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# NEW YORK

## I. AT-WILL EMPLOYMENT

### A. Statute

The State of New York has no specific statute addressing "at-will" employment.

In New York City, however, legislation enacted in January 2021, entitled "Wrongful discharge of fast food employees," protects fast food workers from being fired without "just cause" or for a "bona fide economic reason." The legislation was added to the 2017 Fair Workweek Law, N.Y.C. ADMIN. CODE § 20-1201 *et seq,* which required predictive scheduling (see below under Wage and Hour Laws). It applies to chains and franchises operating 30 or more fast food establishments nationally. It does not cover probationary or salaried employees. It took effect on July 4, 2021.

Just cause is defined as "the fast food employee's failure to satisfactorily perform job duties or misconduct that is demonstrably and materially harmful to the fast food employer's legitimate business interests." N.Y.C. ADMIN. CODE § 20-1271. The statute explicitly requires employers to use progressive discipline before discharging a fast food employee for just cause, unless the discharge is for an "egregious failure by the employee to perform their duties" or for "egregious misconduct."

"Bona fide economic reason" is defined as "the full or partial closing of operations or technological or organizational changes to the business in response to the reduction in volume of production, sales, or profit." Any layoff done for a bona fide economic reason must be done in reverse order of seniority in the establishment where the discharge is to take place.

Since 2022, utility safety employers must also give their employees predictable work schedules. A utility safety employer is one who employs workers who locate and mark underground facilities or inspect gas pipe fusions and joints. The term does not include the local, state, or federal government.

Because the new law is appended to the Fair Workweek Law, it includes the existing enforcement mechanisms, including a private right of action to sue in court. Remedies include reinstatement and attorney's fees. In addition, any individual or organization (including a union) can file a complaint with the NYC Dept of Consumer and Workplace Protection (DCWP) to investigate the employer, or DCWP can open an investigation on its own initiative. If DCWP finds merit to the complaint, it can proceed with the case before an administrative law judge (ALJ) with the NYC Office of Administrative Trials and Hearings (OATH). In addition, New York City's corporation counsel can seek injunctive relief in court to stop an employer from violating the law, or, where the corporation counsel has reasonable cause to believe that an employer

is engaging in a pattern or practice of violations, it can proceed in court to seek relief for the pattern and practice violation.

B. Case Law

The common law of New York 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 that 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 non-discretionary bonus to at-will employee 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 *Estronza v. RJF Sec. & Investigations*, 2014 WL 5877942 (EDNY); *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)("where a sufficiently unambiguous disclaimer, conspicuously placed in the employee handbook such that the employee reasonably could be expected to read it is at issue, the totality of the circumstances inquiry is unnecessary the implied contract claim may be dismissed as a matter of law"); *Senal v Lynch*, 217 A.D.3d 466, 468, 190 NYS3d 352 (1st Dept 2023)(affirming dismissal of breach of contract claim due to express disclaimer).

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 over $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, including cannabis, 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; or refusal to (i) attend an employer-sponsored meeting with the employer or its agent, representative or designee, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters; or (ii) listen to speech or view communications, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters.

Only those political activities specifically referred to in the statute, such as running for office, campaigning, or participating in fundraising, are protected. See Liu v. Morgan Stanley, 2013 WL 5740205 (Sup. Ct., N.Y. County, Oct, 15, 2013).

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). But see *Truitt v. Salisbury Bank & Trust Co.*, 52 F. 4th 80 (2d Cir. 2022)(raising questions whether plaintiff suffered an adverse employment action by being forced to choose between running for office and his job as a bank officer).

3. Refusing to Violate the Law

In *Wieder v. Skala*, 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. *Id*. at 263-64. 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.

The term "retaliatory action" was amended in 2022 to include contacting or threatening to contact immigration authorities concerning an employee's suspected citizenship or immigration status or that of an employee's family or household member.

In *Senal v Lynch*, 217 AD3d 466, 190 NYS3d 352 [1st Dept 2023], the court held that the plaintiff adequately stated a claim under the Whistleblower Law by alleging that he was terminated for reporting that he believed that his supervisor deliberately injected a fatal overdose of morphine to an elderly retired priest residing at defendants' residence to hasten the priest's death. The complaint sufficiently identified the particular activities, policies or practices in which the employer allegedly engaged and provided the employer with notice of the alleged complained-of conduct.

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.

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 (1st Dep't 2008).

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). Section 740(4) provides

that an employee who has been the subject of a retaliatory action in violation of this section may institute a civil action in a court of competent jurisdiction for relief within two years after the alleged retaliatory action was taken.

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).

Section 740(7) provides that nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any other law or regulation or under any collective bargaining agreement or employment contract. 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).

Section 740(7) also 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."

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*).

## 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. See also *DeVivo Assoc., Inc v Nationwide Mut. Ins. Co.*, 797 Fed Appx 661 [2d Cir 2020] ("Under New York law, courts will enforce a contract provision that conditions receipt of postemployment benefits upon compliance with a restrictive covenant without regard to reasonableness unless the employee was terminated involuntarily and without cause").

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); *Hondares v TSS-Seedman's Stores, Inc.*, 151 AD2d 411, 543 NYS2d 442 [1st Dept 1989](employee's reassignment to another position and assignment of his duties to another constituted breach of employment contract).

More recently, it was held that to state a claim for constructive discharge, plaintiff must allege facts showing that defendant "deliberately created working conditions so intolerable, difficult or unpleasant that

a reasonable person would have felt compelled to resign" (*Mascola v. City Univ. of N.Y.,* 14 A.D.3d 409, 410, 787 N.Y.S.2d 655 [2005] ). "Deliberate" is more than "a lack of concern"; "something beyond mere negligence or ineffectiveness." *Whidbee v. Garzarelli Food Specialties,* 223 F.3d 62, 74 [2d Cir.2000]; *Polidori v Societe Generale Groupe*, 39 AD3d 404, 405 [1st Dept 2007].

In *Pugliese v. Actin Biomed LLC*, 106 A.D.3d 591, 967 N.Y.S.2d 16 (1st Dept. 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. See also *Hamburg v New York Univ. School of Medicine*, 155 AD3d 66, 85 [1st Dept 2017]("plaintiff's proposed interpretation of the Handbook runs afoul of the Court of Appeals' admonition to avoid manufacturing artificial ambiguities by isolating a particular clause in a vacuum while ignoring the context and structure of the contract as a whole "

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).

New York law acknowledges the "well settled proposition that the question of arbitrability is an issue generally for judicial determination," but at the same time recognizes an "important legal and practical exception" when parties "evince[ ] a 'clear and unmistakable' agreement to arbitrate arbitrability." *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 45–46 (N.Y. 1997). Courts have recognized the inclusion of a "delegation clause" that specifically states that the arbitrator will decide questions about validity and scope of the arbitration clause as a clear and unmistakable intent of the parties to arbitrate arbitrability issues. See *Kai Peng v Uber Tech., Inc.*, 237 F Supp 3d 36, 53 [EDNY 2017] (collecting cases). Another way in which parties can express clear and unmistakable intent to delegate arbitrability to the arbitrators is to incorporate procedural rules that authorize the arbitrator to decide arbitrability. See *DDK Hotels, LLC v. Williams-Sonoma, Inc.*, 6 F.4th 308, 318 (2d Cir. 2021) ("Where the parties explicitly incorporate procedural rules that empower an arbitrator to decide issues of arbitrability, that incorporation may serve as clear and unmistakable evidence of the parties' intent to delegate arbitrability to an arbitrator").

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 (1st 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). *Reddington v Staten Is. Univ. Hosp.*, 511 F3d 126, 137-38 [2d Cir 2007], *certified question accepted*, 9 NY3d 1020 [2008], *and certified question answered*, 11 NY3d 80 [2008] (promising that plaintiff's old job would "always" be available is akin to an offer of "permanent" employment, which New York law does not recognize to specify a definite period.

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, v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 300-02, 448 N.E.2d 86, 461 N.Y.S.2d 232 (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 (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, it 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. Boeheim*, 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). An email sent by defendant to New Yorker magazine subscribers in April 2017 containing a hyperlink to an article published in the magazine in July 2010 did not constitute republication of the article. See *Biro v. Condé Nast*, 171 A.D.3d 463, 95 N.Y.S.3d 799 (1st Dept. 2019).

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." *Liberman 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. *Liberman,* 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 (1st Dept. 2015)(statement that female plaintiff held parties for "older guys looking for action" did not state a cause of action for libel). See also *Shuman v New York Mag.*, 211 AD3d 558, 558 [1st Dept 2022], *lv to appeal denied*, 40 NY3d 974 [2023](articles discussing plaintiffs' sexual relationships and other private conduct did so in connection with matters of significant public concern and were not defamatory).

Statements falsely imputing homosexuality are no longer recognized as defamatory per se. See *Laguerre v. Maurice*, 192 A.D.3d 44, 138 N.Y.S.3d 123 (2d Dept. 2020)(overruling earlier decisions); *Yonaty v. Mincolla*, 97 A.D.3d 141, 144, 945 N.Y.S.2d 774, 777 (3d Dept. 2012)(deeming earlier decisions from other departments to be contrary to *Lawrence v. Texas*, 539 U.S. 558); *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 (1st 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 include: 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), *abrogated on other grounds*, *Laguerre v. Maurice*, 192 A.D.3d 44, 138 N.Y.S.3d 123 (2d Dept. 2020), 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. See also *Goldfarb v Channel One Russia,* 18 CIV. 8128 (JPC), 2023 WL 2586142, at *6 [SDNY Mar. 21, 2023](television programs deemed to be governed by law of libel rather than slander).

2. Slander

*See* "General Rule" discussed above.

B. References

A plaintiff's solicitation of or consent to a publication makes the statement privileged and thus the defense of consent may be available. For example, where the plaintiff had individuals impersonate landlords and call the defendant for references, the calls were held to be solicitations and the defendant's statements were defensible as consented to publications. *LeBreton v. Weiss*, 256 A.D.2d 47, 680 N.Y.S.2d 532 (1st Dep't 1998).

Statements made to a committee investigating a judicial candidate were held to be protected by a qualified privilege in *Toker v. Pollak*, 44 N.Y.2d 211, 219, 376 N.E.2d 163, 405 N.Y.S.2d 1 (1978). See also *Colantonio v Mercy Med. Ctr.*, 135 A.D.3d 686, 691, 24 N.Y.S.3d 653 [2d Dept 2016]("Generally, communications 'protected by a qualified privilege are not actionable unless a plaintiff can demonstrate that the declarant made the statement with malice'").

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 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*, 247 A.D.2d 250, 633 NYS2d 106 (1st Dept. 1995).

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 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 Court 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). 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) (administrative findings that established the truth of the remarks alleged to be slanderous held to constitute a complete defense to defamation claim); *Olney v Town of Barrington*, 180 AD3d 1364, 118 NYS2d 898 [4th Dept 2020] [truth constitutes a complete defense to a defamation claim].

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.); In New York, this rule applies even to statements made by one employee to another. *Albert v Loksen*, 239 F3d 256, 269 [2d Cir 2001]; *Pirre v Print. Developments, Inc.*, 468 F Supp 1028, 1041 [SDNY 1979], *affd*, 614 F2d 1290 [2d Cir 1979]. Such statements could, however, be protected as statements of opinion. *Albert v Loksen*, *supra*, 239 F3d at 268. 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); *Richards v Sec. Resources*, 187 AD3d 452, 133 NYS3d 12 [1st Dept 2020](plaintiff failed to allege one allegedly defamatory statement was published to a third-party).

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).

New York courts have rejected the concept of defamation by compelled self-publication, (i.e., whether a discharged employee may sue for defamation even if an employer made the defamatory statement to no one other than the employee if the employer knows, or should know, of circumstances where the employee is later put in a position in which he or she has no reasonable means of avoiding publication of the statement and must repeat such statement; usually when seeking new employment); *Wieder v Chem. Bank*, 202 AD2d 168, 170 [1st Dept 1994]; *Phillip v. Sterling Home Care, Inc.*, 103 A.D.3d 786, 787, 959 N.Y.S.2d 546, 548 (2d Dept. 2013)(required disclosures on applications to potential employers were not actionable); *Weintraub v Phillips, Nizer, Benjamin, Krim, & Ballon*, 172 AD2d 254, 255 [1st Dept 1991].

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), on subsequent appeal, 909 F.3d 519 (2d Cir. 2018). See also *Tetens v Sokolsky*, 54 N.Y.S.2d 240, 241 [Sup Ct, Queens County, 1945](Ughetta, J.)("One who publishes an article invites criticism and the free expression by others of his work and of his opinions, and he should not be thin-skinned if the criticism so invited is not gentle").

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, 688 N.Y.S.2d 31 (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 *Steinhilber 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. *Steinhilber*, 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." *Steinhilber*, 68 N.Y.2d at 289.

In *Davis v Boeheim*, 24 N.Y.3d 262, 274, 22 N.E.3d 999, 998 N.Y.S.2d 131 [2014], the Court of Appeals reversed an order dismissing a complaint for defamation, holding that on a pre-answer motion to dismiss and on the record before the court, it could not state as a matter of law that the statements were pure opinion. See also *Davis v Brown*, 211 A.D.3d 524, 525, 181 N.Y.S.3d 34 [1st Dept 2022](reinstating claim based on defamation by implication).

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 expression of opinion and not libelous per se).

6. Actual Harm to Reputation Recognized

In *Nolan v. State*, 158 A.D.3d 186, 69 N.Y.S.3d 277 (1st Dept. 2018), the court held that the plaintiff would have a claim even though she could not prove harm to her reputation because mental anguish was an alternative to reputational injury in establishing damages in a defamation case, citing *Hogan v. Herald Co.,* 58 N.Y.2d 630, 458 N.Y.S.2d 538, 444 N.E.2d 1002 (1982).

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 (1st Dept. 1976).

New York's blacklisting statute, Executive Law § 296(13), states:

> 13. 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, citizenship or immigration status, sexual orientation, gender identity or expression, military status, sex, status as a victim of domestic violence, disability, or familial status, or 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 wilfully to do any act or refrain from doing any act which enables any such person to take such action.
>
> This subdivision shall not apply to:
> (a) Boycotts connected with labor disputes; or
> (b) Boycotts to protest unlawful discriminatory practices.

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) (2021).

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 (1st 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 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*, *supra*, 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*, *supra*, 27 N.Y.3d at 57, 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); *Greene v Esplanade Venture Partnership,* 36 NY3d 513, 168 NE3d 827, 144 NYS3d 654 (2021)(extending "zone of danger" rule to include grandmother). 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. *Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111, 97 N.E.3d 389, 73 N.Y.S.3d 780 (2018); *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); *Porco v Lifetime Entertainment Services, LLC*, 195 AD3d 1351, 150 NYS3d 380 [3d Dept 2021], *appeal dismissed,* 37 NY3d 1084 [2021], and *lv to appeal denied,* 38 NY3d 912 [2022].

New York courts have limited the right to privacy to the protection afforded by Civil Rights Law §§ 50 and 51. See, e.g., *Lohan*, *supra*; *Porco, supra*, *Electra v 59 Murray Enterprises, Inc.*, 987 F.3d 233, 248 [2d Cir 2021], *cert denied,* 142 S Ct 563 [2021](noting that the statutes provide for a limited statutory right of privacy); *Souza v Exotic Is. Enterprises, Inc.*, 68 F.4th 99, 121 [2d Cir 2023](noting that to the extent that New York law recognizes a right of publicity, that right is "encompassed" under the state's statutory right of privacy; it has no other source).

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. Casablancas*, 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 519, 530 (EDNY 2013) (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, citizenship or immigration status, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence, are unlawful. N.Y. EXEC. L. § 296(1)(d) (eff. 12/23/2022).

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 liability for reporting suspicious behavior. N.Y. PENAL L. § 490.01; *Tokko v. Consol. Edison Co.*, 62 A.D.3d 533 (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). Effective Nov. 16, 2024, felony convictions over eight years old, and misdemeanor convictions over three years old, will be automatically sealed if the defendant meets the conditions in the statute. N.Y. Crim. Pro. L. § 160.57.

Job applicants may not be denied employment because 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); *Levy v New York State Educ. Dept.*, 172 AD3d 1674, 1676 [3d Dept 2019](determination denying petitioner's application for license as psychoanalyst was supported by substantial evidence); *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 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. "[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 Coss*, 189 AD3d 1759, 1762 [3d Dept 2020](search of defendant's vehicle by an Airborne Auto employee – a private individual who was not acting at the direction of police – did not violate his constitutional rights); *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 , 974 N.Y.S.2d 896 (2013); *Matter of Caruso v. Ward,* 72 N.Y.2d 432, 534 N.Y.S.2d 142, 530 N.E.2d 850 (1988).

In *Cunningham*, 21 N.Y.3d 515, 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.

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.

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).

A rule requiring the installation of electronic logging devices (ELD) in commercial motor vehicles with recorded data made available for inspection by law enforcement was held not to violate the plaintiff drivers' right to due process and proscription against unreasonable searches and seizures guaranteed by

the New York constitution. *Owner Operator Ind. Drivers Assn., Inc. v New York State Dept. of Transportation*, 40 NY3d 55, 214 N.E.3d 482, 193 N.Y.S.3d 714 [2023].

3. Social Media

New York has not enacted any social media privacy legislation. A bill (S6418) intended to make it unlawful for a minor to hold or open a social media account without parental consent and access is under consideration in the legislature.

The Court of Appeals held in *Forman v. Henkin*, 30 N.Y.3d 656, 70 N.Y.S.3d 157, 93 N.E.3d 882 (2018), 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. But see *Sereda v A.J. Richard & Sons, Inc.*, 219 AD3d 1458, 1459, 196 NYS2d 174 [2d Dept 2023](denying motion seeking authorizations to obtain records from the plaintiff's Facebook and other social media accounts beginning two years before the date of the accident, authorizations to obtain records from the E–Z Pass account of the plaintiff's wife from the date of the accident, a copy of the plaintiff's passport, and copies of all photographs taken by the plaintiff with his cell phone since the date of the accident).

In *LaPorta v. Alacra, Inc.*, 142 A.D.3d 851, 38 N.Y.S 3d 20 (1st 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 (1st 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 (3d 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).

In *JLM Couture, Inc. v Gutman*, – F.4th –, 2024 WL 172609 [2d Cir., Jan. 17, 2024], the Court held that the plaintiff company had to meet more stringent standard to obtain preliminary mandatory injunctive relief compelling designer/former employee to turn over credentials to social media accounts over which they both previously had access and give company exclusive control over them.

4. Taping of Employees

N.Y. Labor Law § 203-c (2006) provides that "[n]o employer may cause a video recording to be made of an employee in a restroom, locker room, or room designated by an employer for employees to change their clothes, unless authorized by court order." The statute contemplates a private right of action. See, e.g., *Davis v Duane Reade, Inc.*, 120 AD3d 1386, 1387 [2d Dept 2014](separate and independent claim of illegal placement of video cameras in employee restrooms not barred by Labor Law § 740(7) election of remedies provision); *Conroy v Inc. Vil. of Freeport*, 43 Misc 3d 608, 611 [Sup Ct 2014](video surveillance system in lifeguards' 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 (2008). "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). See also *McFarlane v Altice USA, Inc.*, 524 F Supp 3d 264, 282 [SDNY 2021].

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). This statute only imposes a duty of confidentiality on *third parties* to whom health care providers make otherwise *authorized* disclosures of patient information. *Makinen v City of New York*, 53 F Supp 3d 676, 703 [SDNY 2014].

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

N.Y. Labor Law § 194-a, which became effective in 2020, provides, *inter alia*, that no employer shall rely on the wage or salary history of an applicant in determining whether to offer employment to such individual or in determining the wages or salary for such individual. An applicant or current or former employee aggrieved by a violation of this section may bring a civil action for compensation for any damages

sustained as a result of such violation on behalf of such applicant, employee, or other persons similarly situated in any court of competent jurisdiction. The court may award injunctive relief as well as reasonable attorneys' fees to a plaintiff who prevails in a civil action brought under this paragraph.

In New York City, it is 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/Supervision/Retention

New York courts have long recognized the tort of negligent hiring and retention. S*ee 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.

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).

B. Interplay with Workers Compensation Bar

A worker injured by a co-employee must establish the elements of an intentional tort by his employer 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).

C. Firearms in the Workplace

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

New York law concerning firearms is in flux as of this writing, because its licensing laws were declared unconstitutional by the U.S. Supreme Court. See *New York State Rifle & Pistol Assn., Inc. v Bruen*, 597 US 1, 71 [2022]; *Antonyuk v Chiumento*, 89 F.4th 271, (2d Cir. 2023)(upholding challenges to certain provisions of New York's Concealed Carry Improvement Act ("CCIA"), primarily on Second Amendment grounds).

New York law, pre-*Bruen*, generally prohibited the possession of "firearms" without a license, see Penal Law § 400.00, and very few people were licensed to carry firearms outside their home or place of business. Full-carry licenses would only be issued if the applicant showed "proper cause" which was 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*, 569 U.S. 918 (2013). However, the U.S. Supreme Court held in *Bruen*, 597 US 1, 142 S.Ct 2111 [2022] that New York's "proper-cause" requirement violates the Fourteenth Amendment of the U.S. Constitution because it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms. *Bruen, supra,* 597 US at 71, abrogating *Kachalsky, supra*.

Although the failure to demonstrate "proper cause" may no longer serve as an appropriate ground for the denial of a handgun license, see *Matter of Vicari v. Shea,* 215 A.D.3d 510, 186 N.Y.S.3d 207 [1st Dept. 2023), licenses are still required and may be rationally denied. See *Ward v New York Police Dept. Headquarters License Div.*, 220 AD3d 456, 197 N.Y.S.3d 44 [1st Dept 2023].

The statute hurriedly enacted in the wake of *Bruen*, the Concealed Carry Improvement Act ("CCIA"), Penal L. § 265.01-d(1) (2023), effectively prohibits entrance with a firearm onto another person's private property – whether that property is generally open to the public, like a gas station or grocery store, or is generally closed to the public, like a personal residence – unless the owner or lessee of the property provides affirmative, express consent to armed entry. See *Antonyuk v Chiumento*, *supra*, 89 F.4th at 290-91.

The CCIA makes it a crime to carry a firearm in a number of "sensitive locations," even for individuals with concealed-carry licenses. N.Y. Penal L. § 265.01-e(1). *Antonyuk, supra*. A gun may be left unattended in a vehicle only if it is unloaded and stored in an appropriate safe storage depository out of sight. Glove compartments, locked or not, are not considered appropriate safe storage depositories. [PL § 265.45(2)]

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 (1st 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).

The prohibition on possession of a "gravity knife" which can be opened with one hand and locks into place was repealed in 2019; however, the Legislature added "undetectable knife" to the list of weapons a person is not permitted to possess. See N.Y. PENAL LAW §§ 265.00, 265.05. Such knives are defined as "any knife or other instrument, which does not utilize materials that are detectable by a metal detector or magnetometer when set at a standard calibration, that is capable of ready use as a stabbing or cutting weapon and was commercially manufactured to be used as a weapon." Penal L. 265.00 (5-d).

### D. 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 negligent hiring claim was held to have stated a cause of action against an employer whose employee shared intimate cell phone photos of another employee with co-workers during work hours and on work premises in *Waterbury v New York City Ballet, Inc.*, 205 AD3d 154, 158 [1st Dept 2022].

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); *Wood v William Carter Co.*, 273 AD2d 7 [1st Dept 2000](alleged agent cannot, by his own acts, imbue himself with authority).

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); *Webb v United Health Services, Inc.*, 221 AD3d 1315, 1319 [3d Dept 2023](employee's access to plaintiff's medical records was outside the scope of her employment as she accessed the records out of spite).

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); *White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426, 867 N.E.2d 381, 835 NYS2d 530 [2007]; *RBG Mgt. Corp. v Vil. Super Mkt., Inc.*, - F.Supp.3d -, 2023 WL 5976273 at *4 [SDNY Sept. 14, 2023].

## XI. RESTRICTIVE COVENANTS/NON-COMPETITION 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-1-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). See also *Magtoles v United Staffing Registry, Inc.*, 21 CV 1850 KAM PK, 2023 WL 2710178, at *13 [EDNY Mar. 30, 2023](discussing whether non-compete provisions are enforceable under New York law).

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).

#### 1. Injunctive Relief

Injunctive relief is available; however, the Court of Appeals held in *BDO Seidman v. Hirshberg*, 93 NY2d 382, "[a] restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the legitimate *interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." But see *Jefferies LLC v Gegenheimer*, 849 Fed Appx 16, 18 [2d Cir 2021} (arbitration panel did not manifestly disregard NY law in finding liquidated damages provision enforceable); *Ticor Tit. Ins. Co. v Cohen*, 173 F3d 63, 72 [2d Cir 1999](where the employee's services are "special, unique or extraordinary," then injunctive relief is available to enforce a covenant not to compete, if the covenant is reasonable).

#### 2. Forum Selection Clauses

In *Brown & Brown v. Johnson*, *supra*, 25 N.Y.3d at 370, the Court of Appeals held that the choice-of-law clause providing for Florida law would not be applied because Florida's statute governing restrictive covenants in employment agreements was offensive to a fundamental public policy of New York.

#### 3. Enforcement by Successors and Assigns

New York courts have held that "when the original parties to an agreement so intend, a covenant not to compete is freely assignable." *Special Products Mfg., Inc. v Douglass*, 159 AD2d 847, 849 [3d Dept 1990], citing 6 NY Jur 2d, Assignments, § 11, at 246; *see, e.g., Abalene Pest Control Serv. v. Powell,* 8 A.D.2d 734, 735, 187 N.Y.S.2d 381 (2d Dept. 1959). See also *Eisner Computer Sols., LLC v Gluckstern*, 293 AD2d 289, 289 (1st Dept 2002)(covenant not to compete held distinguishable from a personal services contract,

and thus freely assignable); *Buchanan Capital Markets, LLC v DeLucca*, 150 AD3d 436, 437 (1st Dept 2017)("While covenants not to compete in employment contracts may be assignable without the parties' consent, that depends on the parties' intent," citing *Archer Worldwide v. Mansbach*, 289 A.D.2d 349, 734 N.Y.S.2d 869 (2d Dept.2001).

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). See also *Frantic, LLC v Konfino*, 13 CIV. 4516 AT, 2013 WL 5870211, at *3 [SDNY Oct. 30, 2013]("Although the Court would blue pencil the Agreement if preserving client relationships were the only interest involved, there exist material issues of fact regarding Frantic's interest in protecting its alleged trade secrets, discussed below, which constrain the Court from amending the Agreement at this time").

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. See, e.g., *Helio Logistics, Inc. v Mehta*, 22 CV 10047 (NSR), 2023 WL 1517687 [SDNY Feb. 3, 2023](granting plaintiff's application to temporarily restrain defendants action from using or disclosing Plaintiff's trade secrets). *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 (2nd 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 (1st 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.

In *E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441 [2018], a divided (4-3) Court of Appeals held that a plaintiff asserting claims for misappropriation of a trade secret, unfair competition, or unjust enrichment cannot recover compensatory damages measured by the costs defendant avoided due to its unlawful activity, the so-called "avoided costs" theory. But see *Better Holdco, Inc. v Beeline Loans, Inc.*, 20 CIV 8686 (JPC), 2023 WL 2711417, at *38 [SDNY Mar. 30, 2023](noting that New York and federal law have clearly diverged on the issue of damages, citing the federal Defend Trade Secrets Act).

E. 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.

Under New York law, an agent is obligated "to be loyal to his employer and is 'prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties.' " *Western Elec. Co. v. Brenner,* 41 N.Y.2d 291, 295 (1977); *Lamdin v Broadway Surface Adv. Corp.*, 272 NY 133, 138 [1936]; *Phansalkar v Andersen Weinroth & Co., L.P.*, 344 F3d 184, 200 [2d Cir 2003]; *Miller v Levi & Korsinsky, LLP*, 20 CIV. 1390 (LAP), 2021 WL 535599, at *5 [SDNY Feb. 12, 2021](examining whether an employee's conduct warrants forfeiture under the faithless servant doctrine).

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 (3d Dep't 1996); *In re Douglas*, 250 A.D.2d 900, 672 N.Y.S.2d 534 (3d Dep't 1998); *In re Flaherty*, 239 A.D.2d 647, 657 N.Y.S.2d 217 (3d Dep't 1997). See also *In re Lambert*, 18 A.D.3d 1049, 1050, 794 N.Y.S.2d 742, 743 (3d 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 (1st Dept. 1990). Courts have since determined that incarcerated individuals are owed a duty of care arising from urinalysis tests that resulted in allegedly false positive results. *See, e.g., Taylor v Microgenics Corp.*, 21 CV 6452 (VB), 2023 WL 1865274, at *7 [SDNY Feb. 9, 2023].

## 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) defines the term "employer" to include all employers within the state.

"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 (Sup. Ct. 1996). See also *Doe v. Bloomberg, L.P.*,36 N.Y.3d 450, 455 (2021)(commenting on *Patrowich*).

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, 54 N.Y.S.3d 360, 76 N.E.3d 1063 (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, (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, 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. 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).

In *Doe v. Bloomberg, L.P.*, 36 N.Y.3d 450 (2021), the New York Court of Appeals held that "where a plaintiff's employer is a business entity, the shareholders, agents, limited partners, and employees of that entity are not employers within the meaning of the [New York City Human Rights Law ("City HRL")]." Such individuals may incur liability "only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct. N.Y.C. Admin. Code § 8-107 [1], [6], ][7].

B. Types of Conduct Prohibited

In New York State, 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 status as a victim of domestic violence, 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.

In *Sharikov v Philips Med. Sys. MR, Inc.*, 659 F Supp 3d 264, 270 [NDNY 2023], a *pro se* plaintiff who refused to comply with his employer's COVID-19 vaccination policy, and whose employment was terminated, alleged employment discrimination and retaliation claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213 in connection with Defendant's application of its COVID-19 policy. The court dismissed the complaint. See also *Williams-Moore v Quick Intl. Courier, LLC*, 22 CV 3592, 2023 WL 6292540, at *4 [EDNY Sept. 26, 2023]("like a chorus of courts in this Circuit, I conclude that an employer's imposition of a COVID-19 vaccination requirement does not raise a plausible inference that the employer regarded all its employees (or its unvaccinated employees) as disabled within the meaning of the ADA").

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 childbirth. See N.Y. LABOR L. § 206-c. Effective March 17, 2019, employers in NewYork City 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 (1st 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

New York's paid sick leave law [new for 2021], N.Y. Labor Law § 196-b, requires employers with five or more employees or net income of more than $1 million to provide paid sick leave to employees, and requires employers with fewer than five employees and a net income of $1 million or less to provide unpaid sick leave to employees.

Employers with 100 or more employees must provide up to 56 hours of paid sick leave per calendar year. Employers with 5 to 99 employees must provide up to 40 hours of paid sick leave per calendar year. Employers with 4 or fewer employees and net income of greater than $1 million in the previous tax year are required to provide up to 40 hours of paid sick leave per calendar year.

Employers with 4 or fewer employees and net income of $1 million or less in the previous tax year are required to provide up to 40 hours of unpaid sick leave per calendar year.

The law permits victims of domestic violence and similar offenses to use sick leave to seek protection. (See below under "Domestic violence leave".)

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 employees 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 (as amended in 2023).

Any child care leave policy 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 workday. 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*, 73 F.Supp.2d 175 (S.D.N.Y. 2014)(similar claim brought under the federal Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4311, which prohibits discrimination in employment against members of the uniformed services); *Kassel v City of Middletown*, 272 F Supp 3d 516 [SDNY 2017](issue of material fact existed as to whether proffered legitimate, nondiscriminatory reason for failing to promote employee was pretextual).

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.

See also "Family/Medical Leave" above.

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.

Victims of domestic violence, family offense, sexual offense, stalking, or human trafficking may use accrued sick leave to take actions to protect the health and safety of the employee or that of a family member or person who associates or works with the family member. See N.Y. Labor Law § 196-b (4)(a)(iii). See also "Family/Medical Leave" for additional details.

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 Insurance Circular Letter no. 11 (2017) (https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2017_11).

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 (1st Dept. 2017).

### A. Current Minimum Wage in State

New York's minimum wage requirements are set forth in N.Y. Labor Law § 652 (eff. May 3, 2023). The statute is very detailed and should be consulted. It has been amended several times since the last ALFA compendium was compiled.

For all employers in New York City, Nassau, Suffolk, and Westchester Counties, the minimum hourly wage is $16 (eff. 2024), rising to $16.50 in 2025, and $17, or greater if required by federal law, in 2026.

For employers in the rest of the state, the minimum hourly wage is $15 (eff. 2024), rising to $15.50 in 2025, and $16, or greater if required by federal law, in 2026.

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 statute also makes a distinction between NYC and the remainder of downstate (Nassau, Suffolk, and Westchester Counties), but the distinction does not become applicable until 2027. The statute no longer distinguishes between large and small employers in New York City.

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 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.

The term "employee" also includes farm laborers. "Farm laborers" shall mean any individual engaged or permitted by an employer to work on a farm. Members of an agricultural employer's immediate family who are related to the third degree of consanguinity or affinity shall not be considered employed on a farm if they work on a farm out of familial obligations and are not paid wages, or other compensation based on their hours or days of work. Labor Law § 701.

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 frequency 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)[last revised in 1988].

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*.

The law applies to fast food establishments, defined as any establishment:

(i) that has as its primary purpose serving food or drink items;

(ii) where patrons order or select items and pay before eating and such items may be consumed on premises, taken out or delivered;

(iii) that offers limited service;

(iv) that is part of a chain; and

(v) that is one of 30 or more establishments nationally including integrated enterprises owning or operating 30 or more such establishments, a franchise where the franchisor and franchisees own or operate 30 or more establishments in the aggregate nationally.

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 and vaping in places of employment (and many other enclosed indoor areas). Counties and municipalities may promulgate regulations that are consistent with or more restrictive than state law. N.Y. PUB. HEALTH L. § 1399-r(3).

Adult recreational use of marijuana ("cannabis") became legal in New York on March 31, 2021. The statute is codified as Article 222 of the Penal Law and the newly enacted Cannabis Law.

Smoking or vaping of cannabis is not permitted in schools [Penal Law § 222.10], places of employment [Public Health Law § 1399-o] or inside a car [Public Health Law § 1399-q(1)(b) and § 1399-q(2); Vehicle and Traffic Law § 1227].

Section 127 of the Cannabis Law provides that an employer shall adhere to policies regarding cannabis use in accordance with Labor Law § 201-d(2), which provides

> it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of (b) "an individual's legal use of consumable products, including cannabis in accordance with state law, prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property" and (c) "an individual's legal recreational activities, including cannabis in accordance with state law, outside work hours, off of the employer's premises and without use of the employer's equipment or other property."

### 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".

However, an employer shall not be in violation of this section where the employer takes action related to the use of cannabis because (i) the employer's actions were required by state or federal statute, regulation, ordinance, or other state or federal governmental mandate; (ii) the employee is impaired by the use of cannabis, meaning the employee manifests specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy work place, free from recognized hazards, as required by state and federal occupational safety and health law; or (iii) the employer's actions would require such employer to commit any act that would cause the employer to be in violation of federal law or would result in the loss of a federal contract or federal funding. (Labor Law § 201-d)

A refusal to hire a tobacco smoker was upheld against a claim of disability discrimination in *Matter of Fortunoff Fine Jewelry & Silverware, Inc. v New York State Div. of Human Rights*, 227 AD2d 557, 642

N.Y.S.2d 710 [2d Dept 1996](defendant's status as a smoker outside of the workplace, without more, does not constitute a disability). In addition, 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. See also *NYC C.L.A.S.H., Inc. v City of New York*, 315 F Supp 2d 461, 476 [SDNY 2004](smoking bans do not implicate First Amendment protections with regard to assembly and association).

The use of medical marihuana by a "certified patient" is deemed a "disability" under the state Human Rights Law, which prohibits discrimination against employees. N.Y. PUB. HEALTH L. § 3369(2); N.Y. Exec. L. § 296; *Gordon v. Consolidated Edison Co., Inc.*, 190 A.D.3d 639, 140 N.Y.S.3d 512 (1st Dept. 2021). 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).

Blogging or tweeting would probably be deemed 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); *Truitt v. Salisbury Bank & Trust Co.*, 52 F.4th 80 (2d Cir. 2022) (questions of fact precluded summary judgment dismissing claim for wrongful termination brought by candidate for NYS Assembly – a part- time position – who was forced to choose between running for office and remaining an officer of the bank).

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); *Hudson v. Goldman, Sachs & Co.*, 283 AD2d 246, 725 NYS2d 318 (1st Dept 2001). Some doubt was expressed whether New York's highest court would agree with this decision, *McCavitt*, 237 F.3d at 169 (concurring opinion), but the Court of Appeals has never addressed Labor Law § 201-d. But see *Manhattan Pizza Hut, Inc. v. NYS Human Rights Appeal Bd.*, 51 N.Y.2d 506, 415 N.E.2d 950, 434 N.Y.S.2d 961 (1980)(application of employer's anti-nepotism rules to married couple did not violate Exec. L. § 296). 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 gender identity and expression.

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

N.Y. LABOR LAW § 201-g 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), which applies to all employers of more than fifteen employees who have employees in New York City.

1. Lie Detector Tests

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 polygraph examinations, which are not prohibited under New York law, but may be under the Federal Employer Polygraph Protection Act.

H. Volunteer Activities and Reports

A person who performed work for the City of New York in exchange for cash public assistance and food stamps was held to be protected by the federal minimum wage provisions of the Fair Labor Standards Act (FLSA). See *Matter of Carver v State*, 26 NY3d 272, 44 NE3d 154, 23 NYS3d 79 [2015]. In a similar case, public assistance was deemed to be "wages" for the purposes of the Workers Compensation Law. See *Covert v. Niagara County*, 172 AD3d 1686, 102 NYS3d 131 (3d Dept 2019).

The only volunteer workers entitled by law to workers compensation benefits in New York (apart from volunteer fire fighters and ambulance workers who have their own statutes) are those working for the state or a social service organization or civil defense workers.

However, employers may elect to purchase workers compensation coverage that extends to volunteers. The Workers Compensation Board has primary jurisdiction to decide who is eligible for such benefits. For example, in *Aprile-Sci v. St. Raymond of Penyafort R.C. Church*, 151 A.D.3d 671, 672 (2d Dept. 2017), the church was self-insured with a Workers' Compensation policy that extended coverage to volunteers. When a parishioner was injured while acting as a volunteer minister, the church initiated a WCB proceeding, and it was determined that the volunteer minister was covered. When she later sued the church, her complaint was dismissed because the Board had primary jurisdiction and had determined that she was a volunteer minister rather than a parishioner.

Volunteer workers are not covered by the strict liability provisions of the Labor Law. "[A]n individual does not become an employee covered by Labor Law § 240 (1) by providing casual, uncompensated assistance to another person with a repair or construction project in an informal arrangement that does not give rise to mutual duties or obligations between them and bears none of the traditional hallmarks of an employment relationship." *Stringer v. Musacchia*, 11 N.Y.3d 212, 216-17 (2008).

I. Commission Sales Representatives

N.Y. Labor Law § 191-c provides that "[w]hen a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five business days after termination or within five business days after they become due in the case of earned commissions not due when the contract is terminated." A principal who fails to comply with the provisions of this section concerning timely payment of all earned commissions shall be liable to the sales representative in a civil action for double damages. The prevailing party in any such action shall be entitled to an award of reasonable attorney's fees, court costs, and disbursements.

J. Commercial Vehicle Operators

N.Y. Vehicle & Traffic Law § 514-a imposes an affirmative obligation on the holders of commercial driving licenses to notify their employers and/or to notify DMV of convictions for any moving violation, and of any CDL suspension, revocation, cancellation and/or disqualification that they accrue.

K. Labor Relations Act

The New York State Labor Relations Act is codified at N.Y. Labor Law §§ 700-718 (McKinneys). However, it does not apply to (1) employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act; or (2) employees of the state or of any political or civil subdivision or other agency thereof. N.Y. Labor L. § 715. The term "employee" includes professional musicians and farm laborers. N.Y. Labor L. § 701. However, "members of an agricultural employer's immediate family who are related to the third degree of consanguinity or affinity shall not be considered to be employed on a farm if they work on a farm out of familial obligations and are not paid wages, or other compensation based on their hours or days of work." Labor Law § 701.

L. Abortion

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.

M. Local Ordinances

In New York, local governments have broad policing power to enact legislation concerning the health, safety, and welfare of their residents, provided they refrain from adopting laws that are inconsistent with the Constitution or state statutes.

One example of such legislation is the Victims of Gender-Motivated Violence Act ("VGM"), Admin. Code of City of NY § 10-1101, which was enacted in New York City to create a civil rights remedy or cause of action for crimes of violence motivated by gender after the U.S. Supreme Court struck down the federal Violence Against Women Act (VAWA) as an unconstitutional exercise of Congressional power in 2000. The VGM has a seven-year statute of limitations, which is not preempted by the one-year state statute of limitations for intentional torts such as assault. See *Engelman v Rofe*, 194 AD3d 26 (1st Dept 2021)

N. New Developments (including COVID permanent changes)

New York law concerning firearms is in flux as of this writing, because its licensing laws were declared unconstitutional by the U.S. Supreme Court. See *New York State Rifle & Pistol Assn., Inc. v Bruen*, 597 US 1, 71 [2022]; *Antonyuk v Chiumento*, 89 F.4th 271, (2d Cir. 2023)(upholding challenges to certain provisions of New York's newly-enacted Concealed Carry Improvement Act ("CCIA"), primarily on Second Amendment grounds).

The Second Circuit and other courts in New York have repeatedly found that vaccination against COVID-19 is a proper condition of employment. See *Kane v de Blasio*, 623 F Supp 3d 339, 363 [SDNY 2022]. In addition, state and federal courts in New York have generally refused to enjoin state and municipal emergency rules requiring certain persons to be vaccinated against COVID and have rejected most free exercise claims. See, e.g., *We The Patriots USA, Inc. v Hochul*, 17 F.4th 266, 272 [2d Cir 2021], *op clarified,* 17 F.4th 368 [2d Cir 2021](denying applications for preliminary injunctive relief that would restrain the State from enforcing its emergency rule requiring healthcare facilities to ensure that certain employees are vaccinated against COVID-19).

Recreational use of marijuana ("cannabis") became legal in New York in March 2021. The newly codified statutes can be found in the Cannabis Law, and in Article 222 of the Penal Law. Certain provisions in the Public Health Law relating to smoking and vaping also apply to the use of cannabis.