.2d 252, 252 (3d Dep’t 1993). Generally, courts accept failings with regard to performance, including failure to perform a regular duty, *Sines v. Opportunities for Broome, Inc.*, 156 A.D.2d 878, 550 N.Y.S.2d 99 (3d Dep’t 1989), and dishonesty, *Boyle v. Petrie Stores Corp.*, 136 Misc. 2d 380, 518 N.Y.S.2d 854 (N.Y. Sup. Ct. 1985). The utterance of threats to a supervisor or co-worker or the use of vulgar language and/or disrespectful conduct toward supervisors constitutes disqualifying conduct. *In re Schneider*, 201 A.D.2d 811, 607 N.Y.S.2d 501 (3d Dep’t 1994). See also *In re Khan*, 239 A.D.2d 651, 657 N.Y.S.2d 218 (3d Dep’t 1997); *In re Stagno*, 239 A.D.2d 766, 657 N.Y.S.2d 480 (3d Dep’t 1997). Firing an employee for circulating an inflammatory memorandum which was especially critical of management was upheld in *Trieger v. Montefiore Med. Ctr.*, 15 A.D.3d 175, 789 N.Y.S.2d 42 (1st Dep’t 2005).

#### **B. Status of Arbitration Clauses**

New York has a “long and strong public policy favoring arbitration.” *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 49, 689 N.E.2d 884, 889, 666 N.Y.S.2d 990, 995 (1997). However, a party will not be compelled to arbitrate absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. The agreement must be clear, explicit and unequivocal, and must not depend upon implication or subtlety. *Waldron v. Goddess*, 61 N.Y.2d 181, 183-184, 461 N.E.2d 273, 274, 473 N.Y.S.2d 136, 137 (1984). But see *George v. Lebeau*, 455 F.3d 92, 94-95 (2d Cir. 2006)(recognizing that a court may imply continuation of an arbitration clause in an expired employment agreement); *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F.3d 92, 100 (2d Cir. 2002)(discriminatory treatment of arbitration provisions under New York law would be preempted by Federal Arbitration Act in cases to which the FAA applies).

The question of arbitrability is an issue generally for judicial determination in the first instance. *Smith Barney Shearson Inc.*, *supra*; *Von Steen v. Musch*, 3 Misc. 3d 207, 776 N.Y.S.2d 170 (N.Y. Sup. Ct. 2004). The threshold question of arbitrability is for the court and not the arbitrator to decide. *Smith Barney*, 91 N.Y.2d at 45. But once the court looks to the plain meaning of the arbitration clause and finds it to be clear, a party to the contract will not easily be allowed to “elude the comprehensive language” of such agreements. *Id.*, 3 Misc.3d 215, quoting *Smith Barney*, 91 N.Y.2d at 50.

When the parties' agreement specifically incorporates by reference the AAA rules, which provide that “[t]he tribunal shall have the power to rule on its own jurisdiction, including objections with respect to the existence, scope or validity of the arbitration agreement,” and employs language referring “all disputes” to arbitration, courts will “leave the question of arbitrability to the arbitrators.” *Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's*, 66 A.D.3d 495, 496, 888 N.Y.S.2d 458, 459 (1<sup>st</sup> Dep’t 2009), *aff’d*, 14 N.Y.3d 850, 927 N.E.2d 553, 901 N.Y.S.2d 133 (2010).

## **V. ORAL AGREEMENTS**

### **A. Promissory Estoppel**

In *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982), the Court of Appeals reiterated the long held principles of oral agreements and promissory estoppel found in 1 CORBIN ON CONTRACTS, § 122. The *Weiner* court stated that:

If the employer made a promise, either expressed or implied, not only to pay for the service, but also that his employment should continue for a period of time that is either definite or capable of being determined, that employment is not terminable ‘at-will’ after the employee has begun or rendered some of the requested service, or has given any other consideration. This is true even though the employee has made no return promise, and has retained the power and legal privilege of terminating the employment ‘at-will.’ The employer’s promise is supported by the service that has been begun or rendered, or by the other executed consideration.

*Weiner*, 443 N.E.2d at 465, citing 1A CORBIN ON CONTRACTS, § 152, p. 14. See also *Rooney v. Tyson*, 91 N.Y.2d 685, 694, 697 N.E.2d 571, 576, 674 N.Y.S.2d 616, 621 (1998)(split decision holding that oral agreement between fight trainer and professional boxer to train boxer “for as long as the boxer fights professionally” is a contract for a definite duration); *O’Neill v. New York University*, 97 A.D.3d 199, 944 N.Y.S.2d 503 (1st Dept. 2012)(university offer letters evidenced contract for fixed duration).

## B. Fraud

Under New York law, at-will employees cannot recover for wrongful termination, nor can they evade this bar by suing in tort. See *Murphy*, 58 N.Y.2d at 300–02 (1983). At-will employees can, however, recover for fraudulent statements that induce them into accepting positions of employment by showing: (1) a material false representation; (2) scienter; (3) reasonable reliance; (4) damages; and, relevant here, (5) that the fraudulent misrepresentation was collateral or extraneous to the employment agreement. See *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 19–20 (2d Cir. 1996).

In *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 75 N.E.3d 759, 53 N.Y.S.3d 598 (2017), the Court of Appeals held that plaintiff, a former at-will employee, failed to state a cause of action for fraudulent inducement because he did not adequately plead compensable damages. In *Stewart v. Jackson & Nash*, 976 F.2d 86 (2d Cir. 1992), an attorney whose employment had been terminated stated a claim for fraudulent inducement against her employer because its misrepresentations caused her to leave a law firm with an environmental practice and spend two years at one in which she was largely unable to work in her chosen specialty.

A promise to take some future action which is collateral to the contract can be considered a “misrepresentation” for purposes of a fraud in the inducement cause of action. *Wall v. CSX Transp., Inc.*, 471 F.3d 410, 416 (2d Cir. 2006).

## C. Statute of Frauds

According to the Statute of Frauds, as codified in the New York General Obligations Law “[e]very agreement, promise or undertaking is void, unless it or some memorandum thereof be in writing and subscribed by the party to be charged therewith” if it cannot be performed within one year. N.Y. GEN. OBLIG. LAW § 5-701(a)(1). However, if the undertaking can be performed within one year, it is not subject to the writing requirement. New York courts will take a fair and reasonable interpretation of the contract, and will not apply the Statute of Frauds if it may be performed within a year “however unexpected, unlikely, or even improbable that such performance will occur during that timeframe.” *Cron v. Hargo Fabrics, Inc.*, 91 N.Y.2d 362, 366, 694 N.E.2d 56, 670 N.Y.S.2d 973 (1998). See also *Ryan v. Kellogg Partners Inst. Servs.*, 19 N.Y.3d 1, 968 N.E.2d 947, 945 N.Y.S.2d 593(2012).

## VI. DEFAMATION

## A. General Rule

New York law defines defamation as a publication to at least one other person (whether spoken, written, or by symbols or pictures) concerning a living person, “which is false and tends to injure [one’s] reputation and thereby expos[ing] [the person] to public hatred, contempt, obloquy or shame.” *Triggs v. Sun Printing & Publ’g Ass’n*, 179 N.Y. 144, 153, 71 N.E. 739, 742 (1904). See also *Davis v. Boenheim*, 24 N.Y.3d 262, 22 N.E.3d 999, 998 N.Y.S.2d 131(2014); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 379, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (1977); *Chau v. Lewis*, 771 F.3d 118 (2d Cir. 2014).

Each subsequent communication or a subsequent reiteration and publication of a libel constitutes a new and complete libel and gives rise to a new and separate cause of action. *Wolfson v. Syracuse Newspapers*, 279 N.Y. 716, 720, 18 N.E.2d 676, 678 (1939). However, publication of a single edition of a libelous newspaper or periodical gives rise to only one cause of action. *Zuck v. Interstate Pub. Corp.*, 317 F.2d 727, 729 (2d Cir. 1963).

The elements of defamation are “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault . . . and (d) . . . harm caused by the publication.” RESTATEMENT (SECOND) OF TORTS § 558 (1977). Generally, a plaintiff asserting a cause of action sounding in slander must allege special damages contemplating “the loss of something having economic or pecuniary value.” *Lieberman v. Gelstein*, 80 N.Y.2d 429, 434–435, 590 N.Y.S.2d 857, 605 N.E.2d 344 [2003].

Certain types of statement are recognized as injurious by their nature, and so noxious that the law presumes that pecuniary damages will result. *Lieberman*, 80 N.Y.2d at 435. The four established “per se” categories recognized by the Court of Appeals are “statements (i) charging [a] plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that [a] plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman” (*id.*). However, the court must decide as a matter of law whether there is a reasonable basis for drawing a defamatory conclusion from the statement, *James v. Gannett Co.*, 40 N.Y.2d 415, 419, 353 N.E.2d 834, 837, 386 N.Y.S.2d 871, 874 (1976), and not all statements allegedly imputing unchastity to a woman have been deemed to be libelous. See *Cassini v. Advance Publications, Inc.*, 125 A.D.3d 467, 4 N.Y.S.2d 4 (1<sup>st</sup> Dept. 2015)(statement that female plaintiff held parties for “older guys looking for action” did not state a cause of action for libel).

Statements falsely imputing homosexuality are probably no longer recognized as defamatory per se. See *Yonaty v. Mincolla*, 97 A.D.3d 141, 144, 945 N.Y.S.2d 774, 777 (3d Dept. 2012)(deeming previous Appellate Division decisions to be contrary to *Lawrence v. Texas*, 539 U.S. 558 (2003)); *Stern v. Cosby*, 645 F.Supp.2d 258, 273-75 (S.D.N.Y. 2009)(predicting that New York’s highest court would so rule). But see *Nolan v. State of N.Y.*, 158 A.D.3d 186, 69 N.Y.S.3d 277 (1<sup>st</sup> Dept. 2018)(false imputation that plaintiff was infected with HIV virus stated cause of action for defamation per se, even though court disfavored use of word “loathsome”).

Situations in the employment context which may give rise to potential defamation claims are: comments to co-workers explaining the reason for an employee’s discharge, *Epifani v. Johnson*, 65 A.D.3d 224, 882 N.Y.S.2d 234 (2d Dep’t 2009); *Mandelblatt v. Perelman*, 683 F.

Supp. 379, 385 (S.D.N.Y. 1988); responses to reference requests by a prospective employer, *Konowitz v. Archway Sch. Inc.*, 65 A.D.2d 752, 409 N.Y.S.2d 757 (2d Dep't 1978); or statements made on internal memoranda evaluating performance, *Stukuls v. State*, 42 N.Y.2d 272, 366 N.E.2d 829, 397 N.Y.S.2d 740 (1977).

## 1. Libel

Both libel and slander constitute defamation. Traditionally, slander is oral defamation and libel is written. See *Albert v. Loksen*, 239 F.3d 256, 265 (2d Cir. 2001). Though this traditional distinction holds in almost all situations, in *Matherson v. Marchello*, 100 A.D.2d 233, 473 N.Y.S.2d 998 (2d Dep't 1984), defamation which was broadcast by means of a radio show was held to be libel even though it was technically spoken because, *inter alia*, it had the potential for dissemination across a wide audience much like the printed word. *Id.* at 239-40.

## 2. Slander

See "General Rule" discussed above.

### B. References

A plaintiff's solicitation of or consent to a publication, as in the area of references, makes the statement privileged and thus the defense of consent may be available. *Toker v. Pollak*, 44 N.Y.2d 211, 219, 376 N.E.2d 163, 405 N.Y.S.2d 1 (1978). For example, where a plaintiff had individuals impersonate landlords and calling the defendant for references, such were held to be solicitations and thus defensible as consented to publications. *LeBreton v. Weiss*, 256 A.D.2d 47, 680 N.Y.S.2d 532 (1<sup>st</sup> Dep't 1998).

In *Buffolino v. Long Is. Sav. Bank, FSB*, 126 A.D.2d 508, 510 N.Y.S.2d 628 (2d Dep't 1987), the plaintiff claimed that a letter of reference from a former employer sent to a potential employer was defamatory. The court held that the content of the letter could not be construed in any reasonable way as defamatory as the sum and substance were the dates of the plaintiff's employment and a statement regarding the policy of the employer not to release any other information. *Id.* at 510. The court went on to note that even if the letter could be construed as defamatory, "there is no allegation that its qualifiedly privileged contents were the product of actual malice on the part of the defendant's agents," a necessary aspect of the pleadings when dealing with a qualified privilege. *Id.* at 511, citing *Shapiro v. Health Ins. Plan of Greater N.Y.*, 7 N.Y.2d 56, 163 N.E.2d 333, 194 N.Y.S.2d 509 (1959).

### C. Privileges

Privileges concerning defamation are either absolute or qualified. An absolute privilege covers a statement made in the course of "judicial proceedings," if they are "material and pertinent to the questions involved . . . irrespective of the motive with which they are made." *Wiener v. Weintraub*, 22 N.Y.2d 330, 331, 239 N.E.2d 540, 540, 292 N.Y.S.2d 667, 668 (1968) (internal quotations omitted), citing *Marsh v. Ellsworth*, 50 N.Y. 309, 311 (1872). In *Wiener*, for example, a letter to the bar association grievance committee was held to be absolutely privileged.

This privilege has been extended to some quasi-judicial proceedings. The New York Court of Appeals has held that a proceeding is quasi-judicial if: (1) a hearing is held; (2) both parties may participate; (3) the presiding officer may subpoena witnesses; and (4) the body has the power to take remedial action. *Toker v. Pollak*, 44 N.Y.2d 211, 222, 376 N.E.2d 163, 168, 405 N.Y.S.2d 1, 7 (1978). The Court of Appeals discussed whether the privilege would be absolute or qualified in *Stega v. N.Y. Downtown Hosp.*, 31 N.Y.3d 661, 82 N.Y.S.3d 323, 107 N.E.3d 543 (2018). See also *Boice v. Unisys Corp.*, 50 F.3d 1145, 1150 (2d Cir. 1995). For instance, while an administrative investigation conducted by the National Association of Securities Dealers is quasi-judicial, *Dunn v. Ladenburg Thalmann & Co.*, 259 A.D.2d 544, 686 N.Y.S.2d 471 (2d Dep't 1999), the definition does not necessarily extend to less formal proceedings or internal investigations. *Herlihy v. Metropolitan Museum of Art*, 160 Misc. 2d 279, 608 N.Y.S.2d 770 (Sup. Ct. 1994).

In *Rosenberg v. Metlife, Inc.*, 453 F.3d 122 (2d Cir. 2006), certified question answered, 8 N.Y.3d 359, 866 N.E.2d 439, 834 N.Y.S.2d 494 (2007), the New York Court of Appeals answered the question whether “statements made by an employer on an NASD [now FINRA] employee termination notice (‘Form U-5’) [are] subject to an absolute privilege in a suit for defamation” in the affirmative. *Rosenberg*, 8 N.Y.3d at 364. In answering the question, the majority of the New York Court of Appeals stated that the Form U-5 could be viewed as “a preliminary or first step in the NASD’s quasi-judicial process.” *Id.* at 367.

The Court of Appeals has held that “[a] communication made by one person to another upon a subject in which both have an interest is protected by a qualified privilege.” *Stillman v. Ford*, 22 N.Y.2d 48, 53, 238 N.E.2d 304, 306, 290 N.Y.S.2d 893, 897 (1968). In order for the privilege to apply: (1) the person making the communication must have an interest or duty to be upheld; (2) the communication must be made to a party with a corresponding interest or duty; and (3) the content of the communication must be limited to the purpose for which it is made. See also *Albert v. Loksen*, 239 F.3d 256 (2d Cir. 2001); *Shapiro v. Health Ins. Plan of Greater N.Y.*, 7 N.Y.2d 56, 60-61, 163 N.E.2d 333, 335-36, 194 N.Y.S.2d 509, 512-13 (1959). A qualified privilege protected the internal memoranda created in accordance with hospital policy by a supervisor stating the reasons for which an employee was terminated in *Burns v. Palazola*, 22 A.D.3d 779, 803 N.Y.S.2d 169 (2d Dep't 2005). The court found the supervisor had an interest in the writing and only published the writing to two other individuals in hospital management with corresponding interests. *Id.*

In *Loughry v. Lincoln First Bank, N. A.*, 67 N.Y.2d 369, 494 N.E.2d 70, 502 N.Y.S.2d 965 (1986), the plaintiff alleged that he was discharged as the result of slanderous comments made by the defendant at a corporate meeting. The Court of Appeals held that statements among employees in furtherance of the common interest of the employer, made at a confidential meeting, may well fall within the ambit of a qualified or conditional privilege; however, the privilege is conditioned on its proper exercise, and cannot shelter statements published with malice or with knowledge of their falsity or reckless disregard as to their truth or falsity. *Id.* at 376.

#### D. Other Defenses

## 1. Truth

True statements are not defamatory. *Crane v. N.Y. World Tel. Corp.*, 308 N.Y. 470, 475, 126 N.E.2d 753 (1955). However, a plea of truth as justification must be as broad as the alleged libel and must establish the truth of the precise charge. *Id.* at 475. See also *Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984).

For example, in *Dillon v. City of N.Y.*, 261 A.D.2d 34, 704 N.Y.S.2d 1 (1st Dep't 1999), assistant district attorneys submitted their resignations prior to completing their three-year commitment, and were terminated for cause because they did not have the right to resign under their contracts. As a consequence, statements by their supervisors that they had been fired were true, and could not support defamation claims.

## 2. No Publication

“A defamatory writing is not published if it is read by no one but the one defamed. Published, it is, however, as soon as read by anyone else.” *Ostrowe v. Lee*, 256 N.Y. 36, 38, 175 N.E. 505 (1931)(Cardozo, C.J.); *Albert v. Loksen*, 239 F.2d 256, 269 (2d Cir. 2001).

## 3. Self-Publication

Where the only publication consists of a plaintiff's voluntary republication of the alleged defamatory statement, New York courts will not sustain a defamation claim. *Wiedman v. Ketcham*, 278 N.Y. 129, 133-134, 15 N.E.2d 426, 428-429 (1938). Accordingly, a terminated bus driver could not maintain a cause of action for defamation against the school district because the plaintiff himself was the only disseminator of the information that he had been fired. *Fedrizzi v. Washingtonville Cent. Sch. Dist.*, 204 A.D.2d 267, 611 N.Y.S.2d 584 (2d Dep't 1994). See also *Jain v. Sec. Indus. & Fin. Markets Ass'n*, 2009 WL 3166684 (S.D.N.Y. 2009). Similarly, merely entering a letter concerning performance and the reason for termination into an employee's file does not satisfy the publication element of defamation. *Williams v. Varig Brazilian Airlines*, 169 A.D.2d 434, 438, 564 N.Y.S.2d 328, 331 (1st Dep't 1991).

New York courts have rejected the concept of defamation by compelled self-publication, where a defendant would be held liable for the republication if the plaintiff was compelled in some way to republish and if such republication was foreseeable. *Phillip v. Sterling Home Care, Inc.*, 103 A.D.3d 786, 787, 959 N.Y.S.2d 546, 548 (2d Dept. 2013)(disclosures on applications to potential employers were not actionable).

## 4. Invited Libel

New York courts have never used this term in a reported decision. However, intermediate appellate courts have held that the consent of the person defamed to the making of a defamatory statement bars that person from suing for the defamation, and that, in some circumstances, a person's intentional eliciting of a statement that she expects will be defamatory can constitute her consent to the making of the statement. New York's highest court has never ruled on this precise question. See *Sleepy's LLC v. Select Comfort Wholesale Corp.*, 779 F.3d 191, 199 (2d Cir. 2015).

The defense of consent is available where a plaintiff's solicitation of or consent to a publication makes the statement privileged. *Teichner v. Bellan*, 7 A.D.2d 247, 251, 181 N.Y.S.2d 842, 846 (4th Dep't 1959). For example, where the terms of the employment contract require the creation and publication to relevant parties of a notice of termination and a statement of reasons thereof, the privilege will apply. *Mandelblatt v. Perelman*, 683 F. Supp. 379, 383 (S.D.N.Y. 1988). A letter to plaintiff's employer requesting that he provide her a written statement of the reason for her termination was deemed to be consent to publication in *Hirschfeld v. Institutional Investor, Inc.*, 260 A.D.2d 171, 172, 688 N.Y.S.2d 31, 32 (1999). However, consent should not be read as a blanket privilege to defame. *BURTON V. CROWELL PUB. CO.*, 82 F.2d 154 (2d Cir.1936) (plaintiff's consent to use of photographs for which he had posed was no defense to defamation action based on publication of distorted photo not previously shown to him); *NELSON V. WHITTEN*, 272 F. 135 (E.D.N.Y. 1921) (plaintiff's request that former employer write letter of recommendation **"did not invite the defendant to make public anything false and defamatory"**).

## 5. Opinion

Pure opinions are not actionable. In *Steinilber v. Alphonse*, 68 N.Y.2d 283, 501 N.E.2d 550, 508 N.Y.S.2d 901 (1986), the Court of Appeals defined "pure opinion" as "a statement of opinion which is accompanied by a recitation of the facts upon which it is based. *Steinilber*, 68 N.Y.2d at 289. See also *Brian v. Richardson*, 87 N.Y.2d 46, 660 N.E.2d 1126, 637 N.Y.S.2d 347 (1995)(statements in article published on Op Ed page of newspaper which alleged that individual had been involved in illegal conspiracy to steal copies of software were nonactionable statements of opinion); *Egiazaryan v. Zalmayev*, 880 F.Supp.2d 494, 498 (S.D.N.Y. 2012)(granting motion to dismiss because plaintiff did not plausibly allege that defendant made false assertions of fact). An opinion not accompanied by such a factual recitation may, nevertheless, be "pure opinion" if it does not imply that it is based upon undisclosed facts." *Steinilber*, 68 N.Y.2d at 289.

A "mixed opinion," on the other hand, is when "the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it." *Id.* at 289-290. For example, in 1994 the court found disparaging comments about a former employee to be mixed opinion instead of pure opinion, and therefore actionable, because of the bare allegations of "incompetence." *Kelleher v. Corinthian Media Inc.*, 208 A.D.2d 477, 617 N.Y.S.2d 726 (1st Dep't 1994)(noting that statement at issue did not merely constitute employer's evaluation of employee's work performance, but tended to disparage plaintiff in her profession). See also *Rodgers v. Shirer*, 173 F.2d 846(2d Cir. 1999)(unpublished disposition)(critical performance evaluation deemed not actionable).

### E. Job References and Blacklisting Statutes

Concerning job references, generally speaking, a qualified privilege exists for the purpose of permitting a prior employer to give a prospective employer honest information as to the character of a former employee even though such information may prove ultimately to be

inaccurate. *Konowitz v. Archway School Inc.*, 65 A.D.2d 752, 752-753, 409 N.Y.S.2d 757, 758 (2d Dept. 1978); *DeSapio v. Kohlmeyer*, 52 A.D.2d 780, 383 N.Y.S.2d 16 (1<sup>st</sup> Dept. 1976).

New York's blacklisting statute is Executive Law § 296(13). It states:

It shall be an unlawful discriminatory practice (i) for any person to boycott or blacklist, or to refuse to buy from, sell to or trade with, or otherwise discriminate against any person, because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability of such person, or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers or customers, or (ii) for any person willfully to do any act or refrain from doing any act which enables any such person to take such action.

Id.

In *Scott v. Mass. Mut. Life Ins. Co.*, 86 N.Y.2d 429, 436, 657 N.E.2d 769, 772-73, 633 N.Y.S.2d 754, 757-58 (1995), the Court of Appeals noted that absence of evidence of a formal boycott or blacklisting campaign is not fatal to a discrimination claim under section 296(13) because even though the impetus for the statute was an Arab boycott of Jewish businesses, the statute was drafted more broadly to prohibit any business tactics driven by racial or religious bigotry. Evidence establishing that a defendant engaged in a pattern of conduct which commercially disadvantaged only members of a protected class may be sufficient to defeat a summary judgment motion. But see *Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.*, 79 N.Y.2d 227, 590 N.E.2d 228, 581 N.Y.S.2d 643 (1992)(affirming summary judgment for defendant) and *Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.*, 968 F.2d 286 (2d Cir. 1992)(denying defendant's motion for summary judgment).

This statute does not apply to boycotts connected with labor disputes or those that protest unlawful discriminatory practices. N.Y. EXEC. L. § 296(13)(a) and (b) (2013).

#### F. Non-Disparagement Clauses

Non-disparagement clauses in employment separation agreements normally require the parties to refrain from making disparaging comments about the other party or assisting others in doing so.

A former employee was granted summary judgment dismissing a cause of action asserted by her former employer surrounding an apparently disparaging comment made during a post-employment interview with a trade magazine "in the absence of any evidence that defendant solicited the interview or suggested the language in the article or provided any information which would support the implication." *Sage Realty Corp. v. Kerin*, 281 A.D.2d 334, 334, 723 N.Y.S.2d 12, 13 (1<sup>st</sup> Dep't 2001). See also *Conant v. Alto 53, LLC*, 21 Misc. 3d 1147(A), 880 N.Y.S.2d 223 (Sup. Ct. 2008).

A federal district court analyzed the following non-disparagement clause in 2004:

"The Company covenants that its senior management and directors . . . shall not at any time hereafter make any disparaging statements of any kind about Kamfar. The foregoing covenant shall not preclude the Company . . . from disclosing information to the extent that the Company, in good faith, believes that such disclosure is necessary or desirable to protect the Company's interests. . . ."

*Kamfar v. New World Rest. Group, Inc.*, 347 F. Supp. 2d 38, 48 (S.D.N.Y. 2004). The court found factual issues as to the good faith belief of the company which prevented summary judgment in its favor and allowed plaintiff the opportunity to establish the appropriate elements of a disparaging statement and a lack of good faith. Id. at 49.

## VII. EMOTIONAL DISTRESS CLAIMS

### A. Intentional Infliction of Emotional Distress

The tort of intentional infliction of emotional distress as recognized in New York has four elements:

- Extreme and outrageous conduct;
- Intent to cause or disregard of a substantial probability of causing severe emotional distress;
- A causal connection between the conduct and injury; and
- Severe emotional distress.

*Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 121, 612 N.E.2d 699, 702, 596 N.Y.S.2d 350, 353 (1993); see also *DiRuzza v. Lanza*, 685 F. App'x 34 (2d Cir. 2017); *Chanko v Am. Broadcasting Companies Inc.*, 27 N.Y.3d 46, 49 N.E.3d 1171, 29 N.Y.S.3d 879 (2016).

The first element, outrageous conduct, serves the dual function of filtering out the petty and trivial, which do not belong in court, and in assuring that the plaintiff's claim of severe emotional distress is genuine. See William L. Prosser, Insult and Outrage, 44 CAL. L. REV. 40, 44-45 (1956). Courts have tended to focus on the outrageousness element, the one most susceptible to determination as a matter of law. Unlike other intentional torts, intentional infliction of emotional distress does not proscribe specific conduct, but imposes liability based on after-the-fact judgments about the actor's behavior. "The tort is as limitless as the human capacity for cruelty." *Howell*, 81 N.Y.2d at 122. The court also stated that "the price for this flexibility in redressing utterly reprehensible behavior, however, is a tort that, by its terms, may overlap other areas of the law, with potential liability for conduct that is otherwise lawful. Moreover, unlike other torts, the actor may not have notice of the precise conduct proscribed." Id.

“Consequently, the ‘requirements of the rules are rigorous, and difficult to satisfy.’” *Howell*, 81 N.Y.2d at 122, citing PROSSER AND KEETON, TORTS § 12, at 60-61 (5th ed., 1984). The court will impose liability only when it has found that the conduct has been “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Howell*, 81 N.Y.2d at 122.

In *Chanko*, 27 N.Y.3d at 57, 49 N.E.3d 1171, 29 N.Y.S.3d 879, the Court of Appeals held that the broadcasting of a recording of a patient's last moments of life without consent was reprehensible, but not so extreme and outrageous as to satisfy the exceedingly high legal standard for intentional infliction of emotional distress.

#### B. Negligent Infliction of Emotional Distress

New York courts permit claimants to recover for negligent emotional trauma even in the absence of a physical injury. See *Battalla v. State*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); *Scannapieco v. New York City Transit Auth.*, 200 A.D.2d 410, 606 N.Y.S.2d 614 (1st Dep’t 1994). There is no requirement that the claimant must have been in physical fear for her own safety. The Court of Appeals has held that, when a defendant has been found to have breached a duty owed directly to the plaintiff, the breach of that duty resulting directly in emotional harm to the plaintiff is actionable. *Martinez v. Long Island Jewish Hillside Medical Center*, 70 N.Y.2d 697, 512 N.E.2d 538, 518 N.Y.S.2d 955 (1987). See also *Sheppard-Mobley v. King*, 4 N.Y.3d 627, 637, 830 N.E.2d 301, 304, 797 N.Y.S.2d 403, 406 (2005); *Ferrara v. Bernstein*, 81 N.Y.2d 895, 898, 613 N.E.2d 542, 544, 597 N.Y.S.2d 636, 638 (1993).

### VIII. PRIVACY RIGHTS

#### A. Generally

No common-law right to privacy is recognized in New York. *Messenger v. Gruner + Jahr Printing and Pub.*, 94 N.Y.2d 436, 448, 727 N.E.2d 549, 556, 706 N.Y.S.2d 52, 59 (2000); *Edme v. Internet Brands, Inc.*, 968 F.Supp.2d 519 (E.D.N.Y. 2013).

New York courts have limited the right to privacy to the protection afforded by Civil Rights Law §§ 50 and 51. See, e.g., *Farrow v. Allstate Ins. Co.*, 53 A.D.3d 563, 862 N.Y.S.2d 92 (2d Dept. 2005).

Section 50 prohibits the use of a living person’s name, portrait or picture for “advertising” or “trade” purposes without prior written consent. Section 50 provides criminal penalties, and § 51 provides a private right of action for damages and injunctive relief for violations of the law. See *Brinkley v. Casablanacas*, 80 A.D.2d 428, 438 N.Y.S.2d 1004 (1st Dept. 1981). An avatar in a video game may constitute a “portrait” for the purpose of these statutes. See *Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111, 73 N.Y.S.3d 780, 97 N.E.3d 389 (2018).

Although the statute does not define the term “advertising” or “trade” purposes, courts have consistently held that the statute should not be construed to apply to publications concerning newsworthy events or matters of public interest. *Finger v. Omni Publications Int’l*, 77 N.Y.2d 138, 566 N.E.2d 141, 564 N.Y.S.2d 1014 (1990); *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 474 N.E.2d 580, 485 N.Y.S.2d 220 (1984); *Edme v. Internet Brands, Inc.*, 968 F.Supp.2d at 530 (noting that defendant could lose newsworthiness privilege if it were ultimately determined that article was materially and substantially false).

## B. New Hire Processing

### 1. Eligibility Verification & Reporting Procedures

Preemployment inquiries which express, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status are unlawful. N.Y. EXEC. L. § 296(1)(d).

The federal Immigration Reform and Control Act, 8 U.S.C. § 1324a, does not preempt New York’s Workers Compensation Law; therefore, employers who hire undocumented aliens are entitled to immunity from liability for workplace injuries (and generally cannot be held liable for contribution or indemnity to third parties) provided they secure workers compensation benefits for their employees. *N.Y. Hosp. Med. Center of Queens v. Microtech Contracting Corp.*, 22 N.Y.3d 501, 5 N.E.3d 993, 982 N.Y.S.2d 830 (2013).

New York’s Freedom to Report Terrorism Act provides immunity from civil and criminal liability for reporting suspicious behavior. N.Y. PENAL L. § 490.01; *Tokko v. Consol. Edison Co.*, 62 A.D.3d 533, 878 N.Y.S.2d 740 (1st Dept. 2009).

### 2. Background Checks

Employers may inquire about prior criminal convictions but not about arrests or criminal accusations not then pending. N.Y. EXECUTIVE L. § 296 (16).

Job applicants may not be denied employment on the basis of a previous criminal conviction unless there is a “direct relationship” between the criminal offense and the job, or where employment of the applicant would involve an “unreasonable risk” to property or safety. N.Y. CORRECTIONS L. § 752. See *Al Turi Landfill, Inc. v. New York State Dept. of Environmental Conservation*, 98 N.Y.2d 758, 761-762, 781 N.E.2d 892, 89, 751 N.Y.S.2d 827, 829 (2002)(dishonesty, lack of integrity in conducting business, and willingness to mislead the government had direct relationship to duties and responsibilities inherent in license to expand landfill, including accurate record keeping, effective self-policing, and honest self-reporting to government); *Wunderlich v. New York State Educ. Dept.*, 82 A.D.3d 1345, 1346, 918 N.Y.S.2d 257, 258-259 (3d Dept. 2011)(denying license as certified public accountant to applicant previously convicted of attempted promoting gambling in the first degree).

In 2007, Corrections Law § 752 was amended to cover terminations as well as applications for employment. See *Noble v. Career Educ. Corp.*, 375 Fed. Appx. 102 (2d Cir. 2010).

Private employers are generally prohibited from requiring fingerprinting as a condition of securing or continuing employment. N.Y. LABOR L. § 201-a. However, there are a number of exceptions, including hospitals, art museums, private investigators, guard services, and securities brokers. See N.Y. ARTS & CULTURAL AFFAIRS L. § 61.11; N.Y. GENERAL BUSINESS LAW §§ 72, and 359-e.

### C. Other Specific Issues

#### 1. Workplace Searches

Searches by private employers do not violate the federal or state constitutional prohibition against searches and seizures. *People v Zalduondo*, 58 Misc.2d 326, 330, 295 N.Y.S.2d 301 (NY Dist Ct 1968). “[A] search by a private person, even an unlawful search, does not implicate Fourth Amendment considerations...” *People v. Adler*, 50 N.Y.2d 730, 736–737, 431 N.Y.S.2d 412, 409 N.E.2d 888 (1980); *People v Hazzard*, 129 A.D.3d 1598, 1599 (4th Dept 2015).

For public employees, New York has adopted the federal standard in *O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492 (1987), which requires a warrant. See *Cunningham v. New York State Dep't of Labor*, 21 N.Y.3d 515, 520, 997 N.E.2d 468, 471 (2013); *Matter of Caruso v. Ward*, 72 N.Y.2d 432, 534 N.Y.S.2d 142, 530 N.E.2d 850 (1988).

In *Caruso*, the Court of Appeals announced it would follow *O'Connor* in deciding the constitutionality of searches conducted by public employers, whether for noninvestigatory, work-related purposes or for investigations of work-related misconduct, under the New York as well as the federal Constitution. 72 N.Y.2d at 437, 530 N.E.2d 850, 534 N.Y.S.2d 142. *Caruso* applied *O'Connor* to uphold random urinalysis testing of certain police officers.

In *Cunningham v. New York State Dep't of Labor*, 21 N.Y.3d 515, 997 N.E.2d 468, 974 N.Y.S.2d 896 (2013), the Court of Appeals held it was unreasonable for the State to have attached a GPS device to an employee's car for a month in order to investigate whether he was submitting false time reports. The majority opinion held that the action did not require a warrant, but it did not comply with the state or federal Constitution because it was excessively intrusive and therefore unreasonable. Three judges concurred only in the result, arguing that placing a GPS on a private car to investigate workplace misconduct required a warrant.

#### 2. Electronic Monitoring

Section 250.05 of the New York Penal Law prohibits “eavesdropping,” which is defined in § 250.00(1) and (2) to include: “wiretapping,” *i.e.*, “the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or

equipment;” and the “mechanical overhearing of a conversation,” i.e., “the intentional overhearing or recording of a conversation or discussion without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device, or equipment.” N.Y. PENAL L. §§ 250.00(1) and (2); 250.05 (2013).

Absent the consent of at least one party to the conversation, the eavesdropping statute prohibits an employer from mechanically overhearing or recording a telephone conversation between an employee and a third party unless the employer is a party to the conversation. In addition to a violation of the New York eavesdropping statute constituting a Class E felony (N.Y. Penal L. § 250.05), evidence obtained in violation of the statute is generally inadmissible at any proceeding before any New York court, agency, or regulatory body. N.Y. CIV. PRAC. L. & RULES 4506. No private cause of action is provided, although federal law permits victims of the unauthorized interception of oral communications, in violation of 18 U.S.C. § 2511, to bring civil actions for recovery of appropriate relief. 18 U.S.C. § 2520(a); *Arias v. Mut. Cent. Alarm Serv., Inc.*, 202 F.3d 553, 556-57 (2d Cir. 2000).

### 3. Social Media

New York has not enacted any social media privacy legislation. Bills designed to protect employees and applicants from having to disclose passwords have been introduced in the Legislature, but were still under discussion as of the end of 2018.

The recent decision of the Court of Appeals in *Forman v. Henkin*, 30 N.Y.3d 656, 70 N.Y.S.3d 157, 93 N.E.3d 882 (2018), holds that social media content is subject to the usual rules of pretrial discovery, rather than any higher threshold, noting that medical records have long been subject to pretrial disclosure.

In *LaPorta v. Alacra, Inc.*, 142 A.D.3d 851, 38 N.Y.S.3d 20 (1<sup>st</sup> Dept. 2016), the court held that a complaint alleging that a co-worker’s Facebook message created a hostile work environment stated a viable cause of action for sexual harassment. An order terminating the employment of a public school teacher over an inappropriate Facebook post was vacated in *Rubino v. City of New York*, 106 A.D.3d 439, 965 N.Y.S.2d 47 (1<sup>st</sup> Dep’t 2013). A single violation of the employer’s policy against employees posting on social media during work hours did not constitute misconduct that disqualified the employee from collecting unemployment insurance benefits. See *Sullivan v. Brookville Ctr. For Children's Services, Inc.*, 123 A.D.3d 1273, 999 N.Y.S.2d 230 (3<sup>d</sup> Dep’t 2014).

Use of social media after working hours and off the employer’s premises is probably a protected recreational activity. See N.Y. LABOR L. § 201-d(1)(b). But not if the activity creates a material conflict of interest related to the employer’s business. See N.Y. LABOR L. § 201-d(3)(a)

### 4. Taping of Employees

New York does not have any law specifically on this topic.

General Business Law § 395-b prohibits premises owners or managers from knowingly permitting installation of a viewing device “for the purpose of surreptitiously observing the interior of any fitting room, restroom, toilet, bathroom, washroom, shower, or any room assigned to guests or patrons in a motel, hotel or inn,” but does not create a private right of action. *Thomas v. Northeast Theatre Corp.*, 51 A.D.3d 588, 588-589, 859 N.Y.S.2d 415, 417 (1st Dep’t 2008)(dismissing claim by employee who was allegedly videotaped in cinema changing room).

New York Penal Law § 250.05 prohibits “wiretapping” *i.e.*, the intentional overhearing or recording of another. N.Y. PENAL L. §§ 250.00(1) and (2) 250.05. See also *Arias v. Mut. Cent. Alarm Serv.*, 202 F.3d 553, 559 (2d Cir. 2000)(blanket recording of plaintiffs' conversations was in ordinary course of business of alarm company employer and thus non-actionable under Title III of Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq.).

## 5. Release of Personal Information on Employees

Unless otherwise required by law, an employer shall not communicate an employee’s personal identifying information to the general public. N.Y. LABOR LAW § 203-d. “Personal identifying information” includes social security number, home address or telephone number, personal email address, Internet identification names and passwords, parent’s surname before marriage, or drivers’ license number.

In addition, employers shall not publicly display social security numbers or place them in files with unrestricted access. Id.

The commissioner of labor may impose a civil penalty of up to \$500 on any employer for any knowing violation. N.Y. LABOR LAW § 203-d(3). The statute does not create a private right of action; however, a federal district court has held that it implies such a right. See *Sackin v. Transperfect Glob., Inc.*, 278 F. Supp. 3d 739, 752 (S.D.N.Y. 2017).

## 6. Medical Information

The New York Public Health Law mandates that whenever patient information is to be released to a party other than the patient, advance written consent must be obtained. Pub. Health Law § 18(6). For example, a federal district court has held that allegations that an employer, without authorization, “disclosed intimate details about plaintiff’s medical condition to third parties” states a claim for damages for violation of the Public Health Law. *Caraveo v. Nielsen Media Research, Inc.*, No. 01 Civ. 9609 (LBS) (RLE), 2003 WL 169767,\*7 (S.D.N.Y. Jan. 22, 2003).

Testing for HIV is governed by N.Y. Pub. Health L. § 2780 *et seq.* In most situations, the law prohibits any person from “order[ing] the performance of an HIV related test without first receiving the written, or, where authorized by this subdivision, oral, informed consent of the subject of the test.” N.Y. PUB. HEALTH L. § 2781(1) (2013). The statutory provisions make it unlawful for an employer to condition an offer of employment (or continued employment) on the applicant or employee’s “consent” to an HIV related test. The condition attached to the consent would not comply with the need for the consent to be “voluntary.” N.Y. PUB. HEALTH L. § 2781(2).

Compensatory damages may be recovered for disclosure of confidential HIV information contrary to the provisions of Pub. Health L. § 2782. *Doe v. Roe*, 239 A.D.2d 878, 878, 659 N.Y.S.2d 671, 672 (4th Dep’t 1997).

## 7. Restrictions on Requesting Salary History

The State of New York does not currently bar private employers from requesting salary history. However, the Governor signed an executive order in 2017 prohibiting state agencies from evaluating candidates based on salary history, and the Governor is supporting legislation to expand the salary history inquiry ban to private employers.

In New York City, it is currently an unlawful discriminatory practice to inquire into an applicant’s salary history or to rely on that history in determining salary, benefits, or other compensation. The term “salary history” does not include objective measures of the applicant’s productivity, such as sales reports. There is an exception to permit discussion of unvested equity or deferred compensation the employee might forfeit by changing jobs. The subdivision does not apply to actions taken to comply with state and federal laws, internal transfer or promotion, or to public employee positions subject to collective bargaining. See N.Y.C. ADMIN. CODE § 8-107(25).

It is also an unlawful discriminatory practice in New York City to inquire into an applicant’s consumer credit history; however, there are exceptions for positions involving law enforcement, fiduciary duties, and responsibility for trade secrets and data security, among other things. See N.Y.C. ADMIN. CODE § 8-107(24).

## **IX. WORKPLACE SAFETY**

### A. Negligent Hiring

New York courts have long recognized the tort of negligent hiring and retention. See *Haddock v. City of New York*, 75 N.Y.2d 478, 554 N.Y.S.2d 439, 553 N.E.2d 987 (1990); *Detone v. Bullit Courier Serv.*, 140 A.D.2d 278, 528 N.Y.S.2d 575 (1st Dept 1988). This tort applies equally to municipalities and private employers. *Gonzalez v City of New York*, 133 AD3d 65, 67 (1st Dept 2015).

Claims for negligent hiring, supervision, or retention are generally limited to torts by employees acting outside the scope of their employment.

When an injury is caused by an employee acting within the scope of his or her employment, the employer is liable under the doctrine of *respondeat superior*, and the injured party may not proceed against the employer for negligent hiring, training, supervision, or retention. See, e.g., *Segal v. St. John's University*, 69 A.D.3d 702, 893 N.Y.S.2d 221 (2d Dept. 2010). This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training. *Karoon v. New York City Tr. Auth.*, 241 A.D.2d 323, 324, 241 N.Y.S.2d 323 (1st Dept 1997). This rule removes the potential for an employer to be doubly liable for an employee's single tortious act. *Krystal G. v. Roman Catholic Diocese of Brooklyn*, 34 Misc.3d 531, 540 (Sup. Ct., Kings County, 2011).

Where an employer cannot be held liable under *respondeat superior*, a claim for negligent supervision or retention may still lie. *Sheila C. v. Povich*, 11 A.D. 3d 120, 129, 781 N.Y.S.2d 342 (1st Dept. 2004). Such a claim is also permitted when punitive damages are sought based upon facts evincing gross negligence in the hiring or retention of an employee. See *Quiroz v. Zottola*, 96 AD3d 1035, 948 N.Y.S.2d 87 (2d Dept 2012).

The negligence of the employer in such a case is direct, not vicarious, and arises from its having placed the employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee. An essential element of a cause of action for negligent hiring and retention is that the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the injury. *Sheila C.*, 11 A.D.3d at 129–30, 781 N.Y.S.2d at 350.

#### B. Negligent Supervision/Retention

A claim for negligent supervision or retention arises when an employer places an employee in a position to cause foreseeable harm which the injured party most probably would have been spared had the employer taken reasonable care in supervising or retaining the employee. See, e.g., *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 654 N.Y.S.2d 791 (2d Dept. 1997).

#### C. Interplay with Workers Compensation Bar

A worker injured by a co-employee must establish the elements of an intentional tort by his employer in order to avoid the Workers Compensation Bar. See *Kruger v. EMFT, LLC*, 87 A.D.3d 717, 718, 930 N.Y.S.2d 11, 13 (2d Dept. 2011)(undocumented worker who alleged that supervisor directed workers to awaken him from unconsciousness after a fall by throwing buckets of cold water on him stated cause of action for battery).

Employers are generally immune from employees' claims of negligent supervision. *Pereira v. St. Joseph's Cemetery*, 54 A.D.3d 835, 864 N.Y.S.2d 491 (2d Dep't 2008), cited in *Gen. Star Nat. Ins. Co. v. Universal Fabricators, Inc.*, 585 F.3d 662, 665 (2d Cir. 2009).

#### D. Firearms in the Workplace

New York does not have a "Guns-at-Work" or "parking lot" law.

It is not unlawful to transport an unloaded rifle or shotgun in a motor vehicle, and N.Y. Labor Law § 201-d (2013), prohibits an employer from refusing to hire, employ, license or discharge an employee because of his or her legal recreational activities outside work hours and off the employer's premises. However, these laws would probably not prevent employers from insisting that employees not bring rifles and shotguns onto company premises. See, e.g., *Kandros v. Lutton*, 256 A.D.2d 21, 680 N.Y.S.2d 522 (1st Dep't. 1998)(New York Stock Exchange rules prohibited trader from bringing dismantled shotgun into the exchange).

New York generally prohibits the possession of "firearms" without a license, and very few people are licensed to carry firearms outside their home or place of business. The term "firearms" includes pistols, revolvers, sawed-off shotguns and rifles, and assault weapons (broadly defined in N.Y. Penal Law § 265.00). Full-size rifles and shotguns are outside the scope of the licensing requirement, but one must first hold a hunting permit in order to purchase one.

Full-carry licenses will only be issued if the applicant shows "proper cause" which has been defined as "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Kachalsky v. County of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012), cert. denied, 133 S.Ct. 1806 (2013)(holding New York's licensing scheme to be constitutional as applied to applicants seeking full-carry permits).

A first offense for possession of a firearm in a person's home or place of business generally cannot be prosecuted as a felony. N.Y. Penal Law § 265.02. But see *People v. Buckmire*, 237 A.D.2d 151, 655 N.Y.S.2d 9 (1<sup>st</sup> Dep't 1997)(reinstating felony indictment against stockbroker who left loaded firearm inside gym bag in elevator at office building where he worked). A civilian employee of the police department who left a handgun in the trunk of his car for eight hours while at work lost his residential license in *D'Onofrio v. Kelly*, 22 A.D.3d 343, 802 N.Y.S.2d 159 (1st Dep't. 2005).

There is a "place of business" exception to felony possession of a firearm which effectively reduces the offense to a misdemeanor, but the Court of Appeals has held that it only applies to a merchant, storekeeper, or the principal operator of a business. See *People v. Wallace*, 31 N.Y.3d 503, 510, 80 N.Y.S.3d 658, 662, 105 N.E.3d 1238, 1243 (2018)("swing manager" at fast food restaurant was outside scope of exception).

New York also prohibits the possession of a so-called "gravity knife" which can be opened with one hand and locks into place. See N.Y. PENAL LAW § 265.01. The prosecution is not required to prove that the possessor of the knife knew it could be opened with one hand. See *People v.*

*Parrilla*, 27 N.Y.3d 400, 53 N.E.3d 719, 33 N.Y.S.3d 842 (2016)(affirming conviction for possession of knife that defendant used as tool to cut drywall). A bill to amend the law passed both houses of the Legislature in 2016, but was vetoed by the Governor.

E. Use of Mobile Devices

New York does not have any laws or significant case law concerning the use of portable electronic devices in the workplace.

A settlement reached in litigation between the Attorney General and a private employer allows employees who are victims of domestic violence to park closer to the store entrance, have access to a “safe room” to elude abusers, and use cell phones while working to call for help if necessary. See “Domestic Violence in the Workplace: Striking the Right Balance”, 22 No. 12 N.Y. Emp. L. Letter 5 (Dec. 2015).

X. TORT LIABILITY

A. Respondeat Superior Liability

An employer is responsible for the act of its employee if the act is in furtherance of the employer's business and is within the scope of the employee's authority. An act is within the scope of an employee's authority if it is performed while the employee is engaged generally in the performance of his or her assigned duties or if the act is reasonably necessary or incidental to the employment. The employer need not have authorized the specific act in question. See *Riviello v. Waldron*, 47 N.Y.2d 297, 391 N.E.2d 1278, 418 N.Y.S.2d 300 (1979); *Bello v. United States*, 93 Fed. Appx. 288 (2d Cir. 2004)(attorney acted within the scope of his federal employment when he made allegedly slanderous statements).

A sexual assault perpetrated by a hospital employee is not in furtherance of hospital business and is a clear departure from the scope of employment, having been committed for wholly personal motives. *N.X. v. Cabrini Medical Center*, 97 N.Y.2d 247, 765 N.E.2d 844, 739 N.Y.S.2d 348 (2002). See also *Doe v. Guthrie Clinic*, 22 N.Y.3d 480, 5 N.E.3d 578, 982 N.Y.S.2d 431 (2014)(unauthorized disclosure of medical records is also a departure from the scope of employment).

It is important to note that under New York law, even where the employee does not act within the scope of his employment for purposes of respondeat superior liability, an employer may be required to answer in damages for the tort of an employee against a third party when the employer has either hired or retained the employee with knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm. See IX. Workplace Safety A. Negligent Hiring, *supra*.

B. Tortious Interference with Business/Contractual Relations

To state a claim for tortious interference with contract in New York, the former employer or established competitor must generally plead five elements:

- (1) The existence of a valid contract between the plaintiff and a third party,
- (2) Defendant's knowledge of that contract,
- (3) Defendant's intentional procurement of the third-party's breach of the contract without justification,
- (4) Actual breach of the contract, and
- (5) Damages.

*Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 120, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956); see also, *NBT Bancorp v. Fleet/Norstar Fin. Group*, 87 N.Y.2d 614, 641 N.Y.S.2d 581, 664 N.E.2d 492 (1996)(discussing the elements of tortious interference with contract and tortious interference with prospective business relations); *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424, 668 N.E.2d 1370, 1375, 646 N.Y.S.2d 76, 82 (1996); *Innovative Networks v. Satellite Airlines Ticketing Ctrs., Inc.*, 871 F. Supp. 709 (S.D.N.Y. 1995). In *Innovative Networks*, the employer successfully stated a claim for tortious interference where it alleged its competitor utilized the services of a former employee with knowledge that the employee was subject to a restrictive covenant. Similarly, in *American Para Professional Systems, Inc. v. Examination Mgmt. Servs., Inc.*, 214 A.D.2d 413, 625 N.Y.S.2d 33 (1<sup>st</sup> Dep't 1995), the plaintiff stated a claim for tortious interference with contractual relations by establishing that the defendant had intentionally induced an independent contractor's breach of contract to the plaintiff's detriment.

## **XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS**

### **A. General Rule**

New York courts have generally held that powerful public policy considerations militate against sanctioning the loss of one's livelihood. See *Brown & Brown, Inc. v. Johnson*, 25 N.Y.3d 364, 34 N.E.3d 357, 12 N.Y.S.2d 606 (2015). As such, clauses in employment contracts that prevent an employee from pursuing a similar vocation after termination are disfavored. *Columbia Ribbon & Carbon Mfg. Co. v. A-I-A Corp.*, 42 N.Y.2d 496, 369 N.E.2d 4, 398 N.Y.S.2d 1004 (1977). The courts have held that such restrictive covenants will not be enforced "unless necessary to protect the trade secrets, customer lists or goodwill of the employer's business, or perhaps when the employer is exposed to special harm because of the unique nature of the employee's services." *Am. Broad. Cos. v. Wolf*, 52 N.Y.2d 394, 403, 420 N.E.2d 363, 438 N.Y.S.2d 482 (1981).

In *Brown*, 25 N.Y.3d at 370, the Court of Appeals held that Florida's statute governing restrictive covenants in employment agreements was offensive to a fundamental public policy of New York.

It is well settled that where an employer's customer lists are readily ascertainable from sources outside its business, trade secret protection will not attach and the solicitation by the employee will not be enjoined. *Colombia Ribbon*, 42 N.Y.2d at 496; *Leo Silfen, Inc., v. Cream*,

29 N.Y.2d 387, 278 N.E.2d 636, 328 N.Y.S.2d 423 (1972); *IVI Environmental, Inc. v. McGovern*, 269 A.D.2d 497, 707 N.Y.S.2d 107 (2d Dep't 2000).

## B. Blue Penciling

Under the process known as "blue penciling," a court strikes unreasonable provisions from a covenant not to compete, rendering unreasonable restraints reasonable by scratching out any offensive clauses to give effect to the parties' intentions. As the Court of Appeals held in *BDO Seidman v. Hirshberg*:

[T]o reject partial enforcement based solely on the extent of necessary revision of the contract resembles the now-discredited doctrine that invalidation of an entire restrictive covenant is required unless the invalid portion was so divisible that it could be mechanically severed, as with a "judicial blue pencil" (citation omitted). The Restatement (Second) of Contracts rejected that rigid requirement of strict divisibility before a covenant could be partially enforced (see, Reporter's Note, Restatement [Second] of Contracts § 184, at 32). Thus, we conclude that severance is appropriate, rendering the restrictive covenant partially enforceable.

93 N.Y.2d 382, 395, 712 N.E.2d 1220, 1227, 690 N.Y.S.2d 854, 861 (1999).

The party seeking the court's blue penciling ability must show that the restrictive covenant itself was the product of fair dealing, otherwise such action by the court would not cure the agreement. *McDonnell v. E.W. Blanch Co., Inc.*, 6 F. App'x 64 (2d Cir. 2001).

## C. Confidentiality Agreements

Separate from non-compete agreements are agreements to maintain the confidentiality of employer information. In appropriate circumstances, breach of such an agreement may lead to injunctive relief. *North Atlantic Instruments, Inc. v. Haber*, 188 F.3d 38 (2d Cir. 1999). The Second Circuit held in *Haber* that a former employee who signed an express confidentiality agreement had a duty to not disclose trade secrets. Injunctive relief is a proper remedy where there is either disclosure or the imminent risk of disclosure or inevitable disclosure of trade secrets or other information properly deemed confidential in the confidentiality agreement. Id. at 47. In *Buhler v. Michael P. Maloney Consulting, Inc.*, 299 A.D.2d 190, 749 N.Y.S.2d 867 (1st Dep't 2002), however, the court found that the disclosed information did not constitute a trade secret, and therefore did not violate a confidentiality agreement which prohibited trade secret disclosure. See also *Eastman Kodak Co. v. Carmosino*, 77 A.D.3d 1434, 1435-1436, 909 N.Y.S.2d 247, 249 (4th Dep't 2010)(plaintiff failed to establish that the information to which defendant was exposed during his tenure as plaintiff's "Vice President, Sales, Global and Strategic Accounts" qualified as a trade secret or that specific enforcement of the employment agreement was necessary to protect plaintiff's legitimate interests).

#### D. Trade Secrets Statute

New York has adopted the RESTATEMENT OF TORTS definition of “trade secret.” See *Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 407, 624 N.E.2d 1007, 1012, 604 N.Y.S.2d 912, 917 (1993); *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 119 (2d Cir. 2009).

As defined in comment b of § 757, a trade secret is “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.” RESTATEMENT OF TORTS § 757 comment b, quoted in *Softel, Inc. v. Dragon Med. & Scientific Commc’ns, Inc.*, 118 F.3d 955, 968 (2d Cir. 1997). The Restatement further lists six factors that may be considered in determining whether a trade secret exists:

- (1) The extent to which the information is known outside of the business;
- (2) The extent to which it is known by employees and others involved in the business;
- (3) The extent of measures taken by the business to guard the secrecy of the information;
- (4) The value of the information to the business and its competitors;
- (5) The amount of effort or money expended by the business in developing the information;
- (6) The ease or difficulty with which the information could be properly acquired or duplicated by others.

See RESTATEMENT OF TORTS § 757 comment b; North Atlantic Instruments, 188 F.3d at 44; Ashland Mgmt., 82 N.Y.2d at 407.

The burden is on the employer to prove both ownership and the existence of the trade secret, as well as disclosure to and use by the offending employee. *Integrated Cash Mgmt. Servs., Inc. v. Digital Transactions Inc.*, 920 F.2d 171, 173 (2<sup>nd</sup> Cir. 1990). If the information alleged to be a trade secret is found to be a matter of public or general knowledge in an industry, however, it is not a trade secret. *Haber*, 188 F.3d 38; *Buhler v. Maloney Consulting, Inc.*, 299 A.D.2d 190, 749 N.Y.S.2d 867 (1<sup>st</sup> Dep’t 2002). In *Buhler*, the court found a contact list prepared by the plaintiff based on her knowledge of the financial services industry and on information that was publicly available did not qualify as a trade secret and was not entitled to protection. *Id.* at 191.

#### 8. Fiduciary Duty and Other Considerations

In general, an employee owes a duty of good faith and loyalty to an employer in the performance of the employee's duties. *Island Sports Physical Therapy v. Burns*, 84 A.D.3d 878, 923 N.Y.S.2d 156 (2d Dept 2011).

The doctrine of "corporate opportunity," based on a duty of loyalty to an employer, provides that corporate fiduciaries and employees cannot, without consent, divert and exploit for their own benefit an opportunity that should be deemed an asset of the corporation. See *Alexander & Alexander, Inc. v. Fritzen*, 147 A.D.2d 241, 246, 542 N.Y.S.2d 530 (1st Dept 1989). See also *Nostrum Pharm., LLC v Dixit*, 13-CV-8718 (CM), 2016 WL 5806781, at \*19 (SDNY Sept. 23, 2016)(describing various methods for determining whether a venture should be considered a "corporate opportunity").

## **XII. DRUG TESTING LAWS**

### **A. Public Employers**

Drug testing of employees by an employer is permissible under New York Law. A public employee must be cognizant that random drug screening constitutes a search and seizure within the meaning of the federal and state constitutions. *Caruso v. Ward*, 72 N.Y.2d 432, 530 N.E.2d 850, 534 N.Y.S.2d 142 (1988). The guarantees against unreasonable searches and seizures found in both the state and federal constitutions are designed to protect a person's personal privacy and dignity against unwarranted intrusion by the state. *Delaraba v. Nassau County Police Dep't*, 83 N.Y.2d 367, 632 N.E.2d 1251, 610 N.Y.S.2d 928 (1994). Notwithstanding the constitutional restrictions on drug screening by public employers, the New York Court of Appeals has held that drug testing is permitted where: (1) the individual's privacy interests are minimal; (2) the government's interests are substantial; and (3) safeguards are in place to insure that the individual's reasonable expectations of privacy are not subject to unregulated discretion. *Patchogue-Medford Congress of Teachers v. Bd. of Educ.*, 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987). See also *Delaraba*, supra at 367. Following *Patchogue-Medford*, courts have upheld random testing by public employers by applying a reasonableness standard. The court in *Caruso* said that "the constitutionality of the search conducted by a public employer for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances as to both the inception and the scope of the government intrusion." 72 N.Y.2d at 437.

### **B. Private Employers**

Private employers are not tempered by constitutional restrictions on searches and seizures, and are free to maintain a policy that employees must be subject to random drug testing. If the employee is on notice that random drug testing is a term and condition of his employment, his failure to or refusal to submit to a drug test is a violation of company policy and constitutes dismissible misconduct. *In re Grover*, 233 A.D.2d 809, 650 N.Y.S.2d 392 (3<sup>rd</sup> Dep't 1996); *In re Douglas*, 250 A.D.2d 900, 672 N.Y.S.2d 534 (3<sup>rd</sup> Dep't 1998); *In re Flaherty*, 239 A.D.2d 647, 657 N.Y.S.2d 217 (3<sup>rd</sup> Dep't 1997). See also *In re Lambert*, 18 A.D.3d 1049, 1050, 794 N.Y.S.2d 742, 743 (3<sup>rd</sup> Dep't 2005)(fact that salespersons were required to undergo drug testing

and abide by other directives in ostensible employer's "Independent Contractor" policy was among indicia of employer-employee relationship).

In an unusual case, a man who was denied employment by a private investment banking firm because a preemployment drug test showed opiates in his urine sued for discrimination based on the prospective employer's allegedly erroneous perception of the disability of drug addiction. He alleged that the testing method used by the employer could not distinguish between drug use and the lawful consumption of bread containing poppy seeds, and his allegations survived the employer's motion to dismiss. *Doe v. Roe*, 160 A.D.2d 255, 553 N.Y.S.2d 364 (1<sup>st</sup> Dept. 1990). The case has not been widely cited, and current federal guidelines for drug tests result in fewer false positives from poppy seeds today, but poppy seeds can still result in lawsuits. See *Mort v. Lawrence County Children & Youth Services*, No. 2:10 cv 1438, 2011 WL 3862641(W.D. Pa., Aug. 31, 2011).

### **XIII. STATE ANTI-DISCRIMINATION STATUTES**

N.Y. Exec. L. § 296 (the Human Rights Law) prohibits certain discriminatory practices in New York. This statute may have extraterritorial application to employees in other jurisdictions if the alleged discriminatory act occurred in New York. See *Schuler v. PricewaterhouseCoopers, LLP*, 514 F.3d 1365 (D.C. Cir. 2008) (applying New York law). In a subsequent appeal reported at 595 F.3d 370, 378 (D.C. Cir. 2010), the court held that the plaintiffs stated a claim for age discrimination under the New York Human Rights Law; however, their claims were ultimately dismissed, 421 F. App'x. 1 (D.C. Cir. 2011). This statute also has extraterritorial application to acts committed outside the state against residents of this state if such act would be a discriminatory practice if committed in this state. See *Griffin v. Sirva, Inc.*, 29 N.Y.3d 174, 54 N.Y.S.3d 360, 76 N.E.3d 1063 (2017).

#### **A. Employers/ Employees Covered**

N.Y. Executive Law § 292(5) does not include any employer with fewer than four persons in his employ.

"Employee" does not include any individual employed by his or her parents, spouse or child, or in the domestic service of any person. N.Y. EXEC. L. § 292(6). However, N.Y. Exec. L. 296-b, as amended in 2019, protects domestic workers by making sexual harassment and harassment based on gender, race, religion, sexual orientation, gender identity or expression, or national origin an unfair discriminatory practice.

In 2014, the Legislature extended the protection of the Human Rights Law to "interns", defined as "a person who performs work for an employer for the purpose of training" under certain circumstances detailed in the statute. N.Y. EXEC. LAW § 296-c (McKinney). However, the statute expressly states that it does not create an employment relation between the employer and the intern for purposes of the Labor Law.

The definition of "employer" under some circumstances allows for individual liability of a supervisor or other employee of a corporate employer in a discrimination case. In *Patrowich v.*

*Chem. Bank*, 63 N.Y.2d 541, 473 N.E.2d 11, 483 N.Y.S.2d 659 (1984), the New York Court of Appeals used the “economic reality” test in deciding that such individual liability would not apply to a corporate officer because the officer had not been shown to have any ownership interest or power to do more than carry out personnel decisions made by others. *Id.* at 542, 543-44. In essence this “economic reality” test provides a threshold “below which, in the corporate scheme or hierarchy, an individual employee may not be held liable.” *Foley v. Mobil Chem. Co.*, 170 Misc. 2d 1, 4, 647 N.Y.S.2d 374 (N.Y. Sup. Ct. 1996).

However, in *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995), the federal court, although holding the defendant supervisors were free from liability under the *Patrowich* economic reality test, held that the supervisors could be liable under N.Y. Exec. L. § 296(6) as aiders and abettors of the alleged discrimination. *Tomka*, 66 F.3d at 1317. Because the supervisors participated in the alleged assault on the plaintiff, the court found them to be potentially liable as individuals. *Id.* See also *Feingold v. New York*, 366 F.3d 138 (2d Cir. 2004).

In *Griffin v. Sirva, Inc.*, 29 N.Y.3d 174 (2017), the New York Court of Appeals answered three certified questions from the Second Circuit, holding that (a) N.Y. EXEC. LAW § 296 (15), which prohibits discrimination in employment on the basis of a criminal conviction, limits liability to an aggrieved party's “employer”. *Griffin*, 29 N.Y.3d at 181, 54 N.Y.S.3d at 362, 76 N.E.3d at 1065, (b) courts should apply New York common law to determine who is an “employer,” with emphasis placed on the alleged employer's power “to order and control” the employee in his or her performance of work. *Id.* at 186, 54 N.Y.S.3d at 366, 76 N.E.3d at 1069, and (c) N.Y. EXEC. L. § 296 (6), which provides for aiding and abetting liability, also applies to out-of-state defendants. *Id.* at 188, 54 N.Y.S.3d at 367, 76 N.E.3d at 1070. On remand, the district court granted summary judgment for the defendants, holding that there could be no aiding and abetting liability because there was no primary violation. See *Godwin v. Sirva, Inc.*, 291 F. Supp. 3d 245 (E.D.N.Y. 2018).

## B. Types of Conduct Prohibited

In New York, it is unlawful for an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, *gender identity or expression*, military status, sex, disability, predisposing genetic characteristics, *familial status*, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment. See N.Y. Exec. Law § 296(1)(a). “Familial status” was added to the statute in January 2016. “Gender identity or expression” was added in January 2019, even though the term “gender” had previously been interpreted to include “gender identity”.

In New York City, with effect from May 20, 2019, it shall be an unlawful discriminatory practice “for an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, *sexual and reproductive health decisions*, sexual orientation, uniformed service or alienage or citizenship status of any person:

- (1) To represent that any employment or position is not available when in fact it is available;
- (2) To refuse to hire or employ or to bar or to discharge from employment such person; or
- (3) To discriminate against such person in compensation or in terms, conditions or privileges of employment.”

NYC ADMIN. CODE 8-107(1)(a).

The most recent protected category, “sexual and reproductive health decisions,” is defined as “any decision by the employee to receive services which are arranged for or offered or provided to individuals relating to the reproductive system and its functions.” N.Y.C. ADMIN. CODE § 8-102. Specific examples of such decisions identified in the amendments are fertility-related medical procedures; family planning services and counseling; access to all medically approved birth control drugs and supplies; emergency contraception; sterilization procedures; pregnancy testing; sexually transmitted disease testing and treatment; abortion procedures; and HIV testing and counseling.

Alienage (or citizenship status), which became a protected status in November 2017, is defined as “[t]he citizenship of any person, or the immigration status of any person who is not a citizen or national of the United States.” N.Y.C. ADMIN. CODE § 8-102.

Employment discrimination based on consumer credit history and salary history is also unlawful in New York City. See N.Y.C. ADMIN. CODE § 8-107 (24), (25).

Workplace harassment based on perceived sexual orientation states a claim under the NYS and NYC Human Rights Laws. See *Dingle v Bimbo Bakeries USA/Entenmann's*, 624 F. App’x 57, 58 (2d Cir. 2015).

The NYS and NYC Human Rights Laws require employers to make reasonable accommodation for pregnant employees. See N.Y. EXEC. LAW § 296(3)(a); N.Y.C. ADMIN. CODE § 8-107(22). Employers are also required to make reasonable efforts to provide lactation rooms to employees who request them for up to three years following child birth. See N.Y. LABOR L. § 206-c. Effective March 17, 2019, employers in NYC will be required to comply with additional requirements with regards to lactation rooms. See N.Y.C. ADMIN. CODE § 8-107(22)(c).

Alcohol dependency qualifies as a disability under the Human Rights Law; drug abuse does not. See *Kirk v. City of New York*, 47 A.D.3d 406, 848 N.Y.S.2d 169, 170 (1<sup>st</sup> Dep’t 2008); *Griffin v MTA New York City Tr. Auth.*, 127 AD3d 1083, 1084 (2d Dept 2015)(discharge of probationary subway conductor who tested positive for cocaine did not violate any statute or decisional law).

The law also prohibits retaliation against an employee who opposes an unlawful practice or participates in proceedings under the law. See *Thide v. N.Y. State Dep’t of Transp.*, 27 A.D.3d 452, 811 N.Y.S.2d 418 (2d Dep’t 2006)(describing elements of a prima facie case for disability discrimination).

### C. Administrative Requirements

No administrative pre-conditions or requirements are imposed upon an individual who has been discriminated against in violation of N.Y. Exec. L. § 296. Aggrieved persons—or the Attorney General or the State Division of Human Rights—may file a verified complaint in state Supreme Court. Individuals seeking a remedy from the New York State Division of Human Rights must file the grievance within one year. N.Y. EXEC. L. § 297(5) (2009).

### D. Remedies Available

The remedies available in the administrative forum are listed in N.Y. Exec. L. § 297(4)(c), and include injunctive relief and compensatory damages, but not punitive damages unless it is a housing discrimination action. See N.Y. EXEC. L. § 297(4)(c)(iv) (2009).

A private right of action is afforded an individual who has been discriminated against in violation of N.Y. Exec. L. § 296. N.Y. EXEC. L. § 297(9) (2009). No administrative pre-conditions or requirements are imposed upon such individual, and a suit in state court can be initiated within the requisite statute of limitations (three years), even though according to § 297(5), the statute of limitations is only one year for filing a claim with the New York State Division of Human Rights.

Persons suing in state court for an alleged violation of N.Y. Exec. L. § 296 may seek “damages and such other remedies as may be appropriate in that action.” N.Y. EXEC. L. § 297(9). Such damages may include hiring, promotion, reinstatement, back pay, *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 908-909 (2d Cir. 1997); front pay, *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir. 1992); and/or emotional distress, *Shea v. Icelandair*, 925 F. Supp. 1014 (S.D.N.Y. 1996). Neither attorneys’ fees nor punitive damages are available.

Punitive damages are available under the New York City Human Rights Law, N.Y.C. ADMIN. CODE § 8-107 (1)(a). In *Chauca v. Abraham*, 30 N.Y.3d 325, 67 N.Y.S.3d 85, 89 N.E.3d 475 (2017), the Court of Appeals held that the common-law standard as articulated in *Home Ins. Co. v American Home Prods. Corp.*, 75 N.Y.2d 196, 203-204, 550 N.E.2d 930, 551 N.Y.S.2d 481 (1990) determines if and to what extent punitive damages should be awarded.

## **XIV. STATE LEAVE LAWS**

### A. Jury / Witness Duty

Under the New York Judiciary Law, employers are obligated to provide leave to their employees for jury duty in state court. N.Y. JUD. L. §§ 519, 751 (2011). The statute provides that an employee who is summoned to serve as a juror in state court and who gives sufficient notice to his or her employer prior to serving “shall not, on account of absence from employment by reason of such jury service, be subject to discharge or penalty.” *Id.*

As for wages, “an employer who employs more than ten employees shall not withhold the first forty dollars of the daily wages of [jurors covered by the provision] during the first three

days of jury service.” N.Y. JUD. L. § 519 (2011). Otherwise, employers are not obligated to pay wages during absence for jury service.

The New York Penal Law similarly prohibits an employer from taking adverse employment action against an employee due to absences resulting from attendance as a witness at a criminal trial, although wages may be withheld while the employee is absent. N.Y. PENAL L. § 215.14 (2011).

#### B. Voting

The Election Leave Law requires employers to grant leave during working hours to a registered voter who does not have sufficient time outside his or her designated working hours to get to the assigned polling place, where such extra time is necessary to enable the employee to vote in an election. N.Y. ELEC. L. § 3-110.

As long as the polls are open for four consecutive hours before or after an employee’s shift, however, the employee is deemed to have sufficient time and no leave is required. When less than four hours is available, an employer is only required to give an employee the amount of time as is necessary to get to the polls prior to their closing. Any leave up to two hours must be provided without loss of pay. N.Y. ELEC. L. § 3-110 (1) and (2) (2011).

#### C. Family/Medical Leave

There is no separate state family and medical leave act in New York.

In New York City, Title 20, Chapter 8 of the N.Y.C. Administrative Code requires private-sector employers with 5 or more employees and one or more domestic workers are required to offer at least 40 hours of annual paid sick leave to each employee. Private-sector employers with fewer than 5 employees are required to offer at least 40 hours of unpaid sick leave per year to each employee. Sick leave is accrued at the rate of one hour of sick time for every 30 hours worked, up to an annual maximum of 40 hours. N.Y.C. Admin. Code § 20-913(a,b). This law, the Earned Sick Time Act, became effective on April 1, 2014.

#### D. Pregnancy/Maternity/Paternity Leave

New York law prohibits employers from forcing pregnant women to take leaves of absence if their pregnancies do not interfere with their ability to perform their duties. N.Y. EXEC. LAW § 296(1)(g). However, it also forbids the owners of factories or mercantile establishments from employing a woman within four weeks after giving birth unless she submits a written statement expressing her wish for earlier employment and the opinion of a medical professional that she is physically and mentally capable of discharging the duties of her employment. N.Y. LABOR LAW § 206-b.

New York law guarantees nursing mothers the freedom to express breast milk in the workplace for up to three years following the birth of the child. N.Y. LABOR LAW § 206-c.

Any policy providing for child care leave must be applied equally to adoptive parents. N.Y. LABOR LAW § 201-c (1). Any policy permitting accrued sick leave to be used in connection with child care must be applied equally to men and women. *Chavkin v. Santaella*, 81 A.D.2d 153, 439 N.Y.S.2d 654 (1st Dept. 1981).

E. Day of Rest Statutes

New York Labor Law §§ 161 and 162 guarantee employees one day of rest during the calendar week and meal breaks during the work day. There are some exceptions. Employers must keep a time book recording the hours worked each day by every employee. Labor Law § 161(4).

New York Executive Law § 296(10)(a) protects employees who observe the Sabbath or holy days in accordance with the requirements of their religion. Section 296(10)(b) requires a good faith effort to accommodate observance of Sabbath or holy days as well as reasonable travel time unless it will cause undue economic hardship.

F. Military Leave

1. Public Employers

Section 242 of the New York Military Law governs the rights of public officers and employees absent on military duty. When a public officer or employee (defined by § 242(1)(a)) is absent for military duty, it shall not constitute an interruption of continuous employment, and such employee shall not:

be subjected, directly or indirectly, to any loss or diminution of time service, increment, vacation or holiday privileges, or any other right or privilege . . . or be prejudiced . . . with reference to continuance in office or employment, reappointment to office, re-employment, reinstatement, transfer or promotion.

N.Y. MIL. L. § 242(4)(2011).

Further, every public officer or employee shall be paid his salary or other compensation not exceeding a total of 30 days or 22 working days in any one calendar year and not exceeding 30 days or 22 working days in any one continuous period of such absence. N.Y. MIL. L. § 242(5).

Reasonable regulations imposed on employees to coordinate military leave do not necessarily conflict with the Military Law in application, and if they do, the Military Law would control. *Bd. of Educ. v. Licata*, 42 N.Y.2d 815, 364 N.E.2d 1337, 396 N.Y.S.2d 644 (1977). In

*Licata*, the court held that the school board had imposed “reasonable regulations” to attempt to coordinate military leave for the convenience of the employer schools. Consequently, the board may have a cause of action if the defendant employee attempts to arrange his military schedule in a way inconvenient to the school and in violation of the regulation. *Id.* at 816. While the majority opinion held the board’s regulation did not conflict with N.Y. Mil. L. § 242, the dissent notably argued that the statute on its face allows for military leave, consented to or not, at any time, even without notice to the employer, leaving all scheduling decisions to the military. *Id.* at 817-818.

## 2. Private Employers

The New York Soldiers' and Sailors' Civil Relief Act governs re-employment in private industry. Upon application for re-employment, so long as the individual is still qualified to perform the duties of the position, the employer must restore the individual to the position or a position “of like seniority, status and pay, unless the employer’s circumstances have so changed as to make it impossible or unreasonable to do so,” and the employer may not discharge the employee without cause within one year after such restoration. N.Y. MIL. L. § 317 (1) and (4) (2011).

In *Warren v. IBM Corp.*, 358 F. Supp. 2d 301 (S.D.N.Y. 2005), the plaintiff alleged, *inter alia*, a violation of N.Y. Mil. L. § 317(4) in that he had been discharged because of his adherence to duty in the Army Reserves, without proper cause, after coming back to work at IBM following a training mission. The court denied a motion for summary judgment by IBM, stating that material issues of fact existed due to deposition testimony citing numerous complaints by superiors at IBM about the employee’s need to report for additional missions after 9/11. See also *Pfunk v. Cohere Communications*, – F.Supp.2d –, 2014 WL 2208012 (S.D.N.Y. 2014)(similar claim brought under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), 38 U.S.C. § 4311, which prohibits discrimination in employment against members of the uniformed services).

## 3. All employers

Employers with at least 20 employees shall allow an employee whose military spouse has been deployed to a combat zone up to ten days unpaid leave to be used only when such person’s spouse is also on leave. See N.Y. Labor Law § 202-i.

### G. Sick Leave

Under the New York State Labor Law, payment for time not actually worked is not required unless the employer has established a policy to grant such pay. Holidays, sick time and/or vacations fall under 'time not worked.' When an employer does decide to create a benefit policy, it is free to impose any conditions it chooses.

In New York City, the Earned Safe and Sick Time Act, N.Y.C. Admin. Code § 20-911 et seq., provides that employers of five or more employees who work more than 80 hours in a

calendar year in New York City are required to provide **PAID** sick leave. Employers of less than five employees are required to provide **UNPAID** sick leave.

#### H. Domestic Violence Leave

The New York State Human Rights Law (NYSHRL) makes victims of domestic violence a protected class and employers are prohibited from discriminating or retaliating against them based on their status as victims of domestic violence, sexual abuse or stalking.

A recent amendment to the N.Y.C. Earned Safe and Sick Time Act, N.Y.C. Admin. Code § 20-911 et seq., requires employers in New York City to allow employees to use their accrued sick leave to seek assistance or take other safety measures if the employee or a family member of the employee is a victim of any act or threat of domestic violence or unwanted sexual physical contact, stalking, or human trafficking.

#### I. Other Leave Laws

Beginning in 2018, an employer covered by the N.Y. Workers Compensation Law, must also provide family leave benefits to his or her employees under New York's Paid Family Leave Act. See N.Y. Workers' Comp. Law §§ 211, 212. As described by the State, "all eligible employees will be able to take time off, while still being paid a portion of their income, to bond with a new child, care for a family member or handle personal matters arising from an immediate family member being called to active duty in the Armed Forces of the United States." See [https://www.dfs.ny.gov/insurance/circletr/2017/cl2017\\_11.htm](https://www.dfs.ny.gov/insurance/circletr/2017/cl2017_11.htm). To implement this coverage, "every New York statutory Disability Benefits Law ("DBL") policy issued in accordance with Workers' Compensation Law Article 9 must include coverage for family leave benefits." *Id.*

### **XV. STATE WAGE AND HOUR LAWS**

Generally, the New York wage and hour laws do not expressly apply on an extraterritorial basis. Under New York law, it is a "settled rule of statutory interpretation, that unless expressly stated otherwise, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state enacting it" (citations omitted). *Rodriguez v. KGA Inc.*, 155 A.D.3d 452, 452, 64 N.Y.S.3d 11, 12 (1<sup>st</sup> Dept. 2017).

#### A. Current Minimum Wage in State

New York's wage and hour laws differentiate among:

- Large and small employers in New York City;
- the downstate counties of Nassau, Suffolk, and Westchester; and
- the rest of the state.

See N.Y. Labor Law § 652.

For employers in New York City which employ 11 or more people, the minimum hourly wage is \$15 (eff. 2019). For employers in New York City which employ ten or fewer people, the minimum hourly wage is \$13.50, rising to \$15 in 2020.

For employers in Nassau, Suffolk, and Westchester Counties, the minimum wage is \$12 per hour (rising by a dollar per year until 2022 when it should be \$15).

For employers in the rest of the state, the minimum hourly wage is \$11.10, rising by \$0.70 per year until 2021, when the minimum wage will be determined every year by the budget director and the commissioner of labor but will not exceed \$15.

These rates will apply unless federal law (29 U.S.C. § 206) requires a higher wage. The current federal minimum hourly wage is \$7.25 and has not increased since 2009.

The minimum hourly wage for a food service worker receiving tips is two-thirds of the above rates (min. \$7.50), provided that the total compensation equals or exceeds the minimum wage otherwise in effect. N.Y. Lab. Law § 652(4) (McKinney).

The Court of Appeals held in *Barenboim v. Starbucks Corp.*, 21 N.Y.3d 460, 995 N.E.2d 153, 972 N.Y.S.2d 191 (2013), that employees with limited supervisory responsibilities may participate in employer-mandated tip pools despite the statutory prohibition on employers sharing gratuities, and that the statute (Labor Law § 196-d) did not require inclusion of all employees not statutorily barred from participating in tip pools, although there was some limit to an employer's ability to exclude employees.

#### B. Deductions from Pay

New York Labor Law § 193 governs deductions from an employee's wages. The statute currently provides in part that:

1. No employer shall make any deduction from the wages of an employee, except deductions which:
  - a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency [...]; or
  - b. are expressly authorized in writing by the employee and are for the benefit of the employee, provided that such authorization is voluntary and only given following receipt by the employee of written notice of all terms and conditions of the payment and/or its benefits and the details of the manner in which deductions will be made [...]

N.Y. Lab. Law § 193 (McKinney)

Employee authorizations may also be provided to the employer under the terms of a collective bargaining agreement, and there is a long list of deductions permitted under those circumstances. See N.Y. Lab. Law § 193(1)(b)(i-xiv).

The Department of Labor had previously interpreted the expression “similar payments for the benefit of the employee” in a restrictive fashion.

C. Overtime rules

The New York State Department of Labor requires employers to pay their employees an overtime rate for any hours worked over 40 hours a week. Overtime is calculated as one and a half times the employee’s “regular rate,” which is what the employee makes per hour. 12 N.Y.C.R.R. § 141-1.4, 142-2.16.

New York Labor Law § 220 provides that eight hours constitute a legal work day. This statute also states that laborers, workmen, and mechanics may not work more than eight hours in one day or more than five days a week on public works projects, except in cases of extreme emergency, unless approval is received from the Commissioner of Labor. N.Y. Labor L. § 220(2).

D. Time for payment upon termination

Article 6 of the New York Labor Law requires prompt payment to those employed. However, the exact frequency of payment requirements vary with the type of job performed. For example, Labor Law § 191(1) requires manual workers to be paid weekly, while clerical workers cannot be paid less frequently than semi-monthly. Commissioned salesmen, on the other hand, must be paid at least monthly.

Labor Law § 191(c) requires the terms of employment of a commission salesperson to be reduced to writing and kept on file by the employer for at least three years. Failure to produce such written terms creates a presumption that the salesperson’s evidence is correct.

Terminated employees shall be paid no later than the regular pay day for the pay period during which the termination occurred. If requested by the employee, such wages shall be paid by mail. N.Y. Labor Law § 191. A terminated sales representative must be paid any commissions no later than five business days after they become due. N.Y. Labor Law § 191-c(1).

E. Breaks and Meal Periods

N.Y. Labor Law § 162 requires that factory workers receive 60 minutes for the noon day meal. Workers in mercantile establishments and all others who work a shift of at least six hours which extends over the noon day meal period must receive at least 30 minutes. Every person who works a shift extending from 11:00 A.M. to 7:00 P.M. or longer must receive an additional 20 minutes for a meal between 5:00 P.M. and 7:00 P.M.

F. Employee Scheduling Laws

The New York State Department of Labor has been studying the issue of predictive scheduling regulations, and issued proposed regulations in December 2018. However, based on the comments received, it decided to begin the process over in consultation with the Legislature.

New York City enacted a Fair Workweek Law in 2017 which covers fast food and retail workers. N.Y.C. ADMIN. CODE § 20-1201 *et seq.*

Under the law, employers are prohibited from scheduling a retail employee for any on-call hours (that is, requiring an employee to be available to work, contact the employer, or wait to be contacted by the employer) before determining whether the employee must report to work. The law also prohibits employers from requiring fast food employees to work back-to-back shifts, when the first shift closes the restaurant and the second shift opens it the next day, with fewer than 11 hours in between (which the law coins as “clopening” shifts), unless the employee requests to work such shifts or consents in writing. If an employer schedules such back-to-back shifts, it must pay the employee an additional \$100. The law also requires fast food employers to offer work shifts to current employees before hiring additional employees.

The law requires fast food employers to provide employees with an estimate of their work schedule upon hire and regular work schedules outlining all shifts with 14 days’ advanced notice for a period of at least 7 days, and include all regular and on-call shifts that the employee will be required to work or be available to work. It also requires that an employer pay certain premiums to the employee when making a scheduling change.

## **XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES**

### **A. Smoking in Workplace**

N.Y. Pub. Health L. § 1399-o bans smoking in places of employment. Counties and municipalities may promulgate regulations that are consistent with or more restrictive than state law. N.Y. PUB. HEALTH L. § 1399-r(3).

### **B. Health Benefit Mandates for Employers**

N.Y. Insurance Law § 3221(m) permits terminated employees to continue their health insurance coverage if they are not otherwise eligible for continuation of coverage under COBRA, which includes employees discharged for gross misconduct.

Article 9 of the N.Y. Workers Compensation Law (also known as the Disability Benefits Law) provides partial income replacement to employees who are temporarily disabled from an injury or disease which is not work-related. See N.Y. WORKERS COMP. L. §§ 201(9) and 204. Employees become eligible for coverage after four weeks of work. N.Y. WORKERS COMP. L. § 203.

### **C. Immigration Laws**

The New York State Human Rights Law does not specifically prohibit discrimination based on immigration status; however, discrimination based on national origin is unlawful. N.Y. Exec. L. § 296.

In New York City, discrimination based on alienage or citizenship status is generally unlawful; however, it is not unlawful “when such discrimination is required or when such preference is expressly permitted by any law or regulation of the United States, the state of New York or the city, and when such law or regulation does not provide that state or local law may be more protective of aliens...” NYC ADMIN. CODE 8-107 (14).

The New York Court of Appeals has found nothing in federal legislation indicating that Congress meant to affect state regulation of occupational health and safety, *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 357, 845 N.E.2d 1246, 1256 (2006). Accordingly, undocumented workers may not be denied recovery for lost wages solely on that basis. *Id.*

#### D. Right to Work Laws

New York does not have a so-called “right-to-work” law. Article I, § 17 of the New York Constitution provides that “[e]mployees shall have the right to organize and to bargain collectively through representatives of their own choosing.”

#### E. Lawful Off-duty Conduct (including lawful marijuana use)

As noted above, N.Y. Labor Law § 201-d (“the Lawful Activities Act”) prohibits an employer from refusing to hire, employ, license or discharge an employee because of his or her (2) legal use of consumable products prior to and after the conclusion of the employee’s working hours and off the employer’s premises; and (3) legal recreational activities outside work hours and off the employer’s premises, among other things. See also Section II.B.2 above, “Exercising a Legal Right”.

A blanket refusal to hire tobacco smokers would appear to be unlawful, although there are no reported cases. However, in *Fagan v. Axelrod*, 146 Misc. 2d 286, 550 N.Y.S.2d 552 (N.Y. Sup. Ct. 1990), the court applied a rational basis analysis in dismissing a constitutional challenge to the Clean Indoor Air Act, N.Y. PUB. HEALTH L., Article 13-E, noting that smokers are not a “suspect class” and that smoking is not a “fundamental right” in the constitutional sense.

The use of medical marihuana by a “certified patient” is deemed a “disability” under the state Human Rights Law, which prohibits discrimination against employees.<sup>1</sup> N.Y. PUB. HEALTH L. § 3369(2); N.Y. Exec. L. § 296. However, the statute expressly states that it “shall not bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance.” N.Y. PUB. HEALTH L. § 3369(2).

A bill has been introduced in the New York Legislature to decriminalize the recreational use of marihuana, but possession of marihuana remains unlawful in New York, even if possession of small amounts is only a violation. See N.Y. PENAL L. § 221.00 et seq. Smoking

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<sup>1</sup> “Marihuana” is the spelling adopted by the Legislature.

marihuana outside of working hours in a state where that is legal might well be protected “legal use of consumable products” under N.Y. LABOR L. § 201-d, but there are no reported cases.

Blogging is probably a protected “recreational activity” but only if it takes place outside work hours and off the employer’s premises and does not raise a “material conflict of interest” with the employer’s business. See *Cavanaugh v. Doherty*, 243 A.D.2d 92, 100, 675 N.Y.S.2d 143, 149 (3d Dept. 1998)(state employee who alleged she was terminated as a result of political discussion with state official during recreational activities outside of her workplace stated cause of action for violation of Labor Law § 201–d).

Romancing or cohabiting with a co-worker has not been considered a protected recreational activity. See *McCavitt v. Swiss Reinsurance America Corp.*, 237 F.3d 166 (2d Cir. 2001)(citing cases). Some doubt has been expressed whether New York’s highest court would agree with this decision today. *Id.* at 169 (concurring opinion). See also *Matusick v. Erie County Water Auth.*, 757 F.3d 31, 57-59 (2d Cir. 2014)(discussing right of intimate association under federal constitutional law).

#### F. Gender/Transgender Expression

N.Y. Exec. Law § 296 (the New York State Human Rights Law) prohibits employment discrimination based on sex and sexual orientation, but does not expressly cover gender identity and expression. A few New York courts have held that a transgendered person can state a claim under this statute. See *Wilson v Phoenix House*, 42 Misc.3d 677, 978 N.Y.S.2d 748 (Sup Ct. 2013)(finding Gender Identity Disorder to be a disability under NYSHRL); *Buffong v. Castle on Hudson*, 12 Misc. 3d 1193(A), 824 N.Y.S.2d 752 (Sup. Ct. 2005)(worker alleged that he suffered harassment after his coworkers found he had been identified as a woman in his high school yearbook); *Rentos v Oce-Off. Sys.*, 72 Fair Empl Prac Cas (BNA) 1717, 1996 WL 737215 (S.D.N.Y. 1996) (denying motion to dismiss due to ambiguity as to plaintiff’s protected status). See 13A N.Y. Prac., Employment Law in New York § 3:3 (2d ed.).

The New York City Human Rights Law (NYCHRL) prohibits gender-based discrimination in employment, and the definition of “gender” specifically covers transgendered persons. See N.Y.C. Admin Code § 8-102:

The term "gender" includes actual or perceived sex, gender identity and gender expression, including a person's actual or perceived gender-related self-image, appearance, behavior, expression or other gender-related characteristic, regardless of the sex assigned to that person at birth.

NYC ADMIN. CODE 8-102

Employment discrimination based on “gender identity or expression” was added to the list of prohibited activities in the NYCHRL in January 2019, even though the term “gender” had previously been interpreted to include “gender identity”.

### G. Other key state statutes

Under N.Y. CIV. RIGHTS LAW § 79-i, no employee may be discriminated against for refusing to participate in an abortion as long as he or she submits reasons for refusing in writing to the employer. Violation of this section is a misdemeanor.

N.Y. LABOR LAW § 201-g (eff. Oct. 9, 2018) requires every employer to establish a training program for employees to prevent sexual harassment. The Department of Labor and Division of Human Rights have developed a model training program. Employers who do not use it must ensure that their training meets or exceeds the Department's minimum standards. See also N.Y.C. ADMIN. CODE § 8-107(30)[eff. April 1, 2019], which applies to all employers of more than fifteen employees who have employees in New York City.

N.Y. Labor Law § 735 prohibits employers from requiring, requesting, suggesting or knowingly permitting an employee to submit to a "psychological stress evaluator" examination. Note that this is unlike the polygraph examinations, which are not prohibited under New York law, but may be under the Federal Employer Polygraph Protection Act.

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