USA - New York

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STATE SNAPSHOT

Key considerations

1 | Which issues would you most highlight to someone new to your state?

An employer which is new to New York State should be cognizant of state and city laws which have an increasing focus on family leave and pre-employment processes. Among others, the following significant laws have been enacted in recent years:

- New York's Paid Family Leave Law requires that employers provide employees with minimum leave to bond with a new child, including adopted and foster children; care for a seriously ill family member; or address certain military family needs. It further provides that employees will receive certain minimum compensation during such leave—with both the amount of leave and/or the compensation paid during such leave increasing each year throughout 2021;
- "Ban-the-box" legislation prohibiting New York City and Westchester County employers (and those in several other cities and counties throughout the state) from asking job applicants about criminal convictions before making a conditional offer of employment;
- the Stop Credit Discrimination in Employment Act, which makes it an unlawful discriminatory practice for a New York City employer to use or request an employee's or applicant's consumer credit history, except in certain enumerated circumstances;
- New York's Salary History Ban, which went into effect January 6, 2020, prohibits employers in New York State from inquiring about an applicant's or employee's wage or salary history or using such information in deciding whether to make an offer of employment or promotion. This new law largely mirrors New York City's existing salary history ban, except it also applies to current employees, rather than just applicants;
- the Pre-Employment Marijuana Testing Ban, which went into effect May 10, 2020, prohibits New York City employers from requiring testing for marijuana or tetrahydrocannabinols (THC), the active ingredient in marijuana, as a condition of employment, with exceptions for safety and security sensitive jobs, and those tied to a federal or state contract or grant; and
- one of the nation's most far-reaching laws prohibiting discrimination against candidates for employment in New York City based on their status as unemployed.

New York employers also should be aware of the increased focus on confronting discrimination, harassment (including sexual harassment) and retaliation in the workplace. The following are the most significant efforts on this front:

- New York State has amended the New York State Human Rights Law to expand the existing prohibition on the use of non-disclosure (confidentiality) or "NDA" provisions in agreements settling claims of sexual harassment to apply to claims of discrimination based on any protected class (i.e., age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, and domestic violence victim status) unless it is the "complainant's preference" to include such a provision, demonstrated by providing the complainant (via a separate written agreement) a 21-day period to review the terms of the NDA (which period cannot be waived or shortened), and a seven-day revocation period after the agreement is executed. Effective January 1, 2020, any NDA provisions in agreements settling discrimination claims must expressly include a statement that the provision does not prohibit the individual "from speaking with law enforcement, the equal employment opportunity commission, the state division of human rights, a local commission on human rights, or an attorney retained by the employee or potential employee".
- The new amendments to the New York State Human Rights Law also:
  - expand the prohibitions against unlawful discriminatory practices to cover non-employees, including contractors, vendors, consultants, and other persons providing services to a company;
  - prohibit agreements providing for mandatory arbitration of claims of discrimination or harassment based on any protected class (with the caveat that this prohibition may be pre-empted by federal law, and at least one federal court has ruled as much to date);
  - lower the burden of proof for complainants to bring workplace harassment claims by eliminating the "severe or pervasive" standard and instead making employers liable for any harassing conduct which "subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership" in a protected class;
  - eliminate an employee's failure to complain as a defense to liability such that the fact that an individual did not make a harassment complaint to their employer will no longer be determinative as to whether an employer is liable for workplace harassment under the law;
  - broaden the definition of a "covered employer" under the law to all employers, regardless of the number of employees in the state;
  - extend the applicable statute of limitations period for filing sexual harassment claims under the New York State Human Rights Law with the New York State Division of Human Rights from one year to three years; and
  - provide for the recovery of punitive damages and attorneys' fees.
- New York employers must also:
  - adopt an anti-sexual harassment policy and complaint form for reporting claims of sexual harassment; and

    - provide annual anti-sexual harassment "interactive training" for all employees, as well as training for new employees as soon as possible following their hire.
- New York City has broadened its anti-sexual harassment laws to:
    - cover all employers, regardless of size;
    - require all employers to provide an information sheet on sexual harassment to all employees at the time of hire and to post an anti-sexual harassment rights and responsibilities poster in their offices; and
    - provide annual anti-sexual harassment training.

Lastly, New York employers should also be well acquainted with the various laws, regulations and executive orders passed in response to the covid-19 pandemic, including:

- Covid-19 Paid Sick Leave legislation requiring, among other things, employers to provide eligible New York employees with job-protected paid and/or unpaid sick leave in response to the covid-19 pandemic, effective immediately. The legislation also extends New York State paid family leave benefits to certain employees who have been impacted by the pandemic.
- New York State on PAUSE, which had required, among other things, all non-essential businesses to cease in-person operations as of 8:00 PM on March 22, 2020. Essential businesses were permitted to function, but were required to follow certain protocols, such as ensuring proper social distancing. It also prohibited all non-essential social gatherings of individuals of any size, for any reason.
- New York Forward, the state's reopening plan, which has incrementally lifted the restrictions put into place by New York State on PAUSE on non-essential businesses. For example, among other industries: (i) Phase 1 ushered the opening of construction and retail (limited to curbside or in-store pickup or drop off); (ii) Phase 2 allowed for the opening of offices and certain in-store retail (but not malls); (iii) Phase 3 allowed for the opening of certain food service (e.g., restaurants) and personal care (e.g., nail salons) establishments; and (vi) Phase 4 addressed the opening of various educational institutions. The state has issued detailed guidelines outlining procedures for each industry reopening that all employers opening should consult and strictly follow. With respect to New York Forward's timeline, reopening occurred on a region-by-region basis and eligibility for reopening was based on health metrics for the region. Central New York, North Country, Finger Lakes, Southern Tier and Mohawk Valley Regions were the first regions to enter Phase 1 on May 15, 2020. New York City entered Phase 1 on June 8, 2020, and was the last region to enter Phase 4 on June 8, 2020.
- Mask mandates, requiring most people to cover their nose and mouth with a mask or face-covering when in a public place and social-distancing is not possible. Further, the industry guidelines referenced as being issued as part of New York Forward also detail mask/face covering requirements.

2 What do you consider unique to those doing business in your state?

The expansive protections afforded by the New York State and City Human Rights Laws—the state and city counterparts to the federal anti-discrimination laws—are unique to those doing business in New York.

Additionally, New York's wage and hour laws, codified in the New York Labor Law, are more favorable for employees than federal law. New York State's minimum wage is well above the federally mandated minimum wage, and will increase annually, ultimately reaching $15 per hour for all employees state-wide. Likewise, to be exempt from New York Labor Law overtime requirements, employees must earn substantially more than the threshold required by federal law ($684 per week as of January 2020). The New York Labor Law also has a lengthy (six-year) statute of limitations, and permits aggrieved employees to recover up to 100 per cent liquidated damages and attorneys' fees for violations of its provisions, and 300 per cent for violations of pay disparities based on gender. Further, the New York Labor Law was recently amended to combat gender and race-based inequality, first by extending the prohibitions against sex-based pay disparities to cover all protected classes, and second by prohibiting employers from paying workers differently for "substantially similar" work, which is a more employee-friendly standard than the prior standard of "equal" work.

Moreover, New York continues to have one of the country's most generous paid family leave programs, which went into effect on January 1, 2018.

3 Is there any general advice you would give in the labor/employment area?

Employers should be cognizant that many New York State laws offer employees greater protections than federal law, and that localities—such as New York City—may have protections exceeding state law. For example:

- the New York City Earned Safe and Sick Time Act requires employers to provide minimum paid sick and safe (e.g., for reasons associated with domestic violence) leave to employees (Westchester County has a similar Earned Sick Leave Law, however it does not provide for "safe" leave);
- the New York City Human Rights Law prohibits employers from discriminating against unemployed job applicants; and
- as of May 10, 2020, the New York City Human Rights Law will prohibit employers from requiring testing for marijuana or THC, the active ingredient in marijuana, as a condition of employment.

Further, both New York State and New York City have enacted some of the most comprehensive anti-sexual harassment legislation in the country, which mandates, among other things, that all employers have written policies against sexual harassment and conduct interactive sexual harassment prevention training.

Emerging issues

4 What are the emerging trends in employment law in your state, including the interplay with other areas of law, such as firearms legislation, legalization of marijuana and privacy?

New York law is increasingly protective of employees. For instance, the New York State Department of Labor recently revised the test regarding employee exemption from state law overtime requirements by increasing the minimum salary that an employee must be paid in order to be exempt, making a large number of employees newly overtime eligible. As such, in addition to the previously required duties-based criteria, since December 31, 2019, to be exempt, an employee must be paid a salary of:

- $1,125 per week in New York City;
- $975 per week in Nassau, Suffolk, and Westchester counties; and
- $885 per week throughout the rest of the state (again, as opposed to $684 per week under federal law currently).

Additionally, New York has minimum wages above those required by federal minimum wage laws, and will increase year on year until they reach $15 per hour. Since December 31, 2019, minimum wages throughout New York State have been as follows:

- $15 per hour in New York City for all employers;
- $13 per hour in Nassau, Suffolk, and Westchester counties; and
- $11.80 per hour throughout the rest of the state.

While $15 per hour continues to be the minimum wage in New York City for all employers, effective December 31, 2020, the remaining thresholds will increase as follows:

- $14 per hour in Nassau, Suffolk, and Westchester counties; and
- $12.50 per hour throughout the rest of the state.

In addition, legislation passed in 2015 sets a higher industry minimum wage for fast-food workers in many jurisdictions. Moreover, in 2020 the New York Department of Labor issued an order for the elimination of subminimum wages (e.g., wages that are subsidized by tips or gratuities) for workers in miscellaneous industries covered by the Minimum Wage Order for Miscellaneous Industries and Occupations, such as car wash attendants, nail salon workers, tow truck drivers, dog groomers, wedding planners, tour guides, valet parking attendants, hairdressers, aestheticians, golf and tennis instructors, and door-persons. Previously, such workers could earn far below the state minimum wage, provided that their wages were sufficiently subsidized by tips to bring their overall compensation up to the minimum wage. However, since June 30, 2020, employers of such workers have been required to increase such workers' wages, such that that difference between their prior subminimum wage and the minimum wage is cut in half. Further, by December 31, 2020, employers shall be required to pay tipped workers at least the normal minimum wage.

Likewise, both New York State and New York City have passed laws prohibiting most employers from inquiring about a job applicant's salary history during the hiring process, either orally or in writing. New York City further has enacted a law prohibiting employers with at least four employees or contractors from inquiring into a job applicant's criminal history until a conditional offer of employment has been extended to that applicant. Westchester County also has passed a similar "ban-the-box" law, along with several other counties and cities throughout the state.

New York City's Earned Sick Time Act requires New York City employers to provide paid sick leave to employees. As of May 2018, it further allows for employees to use paid sick leave for absences arising from personal or family issues related to being a victim of domestic violence, a sexual offence, or stalking. There are attempts to pass similar legislation state-wide. Westchester County enacted a similar Earned Sick Leave Law, which went into effect April 10, 2019; however, that law does not provide for "safe" leave.

In response to the covid-19 pandemic, New York State passed Covid-19 Paid Sick Leave legislation requiring, among other things, employers to provide eligible New York employees with job-protected paid and/or unpaid sick leave in response to the covid-19 pandemic, effective immediately. The sick leave benefits available to eligible employees vary depending on the size of the employer; for example, employers with 100 or more employees must provide eligible employees with at least 14 days of paid sick leave. To be eligible, an employee must be subject to a mandatory or precautionary order of quarantine or isolation issued by the state of New York, the department of health, local board of health, or any governmental entity duly authorized to issue such order due to covid-19. Any leave taken pursuant to the law is protected, meaning an employer must restore the employee to the position they held prior to such period of leave with the same pay and other terms and conditions of employment. Employers are further prohibited from discriminating or retaliating against an employee because they have taken leave provided under the law.

As of October 2018, the New York City Human Rights Law requires that most employers engage in a "cooperative dialogue" with any employee who may be in need of a reasonable accommodation for the employee's issues relating to disability, pregnancy, religion, and sexual assault or domestic violence victim status. Employers must engage in such an exchange not only with any employee who affirmatively seeks a reasonable accommodation, but also with any employee who may be entitled to such accommodation, where the employer has knowledge of a potential entitlement. Further, failure to engage in such a cooperative dialogue may qualify as an unlawful discriminatory practice. Finally, the new amendment requires New York City employers to reduce to writing the final decision granting or denying a requested accommodation and only to make such final decision after engaging in the required cooperative dialogue.

In November 2017, New York City also passed its Fair Workweek Laws, which are generally applicable to fast-food and retail industry employers in New York City. These laws, among other things, prohibit fast food and retail employers from utilizing on-call scheduling for employees, and requires that they provide certain advance notice to employees of their scheduled work hours. In December 2017, New York City also passed its Temporary Schedule Change Law which entitles employees to request two temporary schedule changes per year for "personal events," such as:

- to care for a minor child or care recipient;
- to attend a legal proceeding or hearing for subsistence benefits; or
- any other basis permitted by the New York City Earned Sick Time Act.

Covered employers must conspicuously post a notice prepared by the New York City Department of Consumer Affairs advising employees of their rights under the new law.

In March 2017, New York City passed its Freelance Isn't Free Act, which requires parties to enter into a written contract with any freelancer providing more than $800 of agreed services, and additionally requires that freelancers be paid within 30 days of the completion of their work. This law itemizes certain required information that must be included in the agreement, and provides for penalties in the event of a failure to enter into such an agreement.

In 2014, New York passed the Compassionate Care Act legalizing medical marijuana. The law became effective in January 2016 and under it, covered patients are protected as disabled under the New York State Human Rights Law and entitled to "reasonable accommodations" from employers, although employers may prohibit impaired employees from performing (or attempting to perform) their duties. That said, New York has not yet legalized marijuana for recreational use, although legislation is currently being considered. Additionally, since May 20, 2020, New York City employers are prohibited from testing most applicants for marijuana or THC, the active ingredient in marijuana, as a condition of employment.

In 2018, New York passed a comprehensive piece of legislation known as the Women's Equality Agenda, which significantly amends New York's equal pay, pay transparency, pregnancy accommodation, sex discrimination, and sexual harassment laws to provide greater protection for women in the workplace. The amended provisions prohibit discrimination against an employee who inquires about, discloses or discusses their compensation with another employee and limits exceptions for pay inequality between sexes, while increasing liquidated damages for wilful violations (N.Y. Labor Law § 194). Further, in 2019 New York amended its Pay Equity Law, which now requires equal pay for "substantially similar" work rather than the previous "equal work" standard. It also passed a law prohibiting the inquiry into the salary history of applicants or current employees when making hiring or promotion decisions, which went into effect January 6, 2020.

With respect to the covid-19 pandemic, New York Forward, the state's reopening plan, incrementally lifted the restrictions put into place by New York State on PAUSE and allowed for the reopening of non-essential businesses subject to certain restrictions. Critically, for each industry allowed to reopen under New York Forward, the state issued guidance, providing detailed instructions on how businesses in those industries may reopen. Such guidelines aim for businesses to open in a cautious way to promote the health and safety of employees

and customers, and call for, among other things, mandatory health screenings of employees and visitors, occupancy limitations, requirements to wear masks/face coverings and the development of a safety plan. The guidelines also identify the steps a business must take if it discovers one of its employees has tested positive for covid-19, and requires employers to notify local health department officials of any positive cases and to cooperate with officials for contact tracing purposes. Employers should closely consult such guidance before reopening their businesses and check back frequently to see if there have been any updates to such guidance, which can be found online here: https://forward.ny.gov/.

Proposals for reform

5 | Are there any noteworthy proposals for reform in your state?

Employers should be aware that minimum wages across New York State, as well as the threshold for exemption from the New York Labor Law, are set to increase annually. Likewise, New York's Paid Family Leave Law will provide for increased leave time and compensation to employees throughout 2021.

In addition, New York State and various New York localities have enacted several laws limiting and/or prohibiting inquiries into the backgrounds of job applicants. For example, New York State and New York City have both passed laws prohibiting employers from inquiring about salary history. Further, New York City also enacted a "ban-the-box" law (prohibiting employers from asking job applicants about criminal convictions before making a conditional offer of employment). While Westchester County has already followed New York City's lead, and passed its own "ban-the-box" law, it is possible that similar legislation will be soon enacted state-wide.

Additionally, as of May 2018, New York City's Earned Safe and Sick Time Act—which requires city employers to provide minimum paid sick leave—was amended to cover "safe time," defined as time spent by an employee attending to issues related to being a victim of domestic violence, a sexual offense or stalking, either as it relates to the employee or a family member.

Finally, New York State has passed a law permitting the use of medical marijuana. Employers need to be cognizant of how this affects their workforce, including the fact that workers covered by this law may be classified as "disabled" under the state anti-discrimination statute (i.e., New York State Human Rights Law). Further, New York City enacted the Pre-Employment Marijuana Testing Ban, which takes effect May 20, 2020 and will prohibit New York City employers from requiring testing for marijuana or THC, the active ingredient in marijuana, as a condition of employment for most employees. More broadly, New York has considered, though not yet passed, legislation that would legalize recreational marijuana across the state, and proposed legislation has included prohibitions on discrimination against employees who use recreational marijuana.

EMPLOYMENT RELATIONSHIP

State-specific laws

6 | What state-specific laws govern the employment relationship?

Article 6 of the New York Labor Law governs payment of wages. Regulations promulgated by the New York State Department of Labor can be found under Title 12 of the New York Codes, Rules and Regulations.

The New York State Human Rights Law (N.Y. Exec. Law § 290 and following) is the state equivalent of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act and the Age Discrimination in Employment Act (the federal anti-discrimination statutes), although the New York State Human Rights Law is broader and encompasses more protected classes. Employers should also be aware of the New York City Human Rights Law (N.Y.C. Admin. Code § 8-107 and following), which is the New York City anti-discrimination statute. The New York City Human Rights Law is more employee-friendly than its federal counterpart in both protections and damages, including its provisions for the recovery of uncapped compensatory damages.

7 | Who do these cover, including categories of workers?

The New York Labor Law governs "any person employed for hire by an employer in any employment" (N.Y. Labor Law § 190). Likewise, the New York State Human Rights Law, which prohibits unlawful discriminatory practices, covers all employers, regardless of the number of employees in the state. Employers with four or more workers are covered by the New York City Human Rights Law.

Misclassification

8 | Are there state-specific rules regarding employee/contractor misclassification?

There are no specific state statutes governing employee or independent contractor classification. Courts and state agencies should look to common law definitions, under which:

> *the critical inquiry ... pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results. Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule. (Bynog v. Cipriani Group Inc, 1 N.Y.3d 193, 198 (2003) (citations omitted)).*

In defining independent contractor status, the New York State Department of Labor states that in the performance of their duties independent contractors are free from:

- supervision;
- direction; and
- control.

Factors considered by the New York State Department of Labor in determining employee or independent contractor status include whether the worker:

- has an established business;
- advertises in electronic or print media;
- buys an advertisement in Yellow Pages;
- uses business cards, stationery and billheads;
- carries insurance;
- keeps a place of business and invests in facilities, equipment, and supplies;
- pays their own expenses;
- assumes risk for profit or loss;
- sets their own schedule;
- sets or negotiates their own pay rate;
- offers services to other businesses (competitive or non-competitive);
- is free to refuse work offers; and
- may choose to hire help.

New York City's Freelance Isn't Free Act, which became effective in March 2017, requires parties that engage independent contractors who provide at least $800 in services over a 120-day period to enter into

a written contract for services, and further requires that full payment for services be tendered within 30 days of the completion of the independent contractor's work. Moreover, it prohibits retaliation against a freelancer seeking to enforce any rights under this law.

Contracts

9 | Must an employment contract be in writing?

Generally, employment contracts do not need to be in writing, provided that a contract for a fixed duration may be subject to New York's Statute of Frauds (*Sladden v. Rounick*, 59 A.D.2d 882, 882 (1977) (an oral agreement for a two-year fixed term of employment was not enforceable)). However, a commissioned salesperson's agreement must be in writing (N.Y. Labor Law § 191). Additionally, New York's Wage Theft Prevention Act requires that employees be given written notice of their rate of pay on hire, and in the event of any pay decrease, also be given such a notice and certain other information. Employers must maintain a written acknowledgement that employees received such information (N.Y. Labor Law § 195).

10 | Are any terms implied into employment contracts?

There are implied covenants of good faith and fair dealing in employment contracts (*ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 228-29 (2011)). Employees are likewise subject to an implied duty of loyalty to their employer (e.g., *W. Elec. Co. v. Brenner*, 41 N.Y.2d 291, 294 (1977)). Additionally, if performance is continued under a contract after its expiration, the agreement may, in certain circumstances, be presumed to renew under the same terms. If the contract was for longer than one year, it will presumptively renew on a year-to-year basis (*Borne Chem. Co. Inc. v. Dictrow*, 85 A.D.2d 646, 648 (2d Dep't 1981)).

11 | Are mandatory arbitration agreements enforceable?

Generally, yes, New York courts routinely enforce written agreements requiring final and binding arbitration (e.g., *DiBello v. Salkowitz*, 4 A.D.3d 230, 232 (1st Dep't 2004) (requiring disputes to be submitted to arbitration pursuant to a mandatory arbitration agreement)). However, in 2018 New York passed a law prohibiting employers from requiring arbitration of sexual harassment claims, and in 2019 extended such law to prohibit mandatory arbitration of all claims of discrimination or harassment under the New York State Human Rights Law. That said, at least one federal district court in New York has found that such prohibitions are preempted by the Federal Arbitration Act, which strongly favors the enforcement of arbitration agreements.

12 | How can employers make changes to existing employment agreements?

Amendments to an employment agreement for a fixed term may be obtained through mutual agreement between the parties. Where the employment relationship is at will, "the employer may unilaterally alter the terms of employment, and the employee may end the employment if the new terms are unacceptable" (*Minovici v. Belkin BV*, 109 A.D.3d 520, 523 (2d Dep't 2013)).

HIRING

Advertising

13 | What are the requirements relating to advertising open positions?

In addition to restrictions arising from applicable federal and state anti-discrimination laws, New York City law prohibits "an advertisement for any job vacancy" which indicates that applicants must be employed at the time of application (N.Y.C. Admin. Code § 8-107.1(21)(a)(2)). Further, as of January 6, 2020, New York's Salary History Law will prohibit prospective employers from requesting or requiring the disclosure of a job applicant's previous salary history on any job solicitation or application. A similar law is already in effect for New York City employers. Additionally, New York City's Fair Chance Act and the Westchester Fair Chance to Work Act each prohibit employers in their jurisdictions from making any inquiry about a prospective employee's criminal history in any job advertisement or solicitation.

Background checks

14 | (a) Criminal records and arrests

Employers may not inquire about, or take any adverse action with respect to, any arrest or criminal accusation not currently pending, or any youthful or sealed conviction (N.Y. Exec. Law § 296(16)). New York City passed the Fair Chance Act, which became effective on October 27, 2015, prohibiting employers from inquiring about an applicant's criminal history before making a conditional offer of employment, including on any job solicitations or advertisements. Westchester County passed a similar law which went into effect March 4, 2019.

Moreover, employers may not take adverse employment actions based on any prior conviction, unless:

- there is a direct relationship between one or more of the previous criminal offences and the employment sought or held by the individual; or
- the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public (N.Y. Correct. Law § 752, N.Y. Exec. Law § 296(16) (providing a private right of action)).

Enumerated factors to be considered in determining if an adverse employment action is appropriate can be found in N.Y. Correct. Law § 753.

15 | (b) Medical history

Employers may not discriminate against employees and applicants on the basis of any actual or perceived disability under the New York State Human Rights Law and the New York City Human Rights Law. Employers are also prohibited from administering or requiring applicants to undergo genetic testing, as well as soliciting for such information, except in limited circumstances relating to an employee's susceptibility to a disease which relates to the job in question (N.Y. Exec. Law § 296(19)). Where a background check reflects medical history or a prior adverse employment action due to medical history, such facts may be disclosed only to a "physician designated by the [employee]" (N.Y. Gen. Bus. Law § 380-q). Finally, New York State recently amended its Human Rights Law to prohibit discrimination based on an employee's or employee's dependant's reproductive health choices, which follows similar legislation passed earlier this year by New York City.

16 | (c) Drug screening

New York City recently passed the Pre-Employment Marijuana Testing Ban, which went into effect May 10, 2020. It prohibits New York City employers from requiring testing for marijuana or tetrahydrocannabinols (THC), the active ingredient in marijuana, as a condition of employment, with exceptions for safety and security sensitive jobs, and those tied to a federal or state contract or grant (e.g., police officers or those supervising or caring for children or vulnerable individuals). However, there is no state-wide counterpart, and New York does not otherwise have a statute governing drug and alcohol screening of employees or applicants (other than for transportation providers, 17 N.Y.C.R.R. § 720.0 and following). Employers also should be mindful of proposed legislation at the state level concerning recreational marijuana.

Drug addiction (actual or perceived) qualifies as a protected disability under the New York State Human Rights Law and employers should thus be wary of potential discrimination claims arising from decisions based on drug testing where drug use does not interfere with the employee's ability to perform their job (*Doe v. Roe, Inc.*, 160 A.D.2d 255 (1st Dep't 1990)). As explained by the appellate division, any pre-hiring procedures which implicate a disability must bear "a rational relationship to" and be "a valid predictor of employee job performance" (*Id.* at 256). Further, the appellate division held that:

while [an employer] may be legitimately entitled to discriminate against users of controlled narcotic substances, when challenged it must come forward with evidence establishing that its testing method accurately distinguishes between [narcotic] users and consumers of lawful foodstuffs or medications. (*Id.*).

This issue is further complicated by New York State's Compassionate Care Act legalizing medical marijuana, which protects medical marijuana recipients as "disabled" under the New York State Human Rights Law. Although the courts have yet to definitively rule on a situation involving lawful medical marijuana use by applying the State Human Rights Law, in July 2017 an Administrative Law Judge serving with New York City Office of Administrative Trials and Hearings found that a lawful medical marijuana user could not have his license to drive a New York City taxi revoked on that basis alone, because the driver's medical marijuana use was now protected by law (*Taxi & Limousine Comm'n v. WR*, OATH Index 2503/17 (July 14, 2017) *adopted, Comm'r Dec* (July 25, 2017)).

17 | (d) Credit checks

In addition to federal limitations, New York employers may obtain credit information concerning current or potential employees by requesting consumer reports, which may be used in decision making only with respect to "employment, promotion, reassignment or retention" (N.Y. Gen. Bus. Law § 380-a). Employers must provide notice to employees and obtain authorization from an employee before seeking a consumer report (N.Y. Gen. Bus. Law § 380-b, c).

Except for limited exemptions, New York City's Fair Chance Act bans employers from requesting or using consumer credit history in connection with employment applications (N.Y.C. Admin. Code § 8-107(24)).

18 | (e) Immigration status

The New York State Human Rights Law and New York City Human Rights Law prohibit discrimination against applicants based on their actual or perceived alienage or citizenship status.

19 | (f) Social media

New York law does not address whether an employer may use social media in making an employment decision. However, employers are prohibited from taking adverse employment actions based on certain off-duty conduct which could be discovered through social media (N.Y. Labor Law § 201-d).

20 | (g) Other

Employers generally cannot fingerprint job applicants or employees (N.Y. Labor Law § 201-a). Employers cannot request that an applicant or employee undergo a polygraph test (N.Y. Labor Law §§ 734 and 735).

WAGE AND HOUR

Pay

21 | What are the main sources of wage and hour laws in your state?

Article 6 of the New York Labor Law is the primary source of wage and hour laws, setting forth, among other things:

- requirements regarding wage deductions;
- frequency of payments;
- manner of payment; and
- exemptions from coverage.

Regulations promulgated by the New York State Department of Labor can be found under Title 12 of the New York Codes, Rules and Regulations.

22 | What is the minimum hourly wage?

Since December 31, 2019, the minimum wage has been $11.80 per hour, except in New York City, where has been $15, and in Nassau, Suffolk, and Westchester counties, where it increased to $13 per hour. As of December 31, 2019, the minimum wage for workers in the fast-food industry has been $13.75 per hour state-wide, and $15 in New York City.

While $15 per hour continues to be the minimum wage in New York City for all employers, effective December 31, 2020, the minimum wage will otherwise increase as follows:

- $15 per hour in Nassau, Suffolk, and Westchester counties; and
- $11.30 per hour throughout the rest of the state.

Additionally, the minimum wage for workers in the fast-food industry will be $14.50 per hour state-wide, and will continue to be $15 per hour in New York City.

Lastly, workers in miscellaneous industries covered by the Minimum Wage Order for Miscellaneous Industries and Occupations, such as car wash attendants, nail salon workers, tow truck drivers, dog groomers, wedding planners, tour guides, valet parking attendants, hairdressers, aestheticians, golf and tennis instructors, and door-persons, will be paid the normal minimum wage by the end of 2020. Previously, such workers could earn far below the state minimum wage if they earned a sufficient amount in tips to cover the difference. However, since June 30, 2020, employers of such workers have been required to increase such workers' wages, such that that difference between their prior subminimum wage and the minimum wage is cut in half. By December 31, 2020, employers are required to pay such employees the normal minimum wage.

23 | What are the rules applicable to final pay and deductions from wages?

Final wages must be paid by no later than the next regular pay date following cessation of employment, regardless of the reason for termination (N.Y. Labor Law § 191). Employers must provide terminated employees with written notice of the date of termination and the date that any employee benefits will cease (N.Y. Labor Law § 195(6)).

Section 193 of the New York Labor Law prohibits wage deductions unless they are "authorized in writing by the employee and are for the benefit of the employee." Employers generally cannot, among other things, make deductions for overpayment of wages or for reimbursement for lost or damaged employer property (including by way of separate transaction).

In certain instances, an employee may be entitled to receive wage supplements (e.g., vacation, holiday and severance pay) on termination of employment, if such are provided pursuant to contract or company policy or practice (N.Y. Labor Law §§ 190 and 191). Non-discretionary and formulaic bonuses may, in some instances, constitute "wages" under the New York Labor Law to which an employee is entitled, even if terminated (e.g., *Guiry v. Goldman, Sachs & Co.*, 31 A.D.3d 70, 72 (2006)).

Hours and overtime

24 | What are the requirements for meal and rest breaks?

Generally, all persons subject to the New York Labor Law are entitled to a 30-minute meal break between 11am and 2pm, provided that such an employee works at least a six-hour shift over a day-long period (N.Y. Labor Law § 162(2)). Employees are entitled to an additional meal break "of at least twenty minutes" between 5pm and 7pm if their shift begins before 11am (N.Y. Labor Law § 162(3)). Employees working shifts "of more than six hours" beginning between 1pm and 6am are entitled to a 45-minute meal break (N.Y. Labor Law § 162(4)). Specific rules apply to factory workers (N.Y. Labor Law § 162). New York also requires lactation breaks (N.Y. Labor Law § 206-c).

25 | What are the maximum hour rules?

"Nothing in the New York Labor Law restricts the number of hours" employees can work, subject to "overtime, spread of hours, rest period and day of rest requirements of the law," as well as applicable child labor laws (N.Y.S. Dept. of Labor Opinion Ltr., RO-09-0187 (March 18, 2010)).

26 | How should overtime be calculated?

Non-exempt employees are entitled to no less than one-and-a-half times their regular rate of pay for time worked in excess of 40 hours per work week (12 N.Y.C.R.R. §142-2.2). Employees who are exempt from overtime under the federal Fair Labor Standards Act but still entitled to overtime under the New York State Labor Law are entitled to no less than one-and-a-half times the prevailing minimum wage rate for time worked in excess of 40 hours per workweek (N.Y.S. Dept. of Labor Opinion Ltr., RO-10-0025 (June 30, 2010)).

27 | What exemptions are there from overtime?

New York generally recognizes the exemptions set forth by the Fair Labor Standards Act, subject to a weekly salary threshold requirement above that of federal law. Employees who are exempt from overtime under federal law but are not exempt under state law because they do not meet the minimum salary threshold for exemption must be paid no less than one-and-one-half times the prevailing minimum wage rate for overtime worked (12 N.Y.C.R.R. §142-2.2, see also N.Y.S. Dept. of Lab. Opinion Ltr., RO-10-0025 (June 30, 2010)).

Since December 31, 2019, the salary thresholds for exemptions under the New York Labor Law have been as follows:

- $1,125 per week in New York City for employers with more than 10 employees;
- $1,125 per week in New York City for employers with 10 or fewer employees;
- $975 per week in Nassau, Suffolk, and Westchester counties; and
- $885 per week throughout the rest of the state (again, as opposed to $684 per week under federal law).

Record keeping

28 | What payroll and payment records must be maintained?

With each wage payment an employer must provide documentation identifying:

- the employee's name;
- dates of work covered by the payment;
- the employer's name, address and phone number;
- rate(s) of pay and method of calculation;
- gross wages;
- deductions;
- any allowances claimed; and
- net wages (N.Y. Labor Law § 195).

For non-exempt employees, such statements must also include:

- regular rate of pay;
- overtime rate;
- number of hours worked; and
- number of overtime hours worked (*Id.*).

Additional requirements may apply for specific categories of employee. Weekly payroll records, including the above information, must be maintained for six years (N.Y. Labor Law § 195(4); 12 N.Y.C.R.R. § 142-2.6).

The New York Wage Theft Prevention Act requires employers to maintain a written acknowledgement from all employees for six years, indicating that they have received a notice containing:

- rate of pay;
- overtime rate;
- method for calculating wages (e.g., hourly or piecemeal);
- pay date;
- any allowances that the employer will claim (e.g., tipping, meals or lodging);
- the employer's name;
- the address of the employer's main office or principal place of business, a mailing address if different, and telephone number; and
- "such other information as the commissioner deems material and necessary" (N.Y. Labor Law § 195(1)(a)).

The New York Minimum Wage Law (N.Y. Labor Law § 650 and following) requires employers to maintain for six years records demonstrating compliance with minimum wage laws.

DISCRIMINATION, HARASSMENT AND FAMILY LEAVE

What is the state law in relation to:

PRIVACY IN THE WORKPLACE

Privacy and monitoring

29 | What are employees' rights with regard to privacy and monitoring?

Generally, an employer may implement soundless video recording, although legislation is pending which would require that written notice be given to employees (N.Y. Assembly Bill A. 3871). Absent a court order, New York prohibits employers from video recording an employee in a restroom, locker room or other room designated for purposes of changing clothes (N.Y. Labor Law § 203-c). It is an unfair labor practice for an employer to "spy upon or keep under surveillance, whether directly or through agents," employees or representatives engaging in concerted activities (N.Y. Labor Law § 704-a).

With respect to audio recordings, New York's wire-tapping law, like federal law, requires one party's consent. It is a crime to record or eavesdrop on in-person or telephonic conversations without the consent of at least one party to the communication (N.Y. Penal Law §§ 250.00, 250.05).

In response to the covid-19 pandemic, and under the New York Forward reopening guidelines, many employers are now required to screen employees (and other visitors) for covid-19 symptoms and risks on a daily basis prior to allowing such individuals into the workplace. For example, the guidelines for office-based employers requires all employees to answer questions concerning, among other things, whether they tested positive for covid-19 in the past 14 days or had symptoms in the past 14 days (or been in close contact with someone who tested positive or had symptoms in the past 14 days). However, rather than retain each individual's daily completed forms (or the data contained therein) such guidance states, "the only records to be maintained on a daily basis regarding the screening process are those individuals who were screened and confirmation that no employee or visitor who failed the screening process was granted access" and expressly states such employers "are prohibited from keeping records of employee health data (e.g., the specific temperature data of an individual)" (https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/offices-interim-guidance.pdf).

30 | Are there state rules protecting social media passwords in the employment context and/or on employer monitoring of employee social media accounts?

Legislation regarding the privacy of employees' and applicants' social media accounts has been pending in the State Senate and Assembly since the 2015-2016 Legislative Sessions (N.Y. Senate Assembly Bills S. 3927 and S. 4167; N.Y. Assembly Bills A. 2891 and A. 192).

Bring your own device

31 | What is the latest position in relation to bring your own device?

No New York statute addresses "bring your own device" (BYOD) policies. However, in light of trends and case law in other jurisdictions, employers should be wary of permitting non-exempt employees to use their own devices to conduct work-related business, which suggests that employees could potentially bring overtime and failure-to-pay claims for off-the-clock work performed on such devices. Employers should also ensure that their BYOD policies identify the circumstances under which a personal device may be wiped of data, including authorization by the employee that such may be done, and for preserving electronic data on personal devices in the event that a litigation hold is issued.

Off-duty

32 | To what extent can employers regulate off-duty conduct?

The New York Labor Law prohibits adverse employment actions based on an employee's lifestyle choices outside of the workplace, including political activities, legal recreational activities, legal off-duty use of "consumable products" and union membership (N.Y. Labor Law § 201-d).

"Recreational activity" includes:

> *any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and viewing of television, movies and similar material. (N.Y. Labor Law § 201-d(1)).*

However, no protection is afforded to conduct which creates a material conflict of interest related to the employer's trade secrets, proprietary information or other business interests (N.Y. Labor Law § 201-d(3)). New York appellate courts have held that extramarital romantic relationships between colleagues are not "recreational activities" under this provision (e.g., *Hudson v. Goldman Sachs & Co.*, 283 A.D.2d 246, 246 (1st Dep't 2001)).

Gun rights

33 | Are there state rules protecting gun rights in the employment context?

No New York statute addresses gun rights in the workplace.

TRADE SECRETS AND RESTRICTIVE COVENANTS

Intellectual Property

34 | Who owns IP rights created by employees during the course of their employment?

No New York statute specifically addresses an employee's IP rights. Without an agreement to the contrary, an employer is considered the author of a "work for hire" where an employee prepares such within the scope of their employment (17 U.S.C. § 201(b); see also *Fleurimond v. New York Univ.*, 876 F. Supp. 2d 190, 198 (E.D.N.Y. 2012) ("In the absence of an express, written agreement, the rights to a work for hire generally vest in the employer")).

Restrictive covenants

35 | What types of restrictive covenants are recognized and enforceable?

New York courts will enforce reasonable restrictive covenants, including:

- non-compete agreements;
- customer and employee non-solicit provisions;
- non-disclosure agreements;
- restrictions in connection with the sale of a business; and
- invention assignments.

Among other things, an "employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which has been created and maintained at the employer's expense, to the employer's competitive detriment" (*BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 391-92 (1990)).

Public policy disfavors restrictive covenants where the effect is a loss of the employee's livelihood (*Reed, Roberts Assoc. v. Strauman*, 40 N.Y.2d 303, 307 (1976)). Accordingly, courts undertake a fact-intensive analysis to determine whether a restrictive covenant is reasonable. Initially, courts examine whether the employer has a necessary and legitimate protectable interest (e.g., *Allways Electric Corp. v. Abrams*, 902 N.Y.S.2d 670, 670-71 (1st Dep't 2010) (because "there is no legitimate employer interest to protect, the restrictive covenants are unenforceable"). Among other things, legitimate business interests include:

- possession of trade secrets or proprietary information;
- limiting the solicitation of customers gained using the employer's resources; and
- protection from competition by a former employee whose services are unique or extraordinary.

A restrictive covenant is presumptively "overbroad" where it prevents an individual from working with a former employer's customers that the individual "never met, did not know about and for whom [he]/she had done no work" while employed by the former employer (*Brown & Brown, Inc. v. Johnson*, 25 N.Y.3d 364, 371 (2015)). In such circumstances, to modify and partially enforce the covenant to cover only customers with whom the individual interacted, the employer must show the absence of overreaching, the coercive use of dominant bargaining power, or other anti-competitive misconduct in connection with the agreement's execution (*Id.*).

If the interest is legitimate, courts will examine the reasonableness of the covenant, including the proportionality of duration and geographic scope to the interest at stake. A restrictive covenant will be enforced "to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee" (*Johnson Controls, Inc. v. A.P.T. Critical Sys., Inc.*, 323 F. Supp. 2d 525, 533 (S.D.N.Y. 2004)).

Non-compete

36 | Are there any special rules on non-competes for particular classes of employee?

New York's Broadcast Employees Right to Work Act provides that broadcast industry employers will:

> *not require as a condition of employment ... that a broadcast employee or prospective broadcast employee refrain from obtaining employment in any specified geographic area; for a specific period of time; or with any particular employer or in any particular industry after the conclusion of employment. (N.Y. Labor Law § 202-k.)*

The financial industry limits its members' ability to restrict the right of customers to choose the entity or person with whom they choose to do business (e.g., the Financial Industry Regulatory Authority (FINRA) Rule 2140):

No [FINRA] member or person associated with a member shall interfere with a customer's request to transfer his or her account in connection with the change in employment of the customer's registered representative.

While a financial industry employer may limit a former employee's ability to solicit clients, it may not bar a former employee's new firm from servicing a client, if the client did the soliciting (*First Empire Secs. v. Miele*, 17 Misc. 3d 1108(A), 851 N.Y.S.2d 57 (N.Y. Sup. Ct. 2007)).

New York's Rules of Professional Conduct for Attorneys state that a lawyer cannot offer or make a "partnership, shareholder, operating, employment, or other similar type of agreement" that restricts a lawyer from practicing law after terminating the relationship, except for an agreement about retirement benefits (22 N.Y.C.R.R. Part 1200.0, Rule 5.6(a)).

LABOR RELATIONS

Right to work

37 | Is the state a "right to work" state?

New York does not have a right-to-work law.

Unions and layoffs

38 | Is the state (or a particular area) known to be heavily unionized?

New York had among the highest union membership rate nationally in 2019, at 21 per cent of the state's population, which is significantly higher than the national rate of 10.3 per cent (see Bureau of Labor Statistics, Union Members Summary 2019 (January 22, 2020)).

39 | What rules apply to layoffs? Are there particular rules for plant closures/mass layoffs?

The New York Worker Adjustment and Retraining Notification Act expands the scope of its federal counterpart with respect to covered employers, triggering events and the amount of notice required.

The act applies to private sector employers with at least 50 employees, calculated based on definitions set forth therein (N.Y. Labor Law § 860-a(3); 12 N.Y.C.R.R. § 921-1.1(e)(1)(ii)). Wholly or partially owned subsidiaries and independent contractors may be considered separate employers depending on their level of independence (12 N.Y.C.R.R. § 921-1.1(e)(2)).

The act mandates that covered employers provide 90 days' advance written notice to employees in the event of a plant closing, mass layoff, reduction in work hours or relocation of substantially all facility operations (N.Y. Labor Law §§ 860 to 860-l; 12 N.Y.C.R.R. §§ 921-1.0 to 921-9.1). Employees that are required to receive notice are set forth in N.Y. Labor Law § 921-2.3. Triggering events may include the events which affect as few as 25 employees (12 N.Y.C.R.R. § 921-9.1). The act sets forth requirements with respect to look-back or look-forward periods for use in calculating whether successive events are covered by the act (12 N.Y.C.R.R. § 921-2.1(e)).

In response to the covid-19 pandemic, New York did not suspend its act notice requirements, however, the state initially recognized the covid-19 pandemic as possibly an "unforeseeable business circumstance" under the law. New York businesses forced to close due to covid-19, including as a result of government-mandated closures or loss of workforce due to school closings, were advised to provide notice as soon as possible and identify the circumstances necessitating the closure. Further, employers are strongly encouraged to submit their WARN notices by email to WARN@labor.ny.gov.

DISCIPLINE AND TERMINATION

State procedures

40 | Are there state-specific laws on the procedures employers must follow with regard to discipline and grievance procedures?

New York has no laws regarding discipline and grievance procedures (other than those which may arise indirectly in connection with generally applicable laws, such as those regarding discrimination).

At-will or notice

41 | At-will status and/or notice period?

New York is an employment at-will state, meaning that both an employer and an employee may end an employee's employment at any time for any reason, with or without cause or notice, subject to any agreed-on contractual limitations and in compliance with applicable laws (e.g., anti-discrimination laws). This applies whether an employee voluntarily leaves their job or the employer terminates the employee's employment.

42 | What restrictions apply to the above?

An employer may not terminate an employee based on the employee's membership in a protected class. Likewise, the New York Labor Law prohibits employers from terminating an employee for their off-duty political or legal recreational activities outside of work, legal use of consumable products outside of work or membership in a union (N.Y. Labor Law § 201-d). Employers may also not terminate or discriminate against an employee for making a complaint to the employer or the commissioner of labor regarding purported violations of the New York Labor Law, including a violation which "creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud" (N.Y. Labor Law §§ 215 and 740).

Final paychecks

43 | Are there state-specific rules on when final paychecks are due after termination?

Regardless of whether an employee voluntarily leaves their job or is terminated, the employer must pay the employee's wages not later than the regular pay day for the pay period during which termination occurred (N.Y. Labor Law § 191). Wages may be paid by mail, if requested by the employee.